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Hearing Date September 22, 2004
at 10 00 a m

— and —

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Attorneys for Level 3 Communications, LLC

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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In re

ALLEGIANCE TELECOM, INC , et al ,

Debtors

Chapter 11

Case No 03-13057 (RDD)

(Jointly Administered)

-----X

**MOTION AND REQUEST OF LEVEL 3 COMMUNICATIONS, LLC
FOR ORDER ALLOWING, AUTHORIZING AND DIRECTING
PAYMENT OF CERTAIN ADMINISTRATIVE EXPENSE CLAIMS AND, IN THE
ALTERNATIVE, AND AS MAY BE NECESSARY, EXTENDING
THE DEADLINE FOR ASSERTING ADDITIONAL CURE AMOUNTS**

Level 3 Communications, LLC (“Level 3”), by and through its undersigned counsel, hereby files this motion and request (the “Motion”), pursuant to § 503(a) of title 11 of the United States Code, 11 U S C §§ 101 et seq (the “Bankruptcy Code”) and Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), requesting entry of an order allowing, authorizing and directing payment of certain administrative expense claims, and, in the

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Docket # 1639
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alternative, and as may be necessary, extending the deadline for asserting additional cure amounts related to the assumption and assignment of certain Level 3 executory contracts. In support of the Motion, Level 3 respectfully represents as follows:

Jurisdiction and Venue

1 This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The statutory and rule predicates for the relief requested in the Motion are § 503(a) of the Bankruptcy Code and Rule 9006(b)(1) of the Bankruptcy Rules.

2 Venue is appropriate before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Background

3 On May 14, 2003 (the "Petition Date"), each of the above-captioned debtors and debtors in possession (collectively, including, without limitation, the Reorganized Debtors and the ATLT, as those terms are defined in the Plan (defined hereafter), or any successors thereto, the "Debtors") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On May 28, 2003, an Official Committee of Unsecured Creditors was appointed in the Debtors' Chapter 11 cases.

4 On February 20, 2004, this Court entered an order approving, among other things, that certain asset purchase agreement (the "APA") between the Debtors and XO Communications, Inc. ("XO") for the sale of substantially all of the assets of Debtors Allegiance Telecom, Inc. ("Allegiance") and Allegiance Telecom Company Worldwide ("ATCW") (the "Sale"). The Sale was followed by and further effectuated through the Plan.

5 On May 18, 2004, in accordance with the APA and in connection with the Plan process, the Debtors sent various notices to contract counter-parties informing such parties that

their contracts would either be assumed and assigned in connection with the Sale (the “Assumption Notice”) or rejected pursuant to the proposed plan or reorganization (the “Rejection Notice”) Attached to the Assumption and Rejection Notices were various schedules setting forth contracts to be assumed and assigned or rejected along with their corresponding cure amounts Parties were only served with schedules that pertained to their specific contract issues Accordingly, if a party had contracts that were to be rejected, but had no contracts that were to be assumed, the Debtors would not also serve the party with the schedule pertaining to assumption (a schedule generally deemed to be confidential and which was not filed publicly)

6 The Assumption Notice identified June 2, 2004 (the “Cure Bar Date”) as the assumption and assignment objection deadline by which interested parties had to file an objection to the proposed assumption and assignment or in respect of asserted cure amounts A hearing on assumption and assignment objections as well as cure objections was held on June 7, 2004 in conjunction with Plan confirmation

7 On June 10, 2004, this Court entered an order confirming the *Debtors’ Third Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* (the “Plan”)

8 Level 3 and its counsel timely received the Rejection Notice along with its accompanying schedules and began the process of compiling the requisite information necessary for the preparation and assertion of various rejection damages claims Level 3 timely filed its rejection damages claims on July 15, 2004

9 However, neither Level 3 nor its counsel timely received its conformed version of or any version of the Assumption Notice or its corresponding schedules Level 3 did not receive any Assumption Notice until June 14, 2004 – approximately two (2) weeks *after* the Cure Bar

Date and one (1) week *after* the June 7, 2004 hearing and after confirmation of the Plan itself¹

After receipt of such Assumption Notice, Level 3 forwarded such notice to its counsel

