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SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7645
WWW.SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
TEL. (212) 973-0111
FAX (212) 891-9598

September 19, 2003

BY OVERNIGHT MAIL

Blanca S. Bayo, Director
Division of Records & Recording
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

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**Re: Docket No. 030513-TP
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. Bayo:

Enclosed please find an original and fifteen (15) copies of Applicant's Motion to Dismiss BellSouth Telecommunications, Inc.'s Protest/Request for Clarification of Proposed Agency Action and Petition for Leave to Intervene.

Please date-stamp the extra copy of this filing and return it in the enclosed self-addressed, stamped envelope. Should you have any questions please do not hesitate to contact us.

Respectfully submitted,

Kathleen Greenan Ramsey

Counsel for Applicants

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Enclosure

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CERTIFICATE OF SERVICE

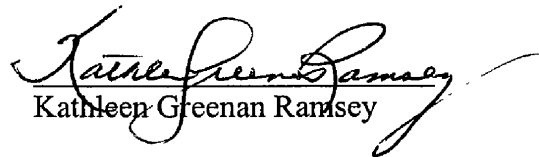
I HEREBY CERTIFY that copies of the Motion to Dismiss were sent via U.S. mail (unless otherwise indicated) on September 19, 2003 to the following parties:

Staff Counsel (Docket No. 030513-TP)*
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Administrative Procedures Committee
Room 120 Holland Building
Tallahassee, FL 32399-1300

Nancy B. White
BellSouth Representative
150 West Flagler Street
Suite 1910
Miami, FL 33130

Mary Jo Peed
BellSouth Representative
675 West Peachtree Street
Suite 4300
Atlanta, GA 30375


Kathleen Greenan Ramsey

* By overnight delivery

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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.)
_____)

Docket No. 030513-TP

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

Pursuant to Section 28-106.204 of the Florida Administrative Code, NOW Communications, Inc. ("NOW" or "Seller") and Essex Acquisition Corporation d/b/a VeraNet Solutions ("VeraNet") (together, the "Parties"), by their undersigned counsel, hereby move that the Commission dismiss BellSouth Telecommunications, Inc.'s ("BellSouth") (a) September 10, 2002 Protest/Request for Clarification of Proposed Agency Action (the "Protest") and (b) September 12, 2002 Petition for Leave to Intervene (the "Intervention") (together, the "Petitions"). The Parties also move that the Commission promptly issue a Consummating Order allowing the Proposed Agency Action to become final and effective so that the proposed transaction may be completed on an expedited basis once approved by the United States Bankruptcy Court for the Southern District of Mississippi ("Bankruptcy Court"). The Commission has found the proposed transaction to be in the public interest. The transaction would prevent the serious disruption in telephone service and significant harm to customers that for various reasons already find it difficult to obtain telecommunications services. The Commission approval of the transaction would also enable a smooth transition of service for such customers from NOW, an entity in Chapter 11 bankruptcy, to VeraNet, an entity that

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already holds local exchange and interexchange authority and has demonstrated that it is financially qualified to provide service in Florida.

As demonstrated herein, the Petitions are an attempt by BellSouth (i) to circumvent the Bankruptcy Court's jurisdiction, (ii) to obstruct the operations of a competitive carrier in the Florida telecommunications market and, most disturbing, (iii) to harm Florida customers. BellSouth's intent is clear – it wishes to terminate service to NOW and to disconnect the local service of thousands of Florida residents.

The BellSouth Petitions are procedurally deficient, adverse to the public interest, and raise issues that already are properly before the Bankruptcy Court and are irrelevant to the Parties' request for waiver of the carrier selection requirements (the "Request"). Therefore, the Commission should dismiss BellSouth's Petitions and issue a Consummating Order or take such other action as to allow the proposed agency action to become final and effective.

I. STANDARD FOR MOTION TO DISMISS

In ruling upon a similar protest by Verizon Florida, Inc. in the Winstar proceeding,¹ this Commission provided an analysis of the standard for reviewing a motion to dismiss. This Commission stated that the standard to be applied in disposing of a motion to dismiss is whether, with all allegations in a petition assumed to be true, the petition states a cause of action upon which relief may be granted.² When evaluating a petition, the Commission should confine its consideration to the petition and the grounds asserted in the motion to dismiss.³ The Commission also determined that it should construe all material allegations against the Parties in making its

¹ See Emergency joint application for approval of assignment of assets and AAV/ALEC Certificate No. 4025 and IXC Certificate No. 2699 from Winstar Wireless, Inc. to Winstar Communications, LLC, *Order Granting Motion to Dismiss Protest of Verizon Florida, Inc.*, Docket No. 020054-TP, Order NO. PSC-02-0744-FOF-TP (May 31, 2002).

