

WILLIAM D. STEINMEIER, P.C.

2031 TOWER DRIVE
JEFFERSON CITY, MISSOURI (MO) 65109

WILLIAM D. STEINMEIER
ATTORNEY AT LAW
REGULATORY CONSULTANT
(573) 659-8672
FAX (573) 636-2305

MAILING ADDRESS:
POST OFFICE BOX 104595
JEFFERSON CITY, MISSOURI (MO)
65110-4595

MARY ANN YOUNG
ATTORNEY AT LAW
OF COUNSEL
(573) 634-8109
FAX (573) 634-8224

September 18, 2003

Mr. Dale Hardy Roberts
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

FILED²
SEP 18 2003
Missouri Public
Service Commission

RE: Case No. XM-2004-0065
Joint Application of Now Acquisition Corporation and NOW
Communications, Inc. for Approval of Transfer of Assets

Dear Mr. Roberts:

Enclosed for filing on behalf of Now Acquisition Corporation and NOW Communications, Inc. please find an original and five (5) copies of a "**MOTION FOR RECONSIDERATION AND REQUEST FOR CONDITIONAL ORDER APPROVING TRANSFER OF ASSETS**" relating to the Application for Authority to Transfer Assets filed simultaneously herewith.

Please see that this filing is brought to the attention of the appropriate Commission personnel.

Thank you for your cooperation and assistance in this matter.

Sincerely,

WILLIAM D. STEINMEIER, P.C.

By: 
William D. Steinmeier

Enclosures

cc: General Counsel
Office of Public Counsel
Patrick D. Crocker
Mary Ann (Garr) Young

BEFORE THE
MISSOURI PUBLIC SERVICE COMMISSION

FILED²

SEP 18 2003

Missouri Public
Service Commission

In the Matter of the Joint Application of)
)
Now Acquisition Corporation)
And)
NOW Communications, Inc.)
)
for Authority to Transfer Certain Assets)
of NOW Communications, Inc. to Now)
Acquisition Corporation)

Case No. XM-2004-0065

**MOTION FOR RECONSIDERATION AND REQUEST FOR CONDITIONAL ORDER
APPROVING TRANSFER OF ASSETS**

Now Acquisition Corporation ("NAC") and Now Communications, Inc. ("NOW"), Joint Applicants herein, by and through their undersigned counsel, and pursuant to 4 CSR 240-2.160(2), hereby move the Commission to reconsider its *Order Directing Filing* issued in this matter on September 11, 2003, and further request that the Commission issue an Order in this case approving the transfer of assets proposed herein, conditioned upon the subsequent filing of an Order of the Bankruptcy Court for the Southern District of Mississippi authorizing such transfer under the bankruptcy laws of the United States.

In support of this Motion and request, the Parties respectfully state the following:

1. Joint Applicants filed their "Joint Application for Approval to Acquire Assets and Request for Expedited Approval" in this case on July 25, 2003.
2. Joint Applicant Now Acquisition Corporation, Inc., on July 25, 2003, also filed applications for certificates of service authority to provide intrastate, interexchange and local exchange services (Case No. XA-2004-0066) and basic local exchange telecommunications services (Case No. CA-2004-0067).

3. On September 3, 2003, the Staff of the Missouri Public Service Commission (“Staff”) filed its *Staff Recommendation* in this case, recommending approval of the Joint Application herein.
4. Also on September 3, 2003, Staff filed its *Staff Recommendation* in each of the certificate of service authority application cases, recommending that the Commission grant the certificates of service authority sought therein.
5. On September 9, 2003, Regulatory Law Judge Kennard Jones, by delegation of authority pursuant to Section 386.240, RSMo, issued an *Order Approving Interexchange and Nonswitched Local Exchange Certificates of Service Authority and Order Approving Tariff* in Case No. XA-2004-0066 (and regarding Tariff No. YX-2004-0119).
6. On September 16, 2003, the Commission issued an *Order Granting Certificate to Provide Basic Local Telecommunications Services and Closing Case* in Case No. CA-2004-0067 (and approving Tariff No. YC-2004-0120).
7. On September 11, 2003, the Commission, at its regular and duly-noticed Agenda Meeting, took up a proposed *Order Approving Transfer of Assets* in the instant case. At that meeting, the Commission engaged in considerable discussion about the status of the Bankruptcy proceeding of NOW and whether an Order of the Bankruptcy Court appears in the case file of this matter. The Regulatory Law Judge was instructed to issue an order notifying the parties in this case of what they need to do.
8. Later on the morning of September 11, 2003, an *Order Directing Filing* was issued by the Regulatory Law Judge in this case, by delegation of authority. That Order requires the Joint Applicants to “file with the Missouri Public

Service Commission an Order issued by the Bankruptcy Court for the Southern District of Mississippi, authorizing the Commission to go forward with the application.”

