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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
ALLEGIANCE TELECOM, INC., et al.,	:	Case No. 03-13057 (RDD)
Debtors.	:	(Jointly Administered)

OBJECTING ILECS' SUPPLEMENTAL OBJECTION TO CONFIRMATION OF DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE DATED APRIL 22, 2004

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Verizon,[1] BellSouth,[2] and SBC[3] (collectively, the "Objecting ILECs") jointly file this objection to confirmation of the Debtors' Second Amended Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code (the "Plan")[4] dated April 22, 2004 (the "Objection").

This Objection focuses on various provisions of the Plan, particularly Sections 6.2 and 6.3, that purport to obligate the Objecting ILECs to provide telecommunications services to the Debtors, and to other parties, including XO Communications ("XO" or "Buyer") after the Plan goes effective, even if the Debtors do not assume the relevant agreements pursuant to which those services are provided under Section 365 of the Bankruptcy Code, and meet the requirements of that section, including the curing of all defaults and the provision of adequate assurance of future performance. In addition to this Objection, the Objecting ILECs, along with KMC Telecom XI LLC, another telecommunications provider to and creditor of the ATCW Debtors, are filing a separate brief in opposition to confirmation of the Plan, which focuses on

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[1] "Verizon" means the telephone operating company subsidiaries of Verizon Communications Inc.

[2] "BellSouth" means BellSouth Telecommunications, Inc.

[3] "SBC" means SBC Telecommunications, Inc., on behalf of certain of the operating telephone companies affiliated with it including Illinois Bell Telephone Company d/b/a SBC Illinois, Indiana Bell Telephone Company Incorporated d/b/a SBC Indiana, Michigan Bell Telephone Company d/b/a/ SBC Michigan, The Ohio Bell Telephone Company d/b/a SBC Ohio, Pacific Bell Telephone Company d/b/a SBC California, Southwestern Bell Telephone, L.P. d/b/a SBC Missouri and/or SBC Texas, and Wisconsin Bell, Inc. d/b/a SBC Wisconsin.

[4] All capitalized terms used herein that are not otherwise defined herein shall have the meanings ascribed to them in the Plan or in the Debtors' Second Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, filed on April 22, 2004 (the "Disclosure Statement" or "D.S."), as applicable.

the provisions of the Plan affecting general unsecured creditors of the ATCW Debtors (the "Trade Creditor Group Objection").[5]

PRELIMINARY STATEMENT

The Objecting ILECs are filing this Objection to highlight the injustice that confirmation of the Plan will work on the Objecting ILECs and other telecommunications providers to the Debtors, in violation of the express terms of the Bankruptcy Code. The Objecting ILECs are among the largest, if not the largest, trade creditors of the Debtors. They have substantial outstanding prepetition claims for telecommunications services and facilities that they rendered to the Debtors, which remain unpaid.[6] The Objecting ILECs provided those services and facilities to the Debtors under executory contracts – interconnection agreements and service arrangements under various tariffs – that remain in effect today. By the Debtors' own admission, these services and facilities are crucial for the continued operations of the Debtors' business,

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[5] The Plan's provisions affecting general unsecured creditors are relevant to the Objecting ILECs because, if the Plan is confirmed as it currently stands, and in particular if Sections 6.2 and 6.3 are approved, each of the Objecting ILECs will potentially have such general unsecured claims. See Plan, § 6.2 ("Any Claim against a Debtor by a Utility Company . . . for the provision of Utility Services prior to the Commencement Date to such Debtor pursuant to a Tariff or unexpired or expired, terminated, or rejected contract shall be deemed to be an ATCW Unsecured Claim and shall be treated in accordance with Section 3.4 of the Plan); id. § 6.3 ("Any Claim against a Debtor by an Access Provider . . . for the provision of Tariff Services to such Debtor prior to the Commencement Date shall be deemed to be an ATCW Unsecured Claim and shall be treated in accordance with Section 3.4 of the Plan").

[6] The Objecting ILECs note that the procedures for objecting to confirmation of the Plan require that the objecting party include information relating to the claims held against the Debtors. Pursuant to this requirement, Verizon notes that it has prepetition claims against the ATCW Debtors in excess of $61 million, SBC notes that it has prepetition claims against the ATCW Debtors in the approximate amount of $21 million, and BellSouth notes that it has prepetition claims against the ATCW Debtors in the approximate amount of $1.4 million. In addition to these prepetition claims, Verizon, SBC, and BellSouth may hold additional claims for rejection damages in an amount yet to be determined, which claims will be filed within the time limits imposed by the Plan, and they each reserve all rights in connection therewith.

which has, in large part, been purchased by XO; indeed, the Debtors continue, month after month, to demand and obtain millions of dollars in services and facilities under these same executory contracts. But, rather than assume all the agreements and cure the defaults thereunder in accordance with Section 365 of the Bankruptcy Code, the Debtors propose to have their cake and eat it too – to require the Objecting ILECs to continue, after the Plan goes effective, to provide the very same services and facilities, both to the Reorganized Subsidiaries (essentially all of the operating Debtors with whom the Objecting ILECs have contracted) and to XO, but not to cure any of the Debtors' defaults under the executory contracts. Instead, the Debtors propose to treat the Objecting ILECs' substantial claims arising under those contracts as mere general unsecured claims. Finally, the Debtors propose a totally improper setoff scheme that does not comport with Section 553 of the Bankruptcy Code. Because such proposed treatment is fundamentally contrary to the Bankruptcy Code, as shown in this Objection, the Plan is not confirmable.[7]

BACKGROUND

1. On May 14, 2003, Allegiance Telecom, Inc. and certain of its subsidiaries (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). Pursuant to sections 1107(a) and 1108 of the

[7] Adding insult to injury, the Plan goes on to ignore the structural subordination of the ATI Noteholders (whose claims exist solely against ATI, the ATCW Debtors' parent and a mere holding company with few, if any, assets) and, instead, treats the general unsecured claims of the Objecting ILECs and other trade creditors who did business with the ATCW Debtors as merely *pari passu* with the ATI Noteholders' claims. As a result, the Debtors project that the Objecting ILECs and other holders of ATCW Unsecured Claims will receive, at most, only 35-40 cents on the dollar on their general unsecured claims, rather than 100 cents on the dollar, the recovery the Debtors themselves project that the holders of ATCW Unsecured Claims would receive if the ATI Noteholders' structural subordination were honored. The Trade Creditor Group Objection explains why these provisions of the Plan affecting general unsecured creditors similarly violate numerous provisions of the Bankruptcy Code and therefore also render the Plan uncomfirmable.