² *Id.* at 3 (citing *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993)).

³ *Id.* (citing *Flye v. Jeffers*, 106 So.2d 229 (Fla. 1st DCA 1958)).

determination on whether a party has stated the necessary allegations.⁴ As the following demonstrates, the BellSouth Petitions fail to state adequately, and provide support for, a cause of action upon which relief may be granted.

II. DISCUSSION

A. BellSouth did not Comply with the Administrative Requirements to Intervene

Sections 25-22.039 and 28-106.205 of the Florida Administrative Code describe the requirements for a petition for leave to intervene. Specifically, a petition for leave to intervene must comply with “Uniform Rules 28-106.201(2), and must include allegations sufficient to demonstrate that the intervenor 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 intervenor are subject to determination or will be affected through the proceeding.”⁵ BellSouth’s Intervention does not fulfill these requirements.

1. **The Intervention does not comply with all aspects of Uniform Rule 28-106.201(2)**

Uniform Rule 28-106.201(2) describes the information that must be provided in a petition for leave to intervene. The BellSouth Intervention did not fulfill the requirements of Uniform Rule 28-106.201(2). Specifically, Uniform Rule 29-106.201(2) requires:

- (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

⁴ See *id.* (citing *Matthews v. Matthews*, 122 So.2d 571 (Fla. 2nd DCA 1960)).

⁵ See Fla. Admin. Code §§ 25-22.039 and 28-106.205.

- (g) A statement of the relief sought by the petitioner, stating precisely the action the petitioner wishes the agency to take with respect to the agency's proposed actions. *See Fla. Admin. Code § 28-106.201(2)*.

BellSouth's Intervention fails to fulfill *any* of these very explicit requirements. Rather, BellSouth states simply that "[a]ny decisions made by the Commission in the context of this proceeding will necessarily affect the substantial interests of BellSouth and its business in the State of Florida because granting Petitioner's application will cause customer confusion due to Petitioner's use of BellSouth's trademark." Intervention at ¶ 3. BellSouth states nothing further. There are no statements regarding when and how BellSouth received notice, all the disputed issues of material fact, a concise statement of specific facts alleged that warrant reversal, specific rules or statutes that require reversal or modification, or a precise statement of the action the Petitioner wishes the agency to take. There is also no verified statement supporting the Petitions. Moreover, on a single statement BellSouth alleges to create a factual basis for its interest in the proceeding - a possible, prospective violation of a trademark. BellSouth even fails to identify the trademark at issue, fails to provide any evidence of use of a BellSouth trademark by either Party, and fails to explain how such alleged use would confuse customers. Even assuming a prospective trademark violation is within the jurisdiction of the Commission, which it is not, BellSouth's single statement is wholly inadequate and fails to satisfy the enumerated requirements of Uniform Rule 28-106.201(2). Thus, the Intervention should be dismissed.

2. The Intervention does not include allegations sufficient to allow BellSouth to Intervene

In addition to complying with Uniform Rules 28-106.201(2), BellSouth must include allegations sufficient to demonstrate that it is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that a substantial interest of BellSouth is subject to determination or will be affected through the proceeding. BellSouth fails

to identify a legal right to participate or explain a substantial interest affected by the proceeding. As described above, BellSouth only makes reference to a vague and unsubstantiated allegation regarding its trademark. This single reference, however, is wholly insufficient as it does not explain a substantial interest nor provide factual support. Nor does BellSouth in any way tie NOW or VeraNet to its supposed prospective trademark concerns. In addition, BellSouth does not explain how the alleged use of its trademark would create customer confusion. Based on these deficiencies, the Commission should dismiss the Intervention.

B. BellSouth did not Comply with the Requirements for Protests

1. The Protest does not comply with all aspects of Uniform Rule 28-106.201(2)

Like the Intervention, BellSouth's Protest failed to address parts (c) through (f) of Uniform Rule 28-106.201(2), as detailed above. First, the Protest does not provide any statement of when and how BellSouth received notice of the agency decision. While this is arguably a minor omission, when combined with the failure to comply with the other requirements, the Protest is clearly deficient.

The Protest does not provide, as required, a statement of all disputed issues of material fact. Instead, the Protest makes a general, self-serving summary statement that "[t]here are issues of material fact concerning the public interest of the requested transfer." Protest at ¶ 9. BellSouth does not identify nor describe the alleged material issues in the Protest, as required. Nor does the Protest provide, as required, a concise statement of the specific facts that BellSouth contends warrant reversal or modification of the proposed Agency action.

