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October 9, 2003

VIA HAND DELIVERY

Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Joint Application of NOW Acquisition Corporation for Authority to Acquire Certain Assets of NOW Communications, Inc.*
Docket No. 03-00454

Application of NOW Acquisition Corporation for a CCN to Provide Competing Local Telecommunication and Interexchange Services
Docket No. 03-00455

Dear Chairman Tate:

Enclosed are the original and fourteen copies of BellSouth's Response to NAC's Motion to Dismiss BellSouth's Petitions to Intervene. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

508037

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2003, a copy of the foregoing document was served on the parties of record, via the method indicated:

[ ] Hand
[ ] Mail
[ ] Facsimile
[X] Overnight

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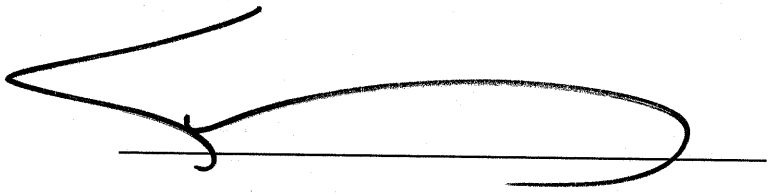

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Joint Application of NOW Acquisition Corporation for Authority to Acquire Certain Assets of NOW Communications, Inc.*

Docket No. 03-00454

Application of NOW Acquisition Corporation for a CCN to Provide Competing Local Telecommunication and Interexchange Services

Docket No. 03-00455

BELLSOUTH'S RESPONSE TO NAC'S MOTIONS TO DISMISS BELLSOUTH'S PETITIONS TO INTERVENE

On September 12, 2003, BellSouth Telecommunications, Inc. ("BellSouth"), pursuant to T.C.A. § 4-5-310 and T.C.A. § 65-2-107, petitioned the Tennessee Regulatory Authority ("the Authority") for leave to intervene in the above-captioned proceedings. On October 2, 2003, NOW Acquisition Corporation ("NAC") filed motions asking the Authority to dismiss BellSouth's Petitions to Intervene. In each motion, NAC makes the same arguments. Those arguments lack merit. As demonstrated below, BellSouth has satisfied the legal standard to intervene in both of these inter-related proceedings.

First, NAC alleges that BellSouth "illegally refused to allow NAC to adopt the AT&T Communications of the Southern States, LLC's ("AT&T") interconnection agreement with BellSouth ..."[1] BellSouth can unequivocally demonstrate the NAC intends to utilize its interconnection agreement to "harvest" the NOW customers

[1] *See* ¶3 of each NAC motion.

presently served through the NOW interconnection agreement. This strategy, if implemented, will allow NOW and NAC to circumvent the cure obligation under the bankruptcy code and leave BellSouth holding a 5 million dollar uncollectible. Section 252(i) of the Telecommunications Act was not intended to used as a loophole to obligations under bankruptcy law. Further, there is no dispute that NAC is not a certified Competing Local Exchange Carrier ("CLEC") in Tennessee. Indeed, NAC's application for CLEC certification is pending before the Authority in Docket No. 03-00454. The Authority Staff has issued data requests relating to NAC's ability to demonstrate its managerial, financial and technical abilities to provide the services for which it seeks authority. Indeed, the Authority Staff has expressly requested that BellSouth and other parties not file or seek approval of interconnection agreements until and unless a prospective CLEC has been certified by the Authority. NAC cannot seriously contend that it has been harmed in any way by not being able to adopt the AT&T/BellSouth interconnection agreement in Tennessee when it is not even a certified CLEC in Tennessee.

NAC's second argument is that BellSouth has not set forth with particularity those facts which demonstrate that BellSouth's legal interests may be determined in this proceeding. NAC also claims that the TRA lacks jurisdiction over the matters BellSouth has raised in its Petitions to Intervene. NAC requests that the Authority either dismiss BellSouth's Petitions to Intervene or require that BellSouth supplement its petition with additional facts. While BellSouth believes that it has already demonstrated in its Petitions to Intervene that its legal interests may be

determined in this proceeding, BellSouth accepts NAC's invitation to provide additional information demonstrating its right to intervene.