Bankruptcy Code, the Debtors continue to operate their businesses and manage their affairs as debtors-in-possession.

2. The ATCW Debtors are competitive local exchange carriers ("CLECs") that rely upon existing or "incumbent" local exchange carriers ("ILECs") as critical wholesale service providers supporting the Debtors' CLEC business. The ATCW Debtors use the telecommunications services and facilities furnished by the Objecting ILECs, not only for their own communications needs, but also as a critical component of their own telecommunications business; the ATCW Debtors could not furnish telecommunications to their end-user customers if they were unable to interconnect with the networks of, and obtain various services and facilities from, the Objecting ILECs. Indeed, "[t]he Debtors acknowledge . . . that the services generally provided by these telecommunications providers [i.e., the Objecting ILECs] are critical to the Debtors' ongoing operations and to those of the Reorganized Subsidiaries." Plan, § 6.4.

3. Pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 251 et seq., the Objecting ILECs furnish much of these services and facilities to the ATCW Debtors pursuant to so-called "interconnection agreements" – i.e., lengthy, state-specific, signed agreements under which the ATCW Debtors interconnect their telecommunications network with those of the Objecting ILECs, purchase services from the Objecting ILECs, and lease facilities from the Objecting ILECs for the provision of services to the ATCW Debtors' end users. Many of these interconnection agreements incorporate various tariffs filed by the applicable Objecting ILEC; for example, an interconnection agreement may provide that services or facilities to be furnished thereunder to the ATCW Debtors will be provisioned by the applicable Objecting ILEC at the rates and/or on the terms specified in a particular tariff. In other situations, the Objecting ILECs may also furnish some services and facilities to the ATCW Debtors directly under a tariff.

4. When the ATCW Debtors purchase services and facilities either under a tariff or under an interconnection agreement, they place an order by submitting an "Access Service Request" (an "ASR") or a "Local Service Request" (an "LSR") with the Objecting ILEC. They submit the ASR, LSR or other service order to obtain the use of a requested circuit, "collocation" site, or other service or facility from the Objecting ILEC in accordance with the terms of the applicable interconnection agreement and/or tariff. Indeed, the ATCW Debtors have continued, month after month, throughout the year in which they have been in bankruptcy, to submit ASRs and LSRs and order new or changed services from the Objecting ILECs in accordance with the relevant interconnection agreements and/or tariffs.

5. On February 20, 2004, this Court entered an order approving the sale to XO Communications, Inc. ("XO") of (i) substantially all of the assets of Allegiance Telecom Company Worldwide ("ATCW") and (ii) the stock of the subsidiaries of ATCW (together with ATCW, the "ATCW Debtors" or the "Reorganized Subsidiaries"), other than Shared Technologies Allegiance, Inc. See Order (I) Approving the Sale Free and Clear of Liens, Claims and Encumbrances to the Successful Bidder, (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (III) Granting Related Relief", at 4 (¶ F) (the "Sale Order"). In the Sale Order, this Court made clear that, in order for XO to obtain (directly or indirectly) the benefits of any of the executory contracts of the Debtors, it would have to do what every other buyer of the business of a debtor in bankruptcy must do: have the debtor assume the contracts, cure all defaults, provide adequate assurance of future performance, and (if the buyer itself is to obtain the contracts) assign the contracts to the buyer, as provided in Section 365 of the Bankruptcy Code. Thus, the Court specified that any assumption and/or assignment of any of the Debtors' contracts could occur only if "the requirements of section 365

of the Bankruptcy Code are satisfied." Sale Order at 11 (¶ 12). The Court also directed that "[a]ll defaults or other obligations of the Debtors under the Assumed Contracts . . . shall be promptly cured by the Debtors or Buyer as set forth in the Purchase Agreement as provided in section 365(b)(1) of the Bankruptcy Code . . . ." Id. at 12 (¶ 15).[8]

6. The Plan provides nothing of the kind, however. Instead, it declares, *ipse dixit*, that "Tariff Services" do not arise under executory contracts and that, accordingly, all ILECs and other telecommunications companies furnishing such services must continue to do so after the Initial Effective Date of the Plan, even though the outstanding service arrangements and orders under the tariffs will not be assumed and no prepetition defaults will be cured by the Debtors. See Plan, §§ 1.117 & 6.3. Similarly, the Plan purports to obligate all providers of "Utility Services" to continue to provide those services after the Effective Date, again apparently without any assumption of any contracts or cure of any defaults, to the extent such services are provided by tariff or by a contract the Debtors deem to have expired. See Plan, §§ 1.126 & 6.2.

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[8] This Court also made clear that the rights of all ILECs, including their right to insist on a full cure of all amounts owed to them, were to be fully preserved:

> Notwithstanding any of the foregoing, or anything else to the contrary contained in this Order, the Purchase Agreement or any documents executed therewith, nothing in this Order, the Purchase Agreement or any documents executed therewith shall be deemed to affect the rights of any ILECs, as to any executory contracts or unexpired leases, to object, respond or otherwise be heard with respect to (without limitation) . . . (b) the assumption and assignment of any such executory contract or unexpired lease to the Buyer . . . and (d) the amount and timing of any cure and payments proposed by the Debtors . . . . All rights of the ILECs and the Debtors, with respect to the matters relating to executory contracts, are hereby fully reserved.

