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Hearing Date: February 19, 2004 @ 10:00 a.m.

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

In re:

ALLEGIANCE TELECOM, INC., et al,  
Debtors.

Chapter 11  
Case No. 03-13057 (RDD)  
(Jointly Administered)

**RESERVATION OF RIGHTS BY LUCENT TECHNOLOGIES, INC.  
WITH RESPECT TO DEBTORS' MOTION TO APPROVE SALE OF  
SUBSTANTIALLY ALL OF THEIR ASSETS FREE AND CLEAR OF ALL LIENS  
CLAIMS AND ENCUMBRANCES AND AUTHORIZING THE ASSUMPTION AND  
ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS**

Lucent Technologies, Inc. ("Lucent"), by its undersigned counsel, hereby states and reserves its rights with respect to the motion (the "Sale Motion") of Allegiance Telecom, Inc. and its direct and indirect subsidiaries, as debtors and debtors-in-possession (the "Debtors") for an Order authorizing the sale by the Debtors of substantially of their assets, free and clear of all liens, claims and encumbrances, and authorizing the assumption and assignment of certain executory contracts in conjunction with such sale.

**BACKGROUND**

1. The Debtors provide integrated telecommunications products and services to small and medium-sized business customers, large businesses, governmental entities, wholesale customers and international users.

2. Lucent is engaged in the business of manufacturing, selling, installing, servicing and supporting various telecommunications equipment and licensing software which enables the operation of such telecommunications equipment.

3. Lucent and the Debtors are parties to various agreements (the "Lucent Agreements"), pursuant to which Lucent: (i) sold to the Debtors and installed various telecommunications equipment (the "Lucent Equipment"); (ii) maintains and supports such Lucent Equipment; and (iii) licenses (the "Lucent Licenses") certain software and firmware (the "Licensed Materials") to enable the Debtors to operate the Lucent Equipment.

4. The Licensed Materials are either installed upon or imbedded within the Lucent Equipment and enable the Lucent Equipment to function. Pursuant to the Lucent Agreements, title to all Licensed Materials are the property of Lucent. The Debtors only have the right to use the Licensed Materials pursuant to the Lucent Licenses.

5. On May 14, 2003, the Debtors filed voluntary petitions for relief pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York. Thereafter, the Debtors continued in the management of their affairs and the possession of their properties as debtors-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

#### **THE SALE MOTION**

6. On or about December 18, 2003, the Debtors filed a motion seeking entry of an Order approving a sale by the Debtors of substantially all of their assets, approving certain bid procedures in conjunction with such sale, and approving the Debtors' assumption and assignment of certain executory contracts in conjunction with the sale. On January 15, 2004, the Bankruptcy Court entered an order fixing the bid procedures, scheduling an auction sale for

February 12, 2004, and scheduling a hearing to consider the Sale Motion for February 19, 2004. Objections to the Sale Motion are due on February 17, 2004.

#### **RESERVATION OF RIGHTS**

7. The Lucent Equipment and Licensed Materials are an integral part of the Debtors' telecommunications network and are subject to the sale proposed by the Debtors. Much of the Licensed Material in the possession of the Debtors constitutes "personal, non-transferable and non-exclusive licenses" of intellectual property that cannot be assumed or assigned without the express consent of Lucent pursuant to § 365(c)(1) of the Bankruptcy Code. That section provides that a debtor "may not assume or assign any executory contract or unexpired lease of the debtor," if applicable nonbankruptcy law precludes assignment. 11 U.S.C. § 365(c)(1); *In re Mitchell*, 249 B.R. 55 (Bankr. S.D.N.Y. 2000). In order to determine whether an executory contract may be assumed, courts have adopted a "hypothetical test" that follows the express language of § 365(c)(1) of the Bankruptcy Code. *See, In re West Elecs., Inc.*, 852 F.2d 79, 82-83 (3<sup>rd</sup> Cir. 1988). The "hypothetical test" provides that a debtor may not assume an executory contract over the non-debtor's objection if applicable law would bar assignment of the contract to a hypothetical third party, even where the debtor has no intention of assigning the contract in question to any such third party. *See also, Perlman v. Catapult Entertainment (In re Catapult Entertainment)*, 165 F.3d 747, 750 (9<sup>th</sup> Cir. 1999). It is well established that "applicable law" referred to in § 365(c)(1) includes patent and copyright law and the non-exclusive licenses of patents and copyrights -- such as the Lucent Licenses -- which are not assumable or assignable by the Debtors without the licensor's consent. *See, In re Patient Educ. Media, Inc.*, 210 B.R. 237 (Bankr. S.D.N.Y. 1997); *In re Golden Book Family Entertainment, Inc.*, 269 B.R. 311, 313-314

(Bankr. D. Del. 2001); *In re: Access Beyond Technologies, Inc.*, 237 B.R. 32, 45 (Bankr. D. Del. 1999).

8. Upon information and belief, the Debtors have not yet identified the executory contracts that they will seek to assume and assign to the purchaser. Under the procedures governing such assumption and assignment, upon receiving notice from the Debtors of any proposed assumption and assignment of any of the Lucent Agreements, Lucent shall have a period of 15 days within which to object to proposed assumption and assignment on the basis of the cure amount set forth on the notice, or on any other ground. Although the proposed Asset Purchase Agreement appears to recognize that third party consent to the assignment of certain contracts and licenses may be required (see §§ 2.1(d) and (j); 2.6, Asset Purchase Agreement), Lucent nonetheless reserves its rights at this juncture, in an abundance of caution, and in an effort to alert the purchaser that the consent of Lucent is required in order to affect an assignment of the non-transferable Lucent Agreements and Lucent Licenses.

9. Lucent further reserves its rights to object to the proposed assumption and assignment of any of the Lucent Agreements and Lucent Licenses on any other ground, including but not limited to cure amount, adequate assurance of future performance.

Dated: February 17, 2004

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