9. The Bankruptcy Court does have jurisdiction over the economic assets of the petitioner in bankruptcy, and an Order of the Bankruptcy Court is a prerequisite to closing the transfer transaction herein. However, Joint Applicants respectfully suggest that this Commission is not dependent upon authorization from the Bankruptcy Court “to go forward with the application.” This Commission has jurisdiction over public utilities in the State of Missouri and over transfers of assets between such utilities. Section 392.300.1, RSMo.
10. Joint Applicants anticipate that the Order of the Bankruptcy Court approving the Asset Purchase Agreement will provide that the transfer shall take place upon receipt by Joint Applicants of the requisite federal and state regulatory approvals. See, for example, *Re Matrix Telecom, Inc and International Exchange Communications, Inc.*, MoPSC Case No. XM-2003-0274, Joint Application, Attachment “C,” paragraph 8 (copy of excerpt attached). In *Re Motion Telecom, Inc. and Univance Telecommunications, Inc.*, Case No. XM-2004-0039, the Bankruptcy Court Order was “effective and enforceable immediately upon entry, and its provision shall be self-executing.” Application, Exhibit C, page 8, Paragraph 15 (copy of excerpt attached).
11. Thus, as both a practical and legal matter, the jurisdiction of the Bankruptcy Court and the jurisdiction of this Commission are concurrent, and the approval of each is required to consummate the transfer transaction. Joint

Applicants would be unable to conclude the transfer transaction without the approval of this Commission, even if approved by the Bankruptcy Court. Likewise, Joint Applicants would be unable to conclude the transfer without the approval of the Bankruptcy Court, even if this Commission has unconditionally approved the transfer. Perhaps for that reason, at least in part, the Commission has not required the filing of a Bankruptcy Court Order by rule in cases such as this and has sometimes approved bankruptcy-driven transfers without a Bankruptcy Court Order ever being filed.

12. Joint Applicants would also observe that, but for the existence of a bankruptcy proceeding in the background, the instant case is similar to any other application for Commission approval of a transfer of assets. Both the seller and buyer in this proposed transaction are Joint Applicants and parties to the case. All information required by MoPSC rule has been provided by the Joint Applicants and analyzed by the Staff, which has recommended that the transaction be approved by the Commission. The legal standard for the Commission's determination, with or without an underlying bankruptcy proceeding, is whether the transaction would result in a detriment to the public interest. Joint Applicants submit that it is clear that no detriment to the public interest would result from this transfer of assets. Staff, in its Staff Recommendation herein, agrees. In fact, a delay in approval of this transaction, at least on a conditional basis, may jeopardize continuous telecommunications service to customers of transferor NOW Communications, a situation which is not in the public interest and which is unnecessary when there is a willing transferee who has met all Commission

requirements and stands ready to accept those customers.

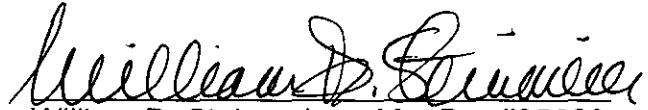
13. Joint Applicants respectfully submit that it would be unwise, as a matter of policy, and unnecessary, as a matter of law, for this Commission to conclude that it cannot or should not accept and process an application for approval of a transfer of assets in cases arising out of bankruptcies until an Order of the Bankruptcy Court has been issued. Such transfers pursuant to Bankruptcy proceedings are very time-sensitive. Both seller and buyer in such cases are trying to secure necessary Court and Commission approvals, in multiple jurisdictions, to accomplish the transfer at the earliest possible opportunity, before the seller's condition deteriorates further and requires it to re-file its bankruptcy under Chapter 7 rather than accomplish a Chapter 11 restructuring.
14. As stated in the Joint Application in this case, the expeditious approval of this Application will allow NAC promptly to assume responsibility for the service of NOW's existing customer base without interruption of service or other inconveniences to Missouri consumers, as soon as the Bankruptcy Court issues its Order.
15. Joint Applicants had hoped, and had sound reason to believe, that the Bankruptcy Court would approve the Asset Purchase Agreement in mid-to-late September. Thus, Joint Applicants requested that the Commission act by September 23, 2003. Due to delays in the Bankruptcy proceeding, it is now expected that the Bankruptcy Court's Order will be forthcoming in early October.
16. If this Commission were to conclude its review and approve this transfer prior

to the issuance of the Bankruptcy Court Order, it would facilitate the expeditious conclusion of the matter and closing of the transfer.