Id. at 15 (¶ 20).

7. In short, the Plan tortures both bankruptcy and telecommunications law to arrive at a nonsensical result: that the ATCW Debtors may avoid their obligations to pay for telecommunications services and facilities they have ordered under interconnection agreements, service arrangements under tariffs, and other executory contracts, and yet the Objecting ILECs must continue to provide those very same services and facilities, both to the Reorganized Subsidiaries and to XO.

OBJECTIONS

I. The Plan Violates Section 365 of the Bankruptcy Code by Failing to Treat Tariffs as Executory Contracts.

8. The Plan asserts that "Tariffs" and "Tariff Services"[9] are not executory contracts within the meaning of Section 365 of the Bankruptcy Code and are, therefore, not subject to that section's requirements for assumption of such contracts and cure of defaults.[10] Specifically, section 1.117 of the Plan states that "[f]or purposes of the Plan, the obligation of an Access Provider[11] to provide Tariff Services does not arise under an executory contract." Based on this

[9] The Plan defines these terms broadly. A "Tariff" is any "schedule of terms, conditions, and prices (a) which are filed with an appropriate regulatory commission or (b) which are made generally available to the public (or such classes of customers as to be effectively available directly to the public) for the provision of products and services." Plan, § 1.116. In turn, "Tariff Services" is defined to be "telecommunications services required to be provided by an Access Provider pursuant to a Tariff filed by such Access Provider with the Federal Communications Commission or relevant state commission." Id., § 1.117.

[10] Section 365 provides that "[i]n a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract … of the debtor at any time before the confirmation of a plan…." 11 U.S.C. § 365(d)(2). A debtor may not assume an executory contract unless the debtor cures, or provides adequate assurance that it will promptly cure, any defaults under the contract and provides adequate assurance of future performance. 11 U.S.C. § 365(b)(1).

[11] The Plan defines an "Access Provider" to include any "Entity providing telecommunications services to the Debtors pursuant to an executory contract or a Tariff filed by such Entity with the

bald assertion of the law, the Debtors purport to require the Objecting ILECs and all other providers of alleged "Tariff Services" to continue to provide such services, after the Plan goes effective, not only to the reorganized Debtors but also to XO, without the payment of the millions of dollars the Debtors owe in prepetition defaults for such services and without any other cure of the outstanding defaults and provision of adequate assurance of future performance. Thus, Section 6.3 provides

> After the Initial Effective Date, all Access Providers shall continue to provide to the Debtors, Reorganized STFI, Buyer or the Reorganized Subsidiaries, as the case may be, without interruption all Tariff Services, specifically including usage-sensitive access services, provided to the Debtors prior to the Initial Effective Date and as the Tariffs for such services may be amended from time to time. Access Providers shall not be entitled to request any additional deposits or other financial security from the Debtors, Reorganized STFI, the Reorganized Subsidiaries or Buyer as a result of, arising out of, or in connection with, the Chapter 11 Cases. Any Claim against a Debtor by any Access Provider (or a Holder of a Claim of an Access Provider) for the provision of Tariff Services to such Debtor prior to the Commencement Date shall be deemed to be an ATCW Unsecured Claim and shall be treated in accordance with Section 3.4 of the Plan [the section on ATCW Unsecured Claims]. . . .

Plan, § 6.3. Similarly, Section 6.2 of the Plan states:

> Utility Companies shall not be entitled to request any additional deposits, payment or other financial security from the Debtors, Reorganized STFI, the Reorganized Subsidiaries or Buyer, as a result of, arising out of, or in connection with, the Chapter 11 Cases. On and after the Initial Effective Date, all Utility Companies that provided Utility Services pursuant to Tariffs prior to the Initial Effective Date shall continue to provide such services to the Debtors, Reorganized STFI, the Reorganized Subsidiaries or Buyer after the Initial Effective Date without interruption in the same manner as they did prior to the Initial Effective Date. . . . Any Claim against a Debtor by a Utility Company (or a Holder of a

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Federal Communications Commission or a relevant state commission. Plan, at § 1.1. Under this definition, the Objecting ILECs are unquestionably Access Providers.

> Claim of a Utility Company) for the provision of Utility Services prior to the Commencement Date to such Debtor pursuant to a Tariff . . . shall be deemed an ATCW Unsecured Claim and shall be treated in accordance with Section 3.4 of the Plan .

Plan, § 6.2.[12]

9. The Debtors' bald assertion that Tariffs are not executory contracts "for purposes of this case" – as if Section 365 could have a different meaning in this case from all others – and that Tariff Services are not provided pursuant to executory contracts does not make it so. As discussed in detail below, the Plan's provisions with respect to Tariffs and Tariff Services fail for at least three independent reasons, rendering the Plan unconfirmable. First, the Debtors have themselves on numerous occasions in these very cases taken the position that Tariffs and the service arrangement thereunder are executory contracts, seeking and obtaining orders from this Court authorizing the Debtors to reject those contracts under Section 365 of the Bankruptcy Code. The doctrines of both judicial estoppel and law of the case preclude the Debtors from taking the contrary position at this late date, simply because it is now in their interests to do a 180-degree about-face. Second, on the merits, the Debtors have been correct throughout these cases up to their sudden flip-flop in the Plan: Tariffs, and the service arrangements thereunder, are, as a matter of law, executory contracts within the meaning of section 365(a). Third, even if all Tariffs and the service arrangements provided thereunder were not executory contracts, many of the relevant Tariffs here were incorporated by reference into interconnection agreements –