10 On June 16, 2004, the Debtors served the *Notice of Entry of Order Pursuant to Sections 1129(a) of the Bankruptcy Code and Rule 3020 of the Federal Rules of Bankruptcy Procedure Confirming the Debtors' Third Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* (the "Confirmation Notice") Pursuant to the Confirmation Notice, all parties holding administrative expense claims against the Debtors' estates are required file a request for allowance of such administrative expense claims on or before the forty-fifth (45) day after the effective date (the "Administrative Claims Bar Date") On June 23, 2004, the Plan became effective pursuant to its terms

11 Level 3 is one of the world's largest fiber optic network and communications support service providers and is, inter alia, in the business of providing dial-up modem services, as well as other business services to major corporate customers

12 The Level 3 contracts rejected pursuant to the Plan (the "Rejected Contracts") and the effective date of rejection of these contracts are the following

- A Addendum To Customer Order and Standard Terms And Conditions (the "Addendum"), between Level 3 and Allegiance, dated May 20, 2002 - effective date of rejection is December 20, 2004
- B Fiber Termination Agreement, between Level 3 and ATCW, dated October 3, 2001 – effective date of rejection is June 23, 2004
- C Master Wavelengths Agreement (the "MWA"), between Level 3 and Allegiance, dated September 14, 2001 – effective date of rejection is December 30, 2004

¹ The only publicly filed document relating to the Assumption or Rejection Notices was an affidavit of service Level 3's counsel's review of the electronic docket in these cases did not reveal the Level 3 contracts to be assumed and assigned in connection with the sale because the filed affidavit did *not* the related notice or schedule

The December 20 and December 30, 2004 effective dates of rejection with respect to the Addendum and MWA are referred to hereafter as the “Subject Rejection Effective Dates”

13 The Level 3 contracts assumed and assigned in connection with the Sale (the “Assumed Contracts”) are identified as the following

- A Traffic Exchange Agreement, between Level 3 and an identified Debtor
- B Metro IRU Agreement (San Diego, CA) (the “Metro IRU”), between Level 3 and Allegiance, dated March 20, 2002
- C IRU Agreement (the “IRU”), between Level 3 and Allegiance, dated December 30, 1999
- D Letter of Intent for Level 3 Services, between Level 3 and an identified Debtor
- E General Terms and Conditions for Delivery (the “General Terms”), between Level 3 and an identified Debtor

14 It is important to reflect that as to Level 3 neither the Rejection Notice nor the tardily served and received Assumption Notice is specific as to the relationships covered by all Level 3 contracts subject to such Notice or even, in certain cases, the Debtor counter-party to such contracts. Because of the Debtors’ failure to provide notice to Level 3, particularly as to the specific identity of the contracts the Debtors sought to reject or assume (either by contract title, service relationship information or account number), Level 3 was required to perform substantial internal due diligence to determine the identity of the contracts at issue from its own corporate perspective (and indeed to determine the appropriate cure amounts due thereunder). *It should be noted that neither the Rejected Contracts nor the Assumed Contracts relate to a certain integrated network solution, which was the subject of a Court approved compromise in these cases between Level 3 and the Debtors*

Administrative Claim in Respect of the Addendum and MWA

15 Level 3 has continued to provide, and indeed is still providing, valuable services under the Addendum and MWA to the Debtors and possibly to XO. While the Debtors have made several payments to Level 3 during the postpetition period, such payments must continue through the Subject Rejection Effective Dates.

16 Pursuant to sections 503(b) and 507(a) of the Bankruptcy Code, Level 3 is entitled to an administrative expense for all costs and fees incurred by the Debtors post-petition as an “actual, necessary cost and expense of preserving the estate.” 11 U.S.C. §503(b)(1)(A). The reason administrative expense payments under section 503(b)(1)(A) are allowed is to facilitate the efforts by a debtor in possession to rehabilitate its businesses for the benefit of all the estates’ creditors. See Trustees of Amalgamated Ins. Fund v. McFarlin’s Inc., 789 F.2d 98 (2d Cir. 1986).

17 In the Second Circuit, a claim is entitled to administrative expense status if (a) it arose from a transaction with or on account of consideration furnished to a debtor in possession and (b) the transaction or consideration directly benefited such debtor in possession. See, e.g., In re Bradlees Stores, Inc., 2003 WL 76990, *2 (S.D.N.Y. 2003), In re WorldCom, Inc., 308 B.R. 157, 166 (Bankr. S.D.N.Y. 2004), In re Enron Corp., 279 B.R. 695, 705 (Bankr. S.D.N.Y. 2002).