17. Joint Applicants have met the requirements for approval of the transfer, and Staff has concluded its analysis of this Joint Application and has recommended approval thereof. Joint Applicants respectfully suggest that, rather than holding the matter in abeyance pursuant to its *Order Directing Filing* of September 11, 2003, the Commission could, and should, set aside that Order and issue, in its stead, an *Order Approving Transfer of Assets* in this case, making the Commission's approval conditional on the filing by Joint Applicants of a Bankruptcy Court Order approving the Asset Purchase Agreement which is currently pending before that Court. Joint Applicants herein agree to file the Bankruptcy Court Order with the Commission upon receipt, and understand that if the Commission grants this Motion and issues a conditional order, the transfer of customers may not take place until that condition is met.

WHEREFORE, NAC and NOW respectfully request that the Commission reconsider its *Order Directing Filing* issued on September 11, 2003, set aside said *Order Directing Filing*, and issue in its stead an *Order Approving Transfer of Assets* which grants the authority sought by Joint Applicants herein, conditioned upon their filing of an Order issued by the Bankruptcy Court for the Southern District of Mississippi authorizing the underlying sale of assets herein.

Respectfully submitted,



William D. Steinmeier, Mo. Bar #25689
Mary Ann (Garr) Young, Mo. Bar #27951
WILLIAM D. STEINMEIER, P.C.
2031 Tower Drive
P.O. Box 104595
Jefferson City, MO 65110-4595
Tel.: (573) 659-8672
Fax: (573) 636-2305
Email: wds@wdspsc.com
Myoung0654@aol.com



Patrick D. Crocker, MI Bar #P43527
Early, Lennon, Crocker
& Bartosiewicz, P.L.C.
900 Comerica Building
Kalamazoo, MI 49007
Tel.: (269) 381-8844
Fax: (269) 381-8822
Email: pcrocker@earlylennon.com

ATTORNEYS FOR APPLICANT
NOW ACQUISITION CORPORATION
AND NOW COMMUNICATIONS, INC.

Dated: September 18, 2003

Certificate of Service

I hereby certify that a copy of this document has been hand delivered or mailed by first class mail, postage prepaid, to the Office of the General Counsel of the Missouri Public Service Commission, and to the Office of Public Counsel, on this 18th day of September 2003.



William D. Steinmeier

Excerpt from
“Order Approving Settlement Agreement With Matrix Telecom, Inc.
and Sale of Assets Pursuant Thereto (Revised Version)

Attached to Joint Application as Attachment C in
Re Matrix Telecom, Inc and International Exchange Communications, Inc.

MoPSC Case No. XM-2003-0274

See Paragraph 8

COPY

FILED

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U.S. BANKRUPTCY COURT
NORTHERN DIST. OF CA.
SAN FRANCISCO, CA.

1 LEE R. BOGDANOFF (SBN 119542)
2 MARTIN R. BARASH (SBN 162314)
3 KLEE, TUCHIN, BOGDANOFF & STERN LLP
4 1880 Century Park East, Suite 200
5 Los Angeles, California 90067-1698
6 Telephone: (310) 407-4000
7 Facsimile (310) 407-9090

8 Bankruptcy Counsel For Pacific Gateway Exchange, Inc., et al.,
9 Debtors and Debtors In Possession

10 Debtor's Mailing Address:
11 500 Airport Drive, Suite 340
12 Burlingame, California 94010

13 UNITED STATES BANKRUPTCY COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 In re:

17 PACIFIC GATEWAY EXCHANGE,
18 INC., a Delaware corporation (Tax I.D.
19 No. 943134065); INTERNATIONAL
20 EXCHANGE COMMUNICATIONS,
21 INC., a Delaware corporation (Tax I.D.
22 No. 943292374); ONYX NETWORKS,
23 INC., a Delaware corporation, f/k/a/
24 PGExpress, Inc. (Tax I.D. 943335904);
25 WORLD PATHWAYS, INC., a
26 Delaware corporation (Tax I.D. No.
27 943282029); WORLDLINK, INC., a
28 Delaware corporation (Tax I.D. No.
943286651); and GLOBAL TIME, INC.,
a Delaware corporation (Tax I.D. No.
943316865),

Debtors.