[12] The Plan defines "Utility Services" broadly in a manner clearly intended to encompass telecommunications services furnished by the Objecting ILECs pursuant to tariffs. "Utility Services means those services generally provided by utility providers and telecommunications vendors pursuant to a Tariff requested by the Debtor via a Utility Service Order, including, but not limited to, . . . telecommunications . . . and other utility services." Plan, § 1.126. In turn, the Plan defines a "Utility Service Order" seemingly to encompass ASRs and LSRs – "those orders, purchase orders, and other requests for Utility Services made by Debtors." Id., § 1.127.

agreements that are unquestionably executory contracts. Under Section 365, the ATCW Debtors must assume or reject each such interconnection agreement *in toto* and, if they assume the agreement, they must cure all defaults thereunder, including the payment in full of all amounts owed for any "Tariff Services" incorporated into the interconnection agreement. Each of these defects renders the Plan unconfirmable because it does not satisfy Section 1129(a)(1)'s requirement that the Plan comply with applicable provisions of the Bankruptcy Code, including Section 365.

A. The Debtors Are Judicially Estopped from Asserting that Tariffs Are Not Executory Contracts, and the Proposed Treatment of Tariffs Is Contrary to the Law of This Case.

10. In the one year that the Debtors have been in bankruptcy, they have filed no fewer than seven separate motions seeking to reject, pursuant to Section 365(a) of the Bankruptcy Code, hundreds of circuits and other service arrangements ordered and provisioned by tariff. In each instance, based on the Debtors' representation that the Tariff Services at issue were subject to executory contracts, this Court granted the relief requested by the Debtors.[13]

11. For example, on September 24, 2003, the Debtors filed a "Motion Of The Debtors For An Order Pursuant To Section 365(a) Of The Bankruptcy Code And Rule 6006 Of The Federal Rules Of Bankruptcy Procedure For Approval Of Rejection Of Certain Individual Service Orders" (the "Rejection Motion") (Docket No. 442).[14] The Debtors could not have been more clear in identifying their service arrangements ordered and provided pursuant to tariffs as

[13] Attached hereto as Exhibit A is a chart setting forth the docket numbers of the rejection motions and the orders granting the motions.

[14] A true and correct copy of this Rejection Motion is attached hereto as Exhibit B.

executory contracts within the meaning of Section 365. Thus, the Debtors "represent[ed]" (Rejection Motion, ¶ 1):

> In the ordinary course of business, the Debtors purchase certain telecommunication services pursuant to (a) ***tariffs*** filed by incumbent and competitive local exchange carriers ("LECs") and interexchange carriers ("IXCs") with the Federal Communications Commission and/or various state public utility commissions and (b) various master service agreements ("MSAs") among the Debtors and certain access providers (the "Providers"). . . .
>
> [T]he Debtors have determined that they do not require the circuits and facilities (the "Circuits") purchased through the service orders (the "Service Orders"), which are listed on Exhibit A annexed hereto. . . .
>
> By this Motion, the Debtors respectfully request the entry of an order, pursuant to ***section 365(a)*** of the Bankruptcy Code and Bankruptcy Rule 6006, authorizing and approving the ***rejection*** of the Service Orders, effective as of the disconnect date set forth in the disconnect notice for each Circuit.

Rejection Motion, ¶¶ 8, 9 and 11 (emphasis added).

12. This Court granted the Rejection Motion in an order that was equally clear and unequivocal. That order is entitled "Order Pursuant to ***Section 365(a)*** of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 6006 Authorizing the ***Rejection*** of Certain Individual Service Orders. It approved, "pursuant to ***Section 365(a)*** of the Bankruptcy Code and Bankruptcy Rule 6006, the ***rejection*** of the Service Orders, and set a deadline for the filing of any proof of claim arising from the ***rejection*** of any of the Service Orders. See Docket No. 491 (the "Rejection Order") (emphasis added).[15]

13. The Debtors took the very same position in these cases on at least six other occasions, expressly seeking and obtaining orders of this Court authorizing them to reject, under

[15] A true and correct copy of the Rejection Order is attached hereto as Exhibit C.

Section 365, ASRs and LSRs for services provided by tariff as executory contracts. Indeed, it appears that the Debtors are continuing to do the same thing right now. While asserting in their Plan that Tariff Services are not provided pursuant to executory contracts, they talk out of the other side of their mouth, filing schedules of "executory contracts" to be rejected under the Plan that include numerous circuits and other service arrangements ordered and provisioned under tariffs.[16]

14. Under these circumstances, the Debtors are estopped from taking the opposite position now by asserting that Tariff Services are not subject to executory contracts. A party is judicially estopped from asserting a position contrary to one it has previously taken if the following conditions are met: (i) there has been an unequivocal assertion of law or fact by a party in a judicial proceeding; (ii) the same party takes an intentionally inconsistent position in a subsequent judicial proceeding; (iii) the party's purpose is to mislead the court and thereby obtain an unfair advantage against another party; and (iv) the party succeeded in the prior proceeding. See Hotel Syracuse, Inc. v. City of Syracuse Indus. Dev. Agency (In re Hotel Syracuse, Inc.), 155 B.R. 824, 837 (Bankr. N.D.N.Y. 1993); see also Pereira V. Dow Chemical Co. (In re Trace Int'l Holdings, Inc.), 301 B.R. 801, 806 (Bankr. S.D.N.Y. 2003) (applying judicial estoppel which is "designed to keep litigants from playing 'fast and loose' with the courts[.]") (internal citations omitted); Rapture Shipping, Ltd. v. Allround Fuel Trading B.V.,

[16] The Plan specifies that the "executory contracts and unexpired leases" on Schedules 2, 3 and 4 "shall be deemed rejected." Plan, § 6.1. The Debtors filed those schedules last week and served them at the same time with a cover letter stating that "[t]he Debtors are rejecting your contract, as identified on the attached schedules." Schedule 1, a copy of which (together with the Debtor's cover letter) is attached hereto as Exhibit D, includes numerous circuits and other service arrangements with the Objecting ILECs under tariffs.