18 Clearly, the Debtors’ continued enjoyment of the Addendum and MWA as effective and enforceable contracts through the Subject Rejection Effective Dates, in turn, benefits the Debtors and is an actual and necessary cost of preserving the estates. The charges for which Level 3 claims contingent administrative expense all arise or will arise from services and facilities provided by Level 3 to the Debtors (and possibly XO). Additionally, the Debtors’

continued use of the services provided by the Addendum and MWA in the ordinary course provides an actual benefit to the Debtors. See In re Enron Corp., 279 B.R. at 706. Accordingly, pursuant to § 503(b)(1)(A) of the Bankruptcy Code, Level 3 is entitled to the allowance of an administrative expense claim for any and all unpaid post-petition services provided to Debtors through the Subject Rejection Effective Dates.

19 The Subject Rejection Effective Dates for the Addendum and MWA will not occur until late December 2004, almost five (5) months after the Administrative Claims Bar Date. Notwithstanding the prospective nature of the Subject Rejection Effective Dates, Level 3 is obligated to continue to provide valuable services to the Debtors under the Addendum and MWA. The Debtors, however, must compensate Level 3, or cause Level 3 to be compensated, for any and all services rendered in respect of the Addendum and MWA through the Subject Rejection Effective Dates.

20 At this time, the Debtors appear to be performing their obligations with respect to the Addendum and MWA currently. Nevertheless, Level 3, in an abundance of caution, hereby asserts this contingent administrative expense claim and reserves the right herein to amend this request and/or assert at a later time such other claims that Level 3 may have against the Debtors and their estates relating to the Addendum and MWA.

21 Because of the Debtor's continued enjoyment of the benefits of the Addendum and MWA through the Subject Effective Rejection Dates, Level 3 asserts a contingent administrative expense claim pursuant to § 503(b)(1)(A).

Cure Claims

22 Section 365(a) of the Bankruptcy Code provides, in relevant part, that a debtor, subject to court approval, may assume or reject an executory contract or an unexpired lease. 11

U S C § 365(a) Section 365(b)(1) of the Bankruptcy Code further requires a debtor to cure all defaults, and to compensate the executory contract counter-party for any damages resulting from such defaults, in any executory contract or unexpired lease as a precondition to the assumption of any such contract or lease Therefore, pursuant to § 365(b)(1) of the Bankruptcy Code, the Debtors are obligated to cure (or provide adequate assurance that they will promptly cure) all defaults (other than defaults described in § 365(b)(2) of the Bankruptcy Code) existing under the Assumed Contracts, if any

23 When read together with Bankruptcy Rules 6006 and 9014, § 365(a) requires a debtor to file a motion to assume or reject *and* provide adequate notice to all parties in interest with an opportunity to object in a contested proceeding before the court See Fed R Bankr P 6006(c) Bankruptcy Rule 6006 specifically requires that notice of a motion to assume, assign or reject an unexpired lease must be given "to the other party to the contract or lease [and] to other parties in interest as the court may direct " In re Martin Paint Stores, 199 B R 258 (Bankr S D N Y 1996) (citing Bankruptcy Rule 6006(c)), see also Golden Books Family Entertainment, Inc., 269 B R 300 (Bankr D Del 2001), Matter of Goldman 82 B R 894 (Bankr S D Ohio 1988) Indeed, the United States Supreme Court has stated that strict fulfillment of notice requirements are central to our system of jurisprudence "due process of law in any proceeding which is to be accorded finality [requires] notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections " In re Golden Books, 269 B R at 305 (quoting Mullane v Central Hanover Bank & Trust Co., 339 U S 306, 314, 70 S Ct 652, 94 L Ed 865 (1950))²

² See also Fed R Bankr Pro 9006(b)(1) ("[W]hen an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of the court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the

24 In the exercise of their business judgment, the Debtors have determined that the assumption and assignment of the Assumed Contracts is appropriate in these cases and is in the best interests of the estates and creditors. The Debtors have, of course, not been relieved of their obligation to provide adequate notice to Level 3 regarding the assumption of the Assumed Contracts as well as to pay the appropriate cure amounts thereunder.