Case Nos. SF 00-33019 DM; SF 01-30027
DM; SF 01-30014 DM; SF 01-30016 DM; SF
01-30017 DM; SF 01-30015 DM (Jointly
Administered under Case No. SF 00-33019
DM)

Chapter 11

ORDER APPROVING SETTLEMENT
AGREEMENT WITH MATRIX
TELECOM, INC. AND SALE OF
ASSETS PURSUANT THERETO
[REVISED VERSION]

1 grounds for avoidance thereto; provided, however, that pursuant to the terms of the Debtor In
2 Possession Credit Agreement ("DIP Agreement") between the Debtors' lenders ("Lenders")
3 and the Debtors, all funds generated from the Settlement Agreement (i.e., \$600,000) will be
4 remitted to the Lenders pursuant to and subject to the terms of the DIP Agreement.

5 5. Except as expressly provided in the Settlement Agreement, each Lienholder
6 that holds or may hold a Lien against the Assets, or against the Debtors arising prior to the
7 Settlement Effective Date, or out of events occurring prior to the Settlement Effective Date,
8 is barred from asserting such Lien against Matrix, its successors or assigns, or the Assets.

9 6. The terms and provisions of the Settlement Agreement and this Settlement and
10 Sale Order, shall be binding on the Debtors, their estates and creditors, Matrix, and its
11 respective affiliates, successors and assigns, and any affected third parties, and all persons
12 asserting a Claim against or interest in any of the Debtors' estates or any of the Assets.

13 7. Except as expressly provided in the Settlement Agreement or this Settlement
14 and Sale Order, Matrix is not assuming any debts arising in any way in connection with any
15 acts of any of the Debtors, claims (as that term is defined in the Bankruptcy Code),
16 obligations, demands, guaranties, options, rights, contractual commitments, restrictions,
17 interests and matters of any kind and nature, arising prior to the Settlement Effective Date or
18 relating to acts occurring prior to the Settlement Effective Date, any debts, liabilities,
19 obligations, commitments, responsibilities or claims of any kind or nature whatsoever,
20 whether know or unknown, contingent or otherwise, existing as of the date hereof or
21 hereafter arising, of or against any of the Debtors, any affiliates of any of the Debtors, or any
22 other person by reason of the transfer of the Assets pursuant to the Settlement Agreement
23 and Settlement and Sale Order, under the laws of the United States, any state, territory or
24 possession thereof or the District of Columbia applicable to such transactions as the result of
25 consummation of the Sale transaction.

26 8. Each entity that is presently, or on the Settlement Effective Date may be, in
27 possession of any of the Assets is directed to surrender possession of said Assets to Matrix
28 on, or as soon as possible after, the Settlement Effective Date. Subject to all of the terms and

1 conditions of the Settlement Agreement, including without limitation the continuing duties
2 of Matrix to indemnify and defend IECOM that are set forth in Paragraph 8(C) thereof,
3 Matrix will continue to manage the Assets under the MSA, as modified by the Settlement
4 Agreement, until such time as the necessary state and federal regulatory approvals for the
5 transfer of the Assets to Matrix have been obtained, at which time ownership of the Assets
6 will automatically be transferred to Matrix in accordance with the terms of this Order.
7 Should any of such regulatory approvals be denied, IECOM shall cooperate with Matrix to
8 provide for an alternative disposition of the Assets for no further consideration other than
9 reimbursement by Matrix to IECOM of out-of-pocket costs incurred by IECOM in connection
10 with such alternate disposition. Notwithstanding any provision of the MSA, the Settlement
11 Agreement, or this Order, Matrix shall be liable for, shall pay, and hereby indemnifies
12 IECOM for all costs arising from or relating to the management of the Assets pending
13 transfer to Matrix, or such alternate disposition.

14 9. The Settlement Agreement and any related documents or other instruments
15 may be modified, amended, or supplemented by the parties thereto in accordance with the
16 terms thereof without further order of the Court, provided that any such modification,
17 amendment or supplement is not material.

18 10. The transactions contemplated by the Settlement Agreement have been
19 bargained for and undertaken by the Debtors and Matrix at arms-length, without collusion,
20 and in good faith within the meaning of section 363(m) of the Bankruptcy Code; and the
21 Debtors and Matrix have not engaged in any conduct that would cause or permit the Sale to
22 be avoided.