2004 WL 253339, at *2 (S.D.N.Y. Feb. 10, 2004) (applying judicial estoppel so as not to compromise the integrity of the judicial system).

15. Here, all of the elements necessary for the application of judicial estoppel are amply satisfied. First, the Debtors have on seven (7) prior occasions unequivocally moved under section 365(a) to reject Tariff Services as subject to executory contracts. Second, the treatment of Tariffs under the Plan (that Tariffs are not executory contracts) plainly is inconsistent with the Debtors' prior position, and there is nothing "unintentional" about it. Three, the Debtors' proposed treatment of Tariffs in the Plan and arguments in support of such treatment are necessarily misleading to the Court – the Debtors have not disclosed to the Court the fundamental inconsistency between their current position and their prior one -- and would enable the Debtors (and the Buyer) to obtain not only an unfair advantage against, but also a windfall from, the Objecting ILECs and other Access Providers by requiring those parties to continue to provide Tariff Services without any cure by the Debtors of their millions of dollars in defaults. Fourth, on each of the seven occasions where the Debtors moved to reject Tariffs as executory contracts under section 365(a), they successfully obtained orders of this Court so authorizing such rejection. Consequently, the Debtors should be judicially estopped from treating Tariffs and Tariff Services in a manner inconsistent with the requirements of Section 365.

16. The doctrine of law of the case also precludes the Debtors from treating Tariff Services under the Plan as not subject to executory contracts. Under that doctrine, in this Circuit, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" Pescatore v. Pan American World Airways, Inc., 97 F.3d 1, 7-8 (2d Cir. 1996) (internal quotation marks and citations omitted). Although "the doctrine is 'admittedly discretionary' and does not limit a court's power to reconsider its own

decisions prior to final judgment" … the Second Circuit has "repeatedly stated that [it] will not depart from [the law of the case] absent 'cogent' or 'compelling' reasons," id., such as "'an intervening change of controlling law'" or "the availability of new evidence, or the need to correct a clear error or prevent a manifest injustice." Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003) (citing Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)).

17. There are no such extraordinary circumstances present here. There is no intervening case law or new evidence, and the Debtors are most assuredly not asking this Court to undo its seven prior orders granting the Debtors' motion to reject various Tariff Services.[17] This Court has issued orders declaring on seven separate occasions that Tariff Services are subject to executory contracts and governed by Section 365. That rule of law is the law of these cases and cannot be overturned by the Debtors at the eleventh hour simply because it is now in their interest to take the diametrically opposite position from the one they took in seven different motions and this Court endorsed in its seven orders granting those motions.

B. The Tariffs and Service Arrangements Pursuant to Tariffs in Question Are Executory Contracts That Must Be Assumed or Rejected Prior to Confirmation of the Plan.

18. Even if the Debtors' own prior actions and this Court's orders in these chapter 11 cases did not preclude the Plan's proposed treatment of Tariff Services, the Bankruptcy Code would. The determination of whether Tariffs, and the service arrangements ordered and provided pursuant thereto, are executory contracts within the meaning of Section 365 entails a two-part inquiry: (1) are the Tariffs and service arrangements contracts, and, (2) if so, are those

[17] The Debtors are currently objecting to certain rejection damage claims filed by SBC as late-filed.

contracts executory. As described in more detail below, the answer to both of these questions is a resounding "yes."

i. The Tariffs and Service Arrangements Are Contracts.

19. Courts have squarely addressed the first question in a variety of contexts and have repeatedly held that a tariff is a type of contract. For example, in Metro East Center for Conditioning and Health v. Qwest Communications Int'l, Inc., 294 F.3d 924 (7th Cir. 2002), the Seventh Circuit considered the nature of tariffs in the context of a dispute over monthly interstate line charges and the applicability of the Federal Arbitration Act (the "FAA"). Qwest had charged Metro East a higher per-line charge than Metro East thought it should pay. The interstate tariff which governed the service at issue provided, in part, that any dispute between the parties had to be resolved by arbitration. But Metro East wanted to sue in court, rather than arbitrate its claim; it filed such an action and argued that the mandatory-arbitration provision in the tariff could not be enforced because the FAA renders only "agreements" to arbitrate enforceable and the tariff was not, according to Metro East, an "agreement."

20. The Seventh Circuit flatly disagreed. Judge Easterbrook, writing for a unanimous panel, held that a tariff is in fact a type of contract:

> An "agreement" for purposes of § 3 [of the Federal Arbitration Act] means no more than an offer and acceptance that produces a legally binding document. Tariffs, like contracts, have that quality. The tariff is an offer that the customer accepts by using the product. The terms have legal effect; indeed, by virtue of federal law a tariff is more conclusive than a contract and is said to have the status of a regulation, . . . though a tariff also may be enforced through suit just as a contract may be enforced. No surprise that we have referred to tariffs as a species of contract. . . . Tariffs differ from private contracts only to the extent that they are not subject to alteration one customer (or one clause) at a time or to nullification by a court on grounds such as unconscionability. Instead a tariff must be enforced as written unless the regulatory agency intervenes.

Id. at 926 (internal citations omitted). The court of appeals explained that Metro East was bound by the provisions of the tariff incorporating the FAA unless and until the Federal Communications Commission suspended or annulled the tariff. Id. at 927-28. Accordingly, the court found that the arbitration provision in the tariff was binding upon Metro East and remanded the case to the district court for dismissal in favor of arbitration. Id. at 930.