On May 23, 2003, NOW Communications, Inc. ("NOW") filed a *Motion to Sell Substantially All of its Assets Pursuant to 11 U.S. Code § 363(b) and (f) Free and Clear of All Claims and Liens* (the "Sale Motion") with the U.S. Bankruptcy Court for the Southern District of Mississippi, Jackson Division, Case No. 03-01336-JEE. BellSouth has filed an objection to NOW's Sale Motion with the Bankruptcy Court. That Motion is pending. BellSouth has learned, through discovery and other means, many of the undisclosed details of NOW's plan for its bankruptcy estate – undisclosed details that dispel any notion that the proposed sale is for the estate's best interest or that the sale has been conducted in good faith. [2]

BellSouth is owed more than five million dollars by NOW for wholesale services provided by BellSouth to NOW. In Docket No. 03-00454, NAC and NOW are jointly requesting approval by the Authority of the transfer of certain assets, including the customer base of NOW, to NAC. NAC has applied for CLEC certification in Docket No. 03-00455. BellSouth believes that these inter-related requests are simply a continuation of NAC's efforts to avoid NOW's obligations under Section 365 of the Bankruptcy Code to assume the interconnection agreement with BellSouth and have it assigned to NAC. This scheme is merely an

[2] A copy of BellSouth's recently-filed *Supplemental Objection to the Debtor's Motion to Sell Substantially All of its Assets* is attached for the convenience of the Authority. The pleadings sets forth in detail the scheme of NOW, NAC and others. Several related motions of the parties are also pending and will be heard by the Bankruptcy Court October 22 and October 24, 2003.

attempted end-run around the requirement under the Bankruptch Code in conjunction with assuming and assigning the interconnection agreement, the debtor must first cure the substantial indebtedness owed to BellSouth by NOW. Federal bankruptcy law requires that an executory contract, such as the interconnection agreement between NOW and BellSouth, only be assumed or assigned to another party if all defaults under the interconnection agreement (i.e., the amounts owed) are promptly satisfied and adequate assurance of future performance by the assignee is provided.[3]

In essence, NOW, utilizing the benefits of the 1996 Telecommunications Act which enables 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. To avoid paying these debts, NOW wants to assign the benefits of the defaulted interconnection agreement to NAC without curing the substantial arrearages owed thereunder as required under Section 365 of the Bankruptcy Code. In other words, NOW and NAC are seeking to use TRA procedures to do what federal law prohibits them from doing in the Bankruptcy Court. If NAC and NOW are granted the relief they are seeking, NOW will effectively cease to exist, NAC will begin billing NOW's former customers and BellSouth could be left "holding the bag." This alone demonstrates that BellSouth has a bona fide interest in these TRA proceedings.

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[3] *See* § 361 of Title 11 U.S.C.

NAC's claim that BellSouth is attempting to find an alternative forum to review BellSouth's unsecured claim is also without merit. It is NOW and NAC, not BellSouth, that initiated requests for relief from the TRA, which are inter-related with the Bankruptcy proceeding. As explained above, it is NOW and MAC who seek to use the TRA to avoid the proper review of these matters in the context of the Bankruptcy Court.

BellSouth is not asking the TRA to make rulings that the Bankruptcy Court should properly make. To the contrary, BellSouth submits that the TRA should not make any substantive rulings in the state proceedings until the Bankruptcy Court has ruled. BellSouth, in fact, 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 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 received Bankruptcy approval as to any buyer at this time.

Furthermore, the outcome of the Bankruptcy proceeding will relate directly to NAC's ability to demonstrate its managerial, financial and technical abilities to provide the services for which it seeks authority. NAC claims in its Motion that the proceeding in Docket No. 03-00455 is "... simply to determine whether or not NAC meets the requirements of the State of Tennessee to receive a CCN to provide competing local telecommunications and interexchange services, a matter in which

the Authority is competent to make a determination without the participation of BellSouth or any other carrier."[4] In effect, NAC is asking the Authority to turn a blind eye towards both BellSouth's claim against NOW for payment for services provided and the key role of the Bankruptcy Court in deciding whether to approve NOW's efforts to sell its assets, including its customer base, to other entities and, ultimately, BellSouth believes, to NAC.[5] At a minimum, whether NAC obtains NOW's customers and other revenue-producing assets will be a relevant factor as to whether NAC can demonstrate its financial abilities to provide the services for which it seeks authority.