23 11. Pursuant to section 363(m) of the Bankruptcy Code, if any or all of the
24 provisions of this Settlement and Sale Order are hereafter reversed, modified, or vacated by a
25 subsequent order of this Court or any other court, such reversal, modification, or vacatur
26 shall not affect the validity and enforceability of any obligation or right granted pursuant to
27 the terms of this Settlement and Sale Order, and notwithstanding any reversal, modification,
28 or vacatur of this Settlement and Sale Order, any actions taken by either the Debtors or

Excerpt from

***“Order Granting Debtors’ Motion for Order Authorizing
(A) Sale of Substantially All of Debtors’ Assets Free and Clear and
Assumption and Assignment of Certain Prepetition Agreements”***

Attached to as Exhibit C in

Re Motion Telecom, Inc. and Univance Telecommunications, Inc.

MoPSC Case No. XM-2004-0039

See Paragraph 15

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**

In re:)	
UNIVANCE TELECOMMUNICATIONS,)	Case No. 03-11156 EEB
INC.,)	Chapter 11
EIN 84-1228159,)	
)	
Debtor.)	
<hr/>		
In re:)	
UNIVANCE MARKETING GROUP,)	Case No. 03-11157 EEB
INC.,)	Chapter 11
EIN 04-3630609,)	
)	
Debtor.)	(Jointly Administered Under Case No. 03-11156 EEB)

**ORDER GRANTING DEBTORS' MOTION FOR ORDER AUTHORIZING
(A) SALE OF SUBSTANTIALLY ALL OF DEBTORS' ASSETS FREE AND CLEAR
AND
(B) ASSUMPTION AND ASSIGNMENT OF CERTAIN PREPETITION AGREEMENTS**

THIS MATTER comes before the Court on Debtors' Motion for an Order Authorizing (A) Sale of Substantially all of Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances Pursuant to Overbid and Auction Procedures Including Break-Up Fee, and (B) Assumption and Assignment of Certain Prepetition Agreements (the "Motion") and the Notice Pursuant to Local Bankruptcy Rule 202 of the Sale Motion (the "Sale Notice").

The Court has reviewed the Sale Motion and the Sale Notice, the Objections to the Sale Motion and based upon pleadings filed with this Court and the record of hearings held before this Court with respect to the proposed sale, including without limitation, the hearing held on March 28, 2003 (the "Sale Hearing"), the Court hereby FINDS, DETERMINES, CONCLUDES AND ORDERS THAT:

1. The Debtors have represented that they provided notice of the Sale Motion, the deadline for objecting to the Sale Motion, the deadline for, and procedures governing, bids, and of the hearing on the Sale Motion, in accordance with Fed. R. Bankr. P. 2002(a)(2),(c)(1),(d)(3), 6004 and 9006(c), L.B.R. 202 and other applicable law and procedures. Accordingly, a reasonable opportunity has been afforded interested parties to make a higher and better offer for the purchase of substantially all of the Debtors' assets and/or to object to the terms of the sale. At the conclusion of the Sale Hearing, no objections remained. All objections were withdrawn at

assumed or credit bid pursuant to this Order, including but not limited to, any lien held by the City and County of Denver, shall attach to the proceeds of the sale.

14. There shall be no break-up fee or reimbursement for expenses payable to S Connect or any other bidder or purchaser in connection with the sale of the Debtors' Assets.

15. This Order shall be effective and enforceable immediately upon entry, and its provisions shall be self-executing. This Order shall not be stayed pursuant to Fed. R. Bankr. P. 6004(g) or otherwise.


16. The filing of the Sale Motion and the entry of this Order shall be deemed to have satisfied any requirement under Fed. R. Bankr. P. 6004(f)(1) that the Debtors file an itemized statement of property sold, name of purchaser and price received with respect to the sale of the UMG Assets and the UTI Assets described herein.

17. Notwithstanding any provision of this Order, nothing contained herein shall be construed to modify USE LLC's obligations regarding payments to MCI WorldCom under prior orders of this Court.

18. This Court shall not retain jurisdiction to hear or determine any disputes between non-debtor parties arising from the implementation of this Order. This Court shall retain jurisdiction to hear and determine any disputes between Debtor(s) and any other party arising from the implementation of this Order, the Sale Motion, the representations at the Sale Hearing, the APA, the S Connect Bid and/or the Advantage Bid.

Dated: April 2, 2003, *nunc pro tunc* March 28, 2003.

BY THE COURT:


United States Bankruptcy Judge