21. The same analysis applies here. Just as Metro East was bound by Qwest's tariff by utilizing Qwest as its long distance telephone service provider, the ATCW Debtors are bound by the Objecting ILECs' tariffs pursuant to which they receive telecommunications services – tariffs that obligate the Debtors to pay their outstanding charges if they wish to continue to obtain the services and facilities they have ordered and the Objecting ILECs have provisioned under those tariffs. Indeed, this is the result of the filed rate doctrine. "The filed rate doctrine, also known as the filed tariff doctrine, is derived from the tariff-filing requirements of the [federal Communications Act]." Marcus v. AT&T Corp., 138 F.3d 46, 58 (2d Cir. 1998) (citing 47 U.S.C. § 203(a)). Pursuant to those requirements, "[t]he terms and conditions of [telephone] service are set forth in 'tariffs,' which are essentially offers to sell on specified terms, filed with the FCC and subject to modification or disapproval by it." Cahnmann v. Sprint Corp., 133 F.3d 484, 487 (7th Cir. 1998). Once an ILEC's customer, like the ATCW Debtors, accepts service governed by a tariff filed with the FCC (or with a state public service commission), the terms of that tariff "conclusively and exclusively control the rights and liabilities between a carrier and its customer." MCI Telecomms. Corp. v. Graham, 7 F.3d 477, 479 (6th Cir. 1993); see also AT&T v. Central Office Tel., Inc., 524 U.S. 214, 227 (1998). Here, those binding tariffs obligate the ATCW Debtors to cure their defaults if they want to continue to obtain the same services and facilities that they have ordered and the Objecting ILECs have provisioned.

22. The mere fact that the Objecting ILECs are compelled to enter into certain such contractual arrangements with CLECs does not somehow cause the Tariffs to not be contracts. Again, the Metro East decision is illuminating. There, the Seventh Circuit rejected Metro East's argument that the tariff, and in particular its provision requiring arbitration, could not be deemed an "agreement" simply because it was not fully and freely negotiated by both sides:

> Arbitration often comes with the territory, so to speak--for example, with a job or with membership in the National Association of Securities Dealers. Although these requirements may be non-negotiable--one cannot join the NASD without accepting its arbitration regimen, and often an investor cannot trade securities *through* NASD members without committing to arbitrate--they remain "agreements" because the person could have chosen to do something else. A would-be securities dealer may elect a different occupation; by making a living at securities trading he agrees to live by the rules applicable to securities dealers.

Metro East, 294 F.3d at 926-27.

23. Similarly, the ILECs and CLECs are all sophisticated companies that operate willingly in the telecommunications industry. As such, they all accept the norms and conditions under which that industry operates, including that fact that an ILEC offers services pursuant to tariffs filed with and approved by a government regulatory agency and that when a CLEC orders services under those filed terms, it and the ILEC agree to be bound by the provisions of the tariff – it contracts with the ILEC for the provision of services (or facilities) pursuant to the terms and conditions set forth in the tariff.

24. Indeed, the courts have overwhelmingly held that tariffs are, or give rise to, contracts. The cases so holding are legion. See, e.g., Arsberry v. Illinois, 244 F.3d 558, 566 (7th Cir. 2001) ("The vertical agreement is effectively the tariff, that is, the ***contract*** between the provider of the regulated service (the phone company) and the customer"); Marcus, 138 F.3d at

56 (finding that tariffs are parties' "agreements"); Cahnmann, 133 F.3d at 487 ("[T]he filed tariff is the ***contract*** between the plaintiff . . . and Sprint."); Atlanta Gas Light Co. v. FERC, 140 F.3d 1392, 1395 n.1 (11th Cir. 1998) ("A tariff is the '***contract*** which governs a pipeline's service to its customers,'"); ANR Pipeline Co. v. FERC, 931 F.2d 88, 90 n.1 (D.C. Cir. 1991) (Ruth Bader Ginsburg, J.) ("A 'tariff' is the ***contract*** which governs a pipeline's service to its customers."); United States v. DeBerry, 487 F.2d 448, 449 n.1 (2d Cir. 1973); Penn Cent. Co. v. General Mills, Inc., 439 F.2d 1338, 1340 (8th Cir. 1971) ("a tariff is no different from any ***contract***"); Tishman & Lipp, Inc. v. Delta Air Lines, 413 F.2d 1401, 1403 (2d Cir. 1969); American Tel. & Tel. Co. v. New York City Human Res. Admin., 833 F. Supp. 962, 970 (S.D.N.Y. 1993) (the "tariffs conclusively and exclusively enumerate the rights and liabilities of the ***contracting*** parties"); MCI Telecomms. Corp. v. TCI Mail, Inc., 772 F. Supp. 64, 66 (D.R.I. 1991) ("MCI's ***contractual*** relationships with its customers are governed by MCI Tariff FCC No. 1"); TADMS, Inc. v. Consolidated Freightways, 619 F. Supp. 385, 392 (C.D. Cal. 1985) ("An ambiguous tariff should be construed according to general principles of ***contract*** law.) (citations omitted); see also 64 AM. JUR. 2d *Public Utilities* § 61 (2003) ("A tariff that has been approved by a public service commission becomes law and has the same force and effect as a statute enacted by the legislature; it amounts to a binding ***contract*** between the utility and its customer[.]); 86 C.J.S. *Telecommunications* § 73 (2003) ("Generally, a tariff is to be viewed as a ***contract*** between the company and its customers, affirmed, on behalf of the customers, by the public service commission.") (emphasis supplied throughout).