25 Based on the facts here, Level 3 respectfully submits that the Assumption Notice regarding the Assumed Contracts was inadequate, and therefore, insufficient to protect Level 3's rights to due process.

26 Level 3 did not receive notice of the proposed assumption until June 14, 2004, which was approximately two (2) weeks *after* the Cure Bar Date and one (1) week *after* the June 7, 2004 hearing. Such late notice denied Level 3 an opportunity to contest the proposed assumption and assignment and file an appropriate objection thereto. Level 3 was further denied an opportunity to contest the proposed cure amounts set forth by the Debtors simply because Level 3 was unaware of the pending assumption and assignment.

27 *Regardless, Level 3 does not contest the assumption and assignment of the Assumed Contracts by the Debtors to XO.* Level 3, does, however, after conducting substantial internal due diligence necessary to determine contract identity and the amounts due as of the relevant assumption date to Level 3, assert cure amounts with respect to the Metro IRU, the IRU

request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect”), Pioneer Investment Services Co. vs. Brunswick Assocs. Ltd. Partnership, et al., 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (holding that when making a determination to extend a claim-related deadline, courts should consider (1) the danger of prejudice to the debtor, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith”), In re O.W. Hubbell & Sons, Inc., 180 B.R. 31 (N.D.N.Y. 1995), In re Golden Books, 269 B.R. at 300 (discussing Pioneer factors in the context of enlargement of time to object to proposed assumption and assignment and proposed cure amounts of certain license agreements)

and the General Terms as administrative expense claims against the Debtors and/or XO in the following amounts

A Metro IRU – cure amount of \$11,866 64

B IRU Agreement – cure amount of \$171,381 11

C General Terms³ – cure amount of \$630,151 64

Related invoices are being served upon counsel to the Debtors and ATLT

28 In the alternative, this Court may extend the June 2, 2004 Cure Bar Date so Level 3 can assert an appropriate objection thereto consistent with its right to due process

29 Level 3 believes that the Debtors will not be prejudiced by Level 3's assertion of cure claims hereby because such claims are asserted by the Administrative Claims Bar Date, and accordingly the Debtors are still in the process of reconciling claims and expenses. Moreover, upon information and belief, no substantial distributions have been made to claimants. In light of these circumstances, allowing and paying Level 3's cure claims at this time will not prejudice the Debtors. Finally, the delay in filing Level 3's cure claims is short and should have no measurable or negative impact on the administration of these cases.

30 The delay in the filing of Level 3's cure claims was due to Level 3's lack of notice or knowledge of the proposed assumption. Again, Level 3 did not receive notice of the Debtors' proposed disposition of the Assumed Contracts until June 14, 2004 – almost 2 weeks *after* the passage of the Cure Bar Date and after confirmation of the Plan. Indeed, upon receipt of the Assumption Notice, Level 3 acted diligently in reviewing its records and compiling sufficient information to enable it to assert the cure claims contained herein by the

³ Level 3 submits that it is difficult to identify what relationships are governed by the General Terms based on a review of the Assumption Notice, and expressly reserves its right to amend its cure amount relating to such Assumed Contract.

Administrative Claims Bar Date

No Previous Request

31 No previous request for the relief sought in this Motion has been made to this or any other Court

No Filing of Brief

32 Because this Motion presents no novel issues of law, and the statutory and case law authorities relied upon by Level 3 are set forth herein, Level 3 is not filing a brief in support of this Motion. Level 3, however, reserves the right to file a brief in reply to any objection to this Motion or as otherwise deemed necessary by Level 3 in accordance with the applicable rules of the Court

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WHEREFORE, Level 3 respectfully requests that this Court (a) grant Level 3 a contingent administrative expense claim relating to the Addendum and the MWA, (b) allow Level 3's cure claims as administrative expenses in the amount of \$813,399.39, (c) direct the Debtors to immediately pay to Level 3 all the cure claims relating to the Assumed Contracts, and (d) grant such other and further relief as is just and proper

Dated August 9, 2004

BLANK ROME LLP

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----x
In re

ALLEGIANCE TELECOM, INC , et al ,

Debtors

Chapter 11

Case No 03-13057 (RDD)

(Jointly Administered)