NAC and NOW are simply trying to use the TRA to facilitate a scheme. The scheme is simply this: Step 1 – CLEC-1 obtains service from BellSouth to service CLEC-1's customers; Step 2 – CLEC-1 fails to pay BellSouth for such service while CLEC-1 continues to retain the money it collects from its own customers; Step 3 – CLEC-1, when BellSouth seeks to collect what it is owed, simply transfers 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 Step 4 – CLEC-2 obtains 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,

[4] *See* ¶5 of NAC pettion.

[5] As NAC acknowledges in its motions, its request for approval of the transfer of certain assets of NOW to NAC will not occur unless it is approved by the U.S. Bankruptcy Court having jurisdiction of the bankruptcy of NOW. This acknowledgement means, of course, that the Authority should not act on NAC's requests until after the Bankruptcy Court rules. *See* ¶5 of NAC Motion in Docket No. 03-00454.

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 have been the intended purpose of the 1996 Act. Moreover, in the wake of the Enron-WorldCom-Tyco revelations, this type of scheme to use corporate forms to stay one step ahead of the bill collector is precisely the type of conduct that outrages the public.

In summary, BellSouth believes that NOW and NAC are engaging in improper activity in an effort to avoid paying BellSouth for services that BellSouth provided to NOW pursuant to the 1996 Telecommunications Act. Condoning the activities of NOW and NAC would contravene public policy and frustrate the competitive environment by allowing parties to obtain the benefits (BellSouth's wholesale services) without assuming the burdens (paying for such services) of the 1996 Act. BellSouth has demonstrated that it has met the legal standard for intervention in these inter-related proceedings.

WHEREFORE, for the reasons set forth above, BellSouth respectfully urges the Authority to (1) grant its Petition to Intervene, and (2) ***following the Bankruptcy Court's rulings***, assign this matter to a pre-hearing officer so that a procedural schedule may be established.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

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

In re:	)	
	)	**Chapter 11**
NOW COMMUNICATIONS, INC.	)	
	)	**Case No 03-01336-JEE**
	)	
Debtor.	)	
	)	

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, Unites 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. . . . ").[1] 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);[2] MCG Deposition,

[1] 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.

[2] 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.[3] 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;[4] 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.

[3] A true and correct copy of an excerpt of the Biz/NAC Deposition containing the pages referenced herein is attached hereto as Exhibit "D".

[4] See Exhibit "D" (Biz/NAC Deposition) at p. 11.

3. Not surprisingly, these facts have never been disclosed by the Debtor.[5] 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.[6]

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

[5] 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.

[6] 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.[7]

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.[8]

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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[7] 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.

[8] 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.[9]

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.[10] 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

[9] 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.

[10] 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.[11] 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,

[11] 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 extorsion (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.[12]

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

[12] 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.[13]

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

[13] 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.[14] 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.[15]

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[14] 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.

[15] 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 (5th 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.[16] 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.

[16] 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 "I"; 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.[17]

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.[18] 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

[17] 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.

[18] 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).[19] 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[20] — 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.[21] 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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[19] 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).

[20] 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.

[21] 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.[22]

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[22] 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 McCarthey 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).[23]

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.[24] 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.[25]

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[23] 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.

[24] See Exhibit "B" (Debtor Deposition) at pp. 9-13; Exhibit "D" (Biz/NAC Deposition) at pp. 24-28.

[25] 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.[26] The Debtor discloses only the salary that each employee will be paid and their closing bonus.[27] 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;[28] (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).[29] 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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[26] 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.

[27] 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?

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

[29] 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.[30] 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

[30] 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").[31] 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.

[31] 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 29th 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 21st day of September, 2003:

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