25. In fact, as the courts have recognized, the FCC itself takes the view that telecommunications tariffs are contracts. In AT & T Corp. v. Public Service Enterprises of Pennsylvania, Inc., 1999 WL 672543, at *4 (S.D.N.Y. Aug. 26, 1999), Judge Preska observed

that "the Commission equates tariff filings with contract offers" and that, "[a]ccordingly, contract law provides the framework by which the Commission assesses a tariff's justness and reasonableness" (citing Capital Network Sys. v. Federal Communications Comm'n, 28 F.3d 201, 204 (D.C. Cir. 1994)) (internal quotation marks omitted). This abundance of authority amply demonstrates that tariffs are a species of contract.

26. Here, the contracts were formed by the Debtors' submission of ASRs or LSRs – in the words of the Plan, by the Debtors' submission of "Utility Service Orders." The Objecting ILECs' Tariffs were offers to provide service. The ATCW Debtors accepted those offers, forming a contract, by submitting the ASR or LSR. See, e.g., Cahnmann, 133 F.3d at 487 ("The terms and conditions of service are set forth in 'tariffs,' which are essentially offers to sell on specified terms, filed with the FCC"); Biddle v. Mountain States Tel. & Tel. Co., 629 F.2d 571, 572 (9th Cir. 1980) ("[T]he written tariffs on file with the Arizona Corporations Commission form only a part of the contract for telephone services. The contract between the parties did not arise until oral requests for telephone services were made and Mountain Bell orally agreed to supply them."). Thus, the applicable ASRs, LSRs and Tariffs created contractual relationships governing each circuit or other service ordered by the ATCW Debtors. The Tariffs established the prices, terms and conditions under which the Debtors have purchased the services and, in turn, the Objecting ILECs have provided those services. In short, there can be no doubt that any service arrangements ordered by the Debtors under Tariffs are contracts.

ii. The Tariffs and Service Arrangements Are Executory Contracts.

27. The answer to the second question – whether the contracts at issue are "executory" within the meaning of Section 365 of the Bankruptcy Code -- is also clearly "yes." While the term "executory contract" is not defined in the Bankruptcy Code, courts generally

embrace Professor Countryman's definition: "[A] contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Countryman, Executory Contracts in Bankruptcy: Part I, 57 MINN. L. REV. 439, 460 (1973); see also TTS, Inc. v. Citibank, N.A. (In re TTS, Inc.), 158 B.R. 583, 588 (D. Del. 1993) (same); NLRB v. Bildisco and Bildisco, 465 U.S. 513, 522 n.6 (1984) (a contract is executory if "performance is due to some extent on both sides"); Eastern Air Lines v. Insur. Co. of State of Pennsylvania (In re Ionosphere Clubs), 85 F.3d 992, 999 (2d Cir. 1996) (same); In re Texaco, Inc., 73 B.R. 960, 964 (Bankr. S.D.N.Y. 1987) (an indenture was an executory contract because performance remained due on both sides); In re O.P.M. Leasing Servs., Inc., 23 B.R. 104, 117-18 (Bankr. S.D.N.Y. 1982) (continuing obligations on both sides compelled the conclusion that a master lease was executory).

28. This definition describes precisely the situation with respect to the Tariff Services at issue here. Under the Tariffs, the Debtors are obligated to pay for the Tariff Services they obtain, and the Objecting ILECs are required to provide those services. Failure to perform by either party would constitute a material breach. Both sides have obligations – the Objecting ILECs to provide the services and the Debtors to pay for them.[18] Indeed, the Debtors themselves

[18] These are just examples; the Tariffs impose numerous other obligations on both the Objecting ILECs and the ATCW Debtors. For example, Verizon's FCC Tariff No. 11 addressing access services, a copy of which is attached hereto as Exhibit E, is some 131 pages long. The Tariff includes 12 pages of "Undertakings" by Verizon (pages 2-1 – 2-12), and another 11 pages of "Obligations" of the customer (in this case, the ATCW Debtors) (pages 2-14 – 2-24). Additionally, by way of example, this tariff also provides that any transfer or assignment of tariffed services to another customer can only be made "provided that the assignee or transferee assumes all outstanding indebtedness for such services, and the unexpired portion of the minimum period and the termination liability applicable to such services[.]" . . . "The assignment or transfer of services does not relieve or discharge the assignor or transferor from

argue that the Objecting ILECs can be required to provide Tariff Services and they could not seriously content that, outside of bankruptcy, they could avoid paying the applicable charges and not be in breach. Consequently, the service arrangements under the tariffs are executory contracts within the meaning of Section 365.

29. Accordingly, just as they have done throughout these cases, the ATCW Debtors must assume or reject their contractual arrangements for Tariff Services with the Objecting ILECs under Section 365. If they assume them, they must of course cure all outstanding defaults and provide adequate assurance of future performance. The Bankruptcy Code is crystal clear on both requirements. See 11 U.S.C. § 365(b)(1)(A) and (C). The Plan's provisions to the contrary must be stricken or the Plan is unconfirmable as a matter of law.[19]

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remaining jointly or severally liable with the assignee or transferee for any obligations existing at the time of the assignment or transfer." FCC Tariff No. 11, at pages 2.1-2.2.

[19] The Plan is also contrary to law to the extent that it provides that any requisite cure payments on executory contracts or unexpired leases to be assumed will be made "on the later of (i) the Initial Effective Date, (ii) the date the Bankruptcy court determined by Final Order the default amount, or (iii) on such other terms as the parties to such executory contracts or unexpired leases and the Buyer may otherwise agree." Plan, § 6.1(c). The Bankruptcy Code expressly requires a debtor to cure all defaults "at the time of assumption." 11 U.S.C. § 365(b)(1). And, even if the ATCW Debtors could wait until the Bankruptcy Court resolved any dispute over the cure amount before making payment, they surely could not hold off until the Bankruptcy Court's determination became a "Final Order," which under the Plan will not occur until all appeals and other avenues of review have been exhausted. Plan, § 1.69. Unless the Debtors obtain a stay, an order of the Bankruptcy Court awarding a cure amount, like any other order, is immediately enforceable against the Debtors notwithstanding the pendency of any appeal. See, e.g., Hill & Sandford, LLP v. Mirzai (In re Mirzai), 236 B.R. 8, 10 (B.A.P. 9th Cir. 1999) ("The trial court can also enforce a judgment that has been neither superseded nor stayed, the rationale being that the 'mere pendency of the appeal does not, in itself, disturb the finality of a judgment'") (internal citations omitted).