BellSouth's Protest generally states that it "is entitled to relief under Chapter 120 [Administrative Procedure Act] and Chapter 364 [Telecommunications Companies], Florida Statutes, and Chapter 25-22, Florida Administrative Code." Protest at ¶ 10. However, BellSouth

fails to demonstrate, as required, how any of the specific statutes or rules contained in these Chapters requires reversal or modification of the Agency's proposed action.

The only reasons provided by BellSouth in support of its Protest are (1) that the public interest would not be served by the waiver of the carrier selection requirements nor approval the transfer of local and long distance customers due to open issues before the Bankruptcy court involving cure of the substantial indebtedness owed to BellSouth by NOW and (2) that moving forward without the approval of the sale by the Bankruptcy Court is premature. *See* Protest at ¶ 8. Both of these assertions are without merit. In fact, contrary to BellSouth's first assertion, the public interest would be harmed if the proposed transaction is *not* approved, because numerous customers would be left without telephone service. And, contrary to BellSouth's second assertion, the Parties' Application requests waiver of the carrier selection requirements so that the Parties can promptly complete the transaction upon approval of the sale by the Bankruptcy Court. Considering that *prior approval* of the waiver is required before transferring NOW's customers to VeraNet, approval by the Commission at this time is necessary and appropriate to ensure that the transaction can be completed without delay following Bankruptcy Court approval of the sale. A delay of such approval would jeopardize the operations of an already distressed carrier (NOW).

BellSouth's unsupported allegations against the Parties do not provide a cause of action upon which relief can be granted and, therefore, the Commission should dismiss BellSouth's Protest.

2. BellSouth's Arguments Belong Before the Bankruptcy Court

In Paragraphs 5 through 7 of BellSouth's Protest, BellSouth describes the various motions it has made in NOW's Bankruptcy proceeding. These motions address issues that properly belong before, and have already been raised in, the Bankruptcy proceeding. BellSouth

is clearly seeking to use this venue in an attempt to raise these same issues before the Commission. Specifically, BellSouth mentions that there are issues “involving cure of the substantial indebtedness owed to BellSouth by NOW.” *See* Protest at ¶ 8. These issues are irrelevant to the present Request. The disposition of NOW’s indebtedness to BellSouth is solely within the purview of the Bankruptcy Court (Indeed, this filing by BellSouth appears on its face to be a violation of the Bankruptcy Code's automatic stay provisions, which prohibit such filings designed to thwart the efforts of debtors to re-organize). As stated in the Staff Memorandum, the primary concern before this Commission is whether waiver of the carrier selection requirements is in the public interest. BellSouth makes no attempt to describe how approval of the waiver is adverse in the public interest, but instead contends that there are issues of material fact concerning the public interest without stating what those issues are.

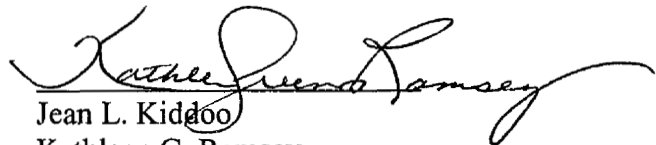
BellSouth’s attempt to insert bankruptcy issues into the instant Request is a blatant attempt by BellSouth to find an alternative forum to review BellSouth’s unsecured claim, which is an issue for the Bankruptcy Court alone. BellSouth appears driven to sabotage the transfer of customers from NOW to VeraNet in order to punish NOW by blocking the sale and to harm NOW customers by disconnecting service. Despite timely and proper adequate assurance payments to BellSouth for post petition services, BellSouth has requested approval from the Bankruptcy Court to disconnect service to NOW either through the rejection of the interconnection agreement or relief from the automatic stay. *See* Protest at ¶ 6. While the bankruptcy issues must be and will be dealt with by the Bankruptcy Court, disconnection of NOW customers, which are primarily low income customers who have very few, if any, options for service providers, is not in the public interest. Commission approval of the Request will help

avoid such disastrous result. The Parties urge the Commission to approve the Request, which is clearly in the public interest.

III. CONCLUSION

As stated above, BellSouth's Petitions are procedurally deficient and do not present any issues relevant to the Request of the Parties. Further, the Petitions are a blatant attempt to undermine the orderly transition of customers from NOW to VeraNet upon approval of the sale by the Bankruptcy Court. Further, the Parties have demonstrated that the Petitions do not state a cause of action upon which the Commission can grant relief. The Parties therefore object to BellSouth's Petitions and request that the Commission dismiss the Petitions and issue a Consummating Order or take other action necessary to make the Proposed Agency Action final and effective.

Respectfully submitted,



Jean L. Kiddoo
Kathleen G. Ramsey
Brett P. Ferenchak
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
300o K. Street, N.W., Suite 300
Washington, D.C. 20007-5116
Tel: (202) 424-7783
Fax: (202) 424-7643

Dated: September 19, 2003