-----x

**ORDER ALLOWING, AUTHORIZING
AND DIRECTING PAYMENT OF CERTAIN
ADMINISTRATIVE EXPENSE CLAIMS**

Upon consideration of the motion and request (the "Motion")¹ dated August 9, 2004 of Level 3 Communications, LLC ("Level 3"), seeking entry of an order, allowing, authorizing and directing payment of certain administrative expense claims, and it appearing that this Court has jurisdiction to consider and determine the relief sought in the Motion as a core proceeding pursuant to 28 U S C §§ 157 and 1334, and it appearing that due notice of the Motion having been provided to parties in interest, and after review and consideration of the Motion and the record established, if any thereon, and after due deliberation and sufficient cause appearing therefor for all of the relief sought in the Motion, it is

ORDERED that the Motion is GRANTED, and it is further

ORDERED that Level 3 is allowed an administrative expense claim relating to the Addendum and the MWA to be paid pursuant to the terms of such contracts through each of the appropriate Subject Rejection Effective Dates, and it is further

¹ All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion

ORDERED that the cure amount due and owing to Level 3 relating to the assumption and assignment of the Metro IRU, the IRU and the General Terms are allowed as administrative expense claims in the aggregate amount of \$813,399.39, and it is further

ORDERED that the Debtors shall pay such cure claims in such amounts no later than five (5) business days from the date of this Order

Dated New York, NY
_____, 2004

HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

Hearing Date September 22, 2004
at 10 00 a m

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

In re

ALLEGIANCE TELECOM, INC , et al ,

Debtors

Chapter 11

Case No 03-13057 (RDD)

(Jointly Administered)

-----X

**NOTICE OF MOTION OF LEVEL 3 COMMUNICATIONS, LLC FOR ORDER
ALLOWING, AUTHORIZING AND DIRECTING PAYMENT OF CERTAIN
ADMINISTRATIVE EXPENSE CLAIMS AND, IN THE
ALTERNATIVE, AND AS MAY BE NECESSARY, EXTENDING
THE DEADLINE FOR ASSERTING ADDITIONAL CURE AMOUNTS**

PLEASE TAKE NOTICE, that a hearing to consider the Motion of Level 3
Communications, LLC (“Level 3”) for an Order Allowing, Authorizing and Directing Payment
of Certain Administrative Expense Claims and, in the Alternative, and As May Be Necessary,
Extending the Deadline for Asserting Additional Cure Amounts, will be held on September 22,
2004 at 10 00 a m (the “Hearing”) before the Honorable Robert D Drain, United States

Bankruptcy Judge, in Courtroom 610 of the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004

PLEASE TAKE FURTHER NOTICE, that objections, if any, to the relief requested by the Motion must be set forth in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of Bankruptcy Court, and shall be filed with the Bankruptcy Court electronically in accordance with General Order M-242 (General Order M-242 and the Users Manual for Electronic Case Filing System can be found at <http://www.nysb.uscourts.gov>, the official website for the Bankruptcy Court), by registered users of the Bankruptcy Court's case filing system, and by all other parties in interest on a 3.5 inch disk, preferably in Portable Document Format (PDF), Wordperfect or any other Windows-based word processing format (with a hard-copy delivered directly to Chambers), and shall be served in accordance with General Order M-242, upon (i) Blank Rome LLP, The Chrysler Building, 405 Lexington Avenue, New York, New York 10174, Attn Edward J LoBello, Esq , (ii) Blank Rome LLP, One Logan Square, Philadelphia, PA 19103, Attn Michael B Schaedle, Esq , (iii) the Office of the United States Trustee, 33 Whitehall Street, 21st Floor, New York, New York 10004, Attn Pamela J Lustrin, Esq , (iv) Kirkland & Ellis LLP, Citigroup Center, 153 East 53rd Street, New York, New York 10022, Attn Jonathan S Henes, Esq , (v) Togut, Seagal & Seagal LLP, One Penn Plaza, New York, New York, 10119, Attn Gerry DeConza, Esq , and (vi) Akin Gump Strauss Hauer LLP, 590 Madison Avenue, New York, New York 10022, Attn Ira S

Dizengoff, Esq , no later than three (3) business days prior to the Hearing

Dated August 9, 2004

BLANK ROME LLP

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