30. Under the Bankruptcy Code, it is equally clear that the ATCW Debtors have until confirmation – but no later – to decide whether to assume or reject the contractual arrangements for Tariff Services. The Code provides:

> In a case under chapter 9, 11, 12 or 13 of this title, the trustee [or debtor-in-possession] may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of a party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease….

11 U.S.C. § 365(d)(2). Courts have consistently recognized that the plain language of Section 365(d)(2) requires a debtor to determine to assume or reject an executory contract prior to plan confirmation, or at an earlier time if ordered by the court upon a request by a party in interest. See, e.g., In re Adelphia Communications Corp., 291 B.R. 283, 292 (Bankr. S.D.N.Y. 2003) ("debtor-in-possession ordinarily has until plan confirmation to decide whether to assume or reject an executory contract. However, . . . a counter-party to an executory contract may request an order compelling the debtor to assume or reject the contract by an *earlier* time.") (emphasis added); In re Physician Health Corp., 262 B.R. 290, 292 (Bankr. D. Del. 2001) (same); In re Miskowski, 182 B.R. 5, 6 (Bankr. M.D. Pa. 1995) ("[I]f the contract in question was executory in nature, the Debtor would be obligated to assume or reject that contract before confirmation . . .").

31. Notwithstanding the clear import of the Code, section 6.5 of the Plan provides that the Debtors shall have fifteen (15) days after a determination that Tariffs and Tariff Services are executory contracts to reject, assume or assume and assign those contracts. This provision of the Plan clearly violates Section 365(d)(2) and the applicable case law construing that provision in accordance with its plain meaning by effectively permitting the Debtors to determine whether to assume or reject a class of executory contracts post-confirmation. The ATCW Debtors must

make that decision now, not after confirmation, and, if the ATCW Debtors do not assume the service arrangements by confirmation, the Objecting ILECs can be under no continuing duty as a matter of bankruptcy law to continue to provide services thereunder.[20]

32. In this regard, Judge Walrath's decision in Net 2000, a case involving another CLEC, is directly on point. There, the debtor entered into an asset purchase agreement to sell its telecommunications operations; the agreement did not provide for the assumption and assignment to the buyer (Cavalier) of any of the Debtors' service arrangements with Verizon whether provided under tariffs or interconnection agreements. Judge Walrath issued an order specifying that – whatever the rights or obligations of the parties might be under telecommunications law – as a matter of bankruptcy law, Verizon had absolutely no obligation to continue to provide the buyer any of the services it had provided to the Debtors, and the buyer had absolutely no right to demand that Verizon do so. Moreover, Judge Walrath also made clear that her order applied equally to service arrangements provided by tariff or by interconnection agreement. Thus, after defining "Verizon Contracts" to mean all "special access services [provided by Verizon to the debtors] pursuant to applicable tariffs and other services pursuant to interconnection agreements," Judge Walrath provided:

[20] Similarly, the Plan is improper to the extent that it provides that, at the Debtors' election, certain executory contracts or unexpired leases will be rejected "on the later of (i) 180 days after the Initial Effective Date and (ii) the date reflected on Schedule 4, . . . provided . . . . , that in the event that notice of a rejection of any contract or lease on Schedule 4 is given by the Debtors to the counterparty to such contract or lease, then such contract or lease shall be deemed rejected on the date that is twenty (20) days after the counterparty receives such notice." Plan, § 6.1(a). Under the plain terms of Section 365 of the Bankruptcy Code, any rejection must be effective when the Plan goes effective. The Debtors cannot continue post-confirmation to retain the benefits of a contract that they intend, effective at a later date, to reject. For the same reasons, Section 6.1(a) is illegal to the extent that it provides for contracts included on a different schedule (number 3) to be assumed, or assumed and assigned, after the Plan goes effective.

> Since there has been no assumption and assignment of the Verizon Contracts to Cavalier under 11 U.S.C. § 365, neither the Sale Order nor this Order nor any other Order of this Court: (i) grants Cavalier the right to use, issue orders with respect to, demand migration of, or obtain any benefit from, either directly or indirectly, any of the services and facilities provided by Verizon to the Debtors pursuant to the Verizon Contracts . . . , (ii) directs Verizon to do anything to transfer any of the Debtors' end users to Cavalier or its network, (iii) grants Cavalier any right to insist that any circuit or facility, or any portion thereof, used to serve the Debtors' end users be used to process orders submitted by Cavalier or that any new order by Cavalier be processed simultaneously or otherwise coordinated with disconnect orders submitted by the Debtors, or (iv) otherwise requires Verizon to process any orders submitted by Cavalier designed to facilitate Cavalier's services to end users formerly served by the Debtors or to shorten any provisioning intervals for such orders.

In re Net2000 Communications, Inc., Order Regarding the Emergency Motion of the Operating Subsidiaries of Verizon Communications Inc. to Require Debtors and Cavalier Telephone Company to Cure Defaults Under the Debtors' Contracts with Verizon and for Contempt, Case No. 01-11324 (MFW) (Feb. 13, 2002), ¶2 (copy attached hereto as Exhibit F.)

33. This Court should adopt the same approach. As the Debtors themselves have repeatedly asserted during these cases, the Tariff Services are subject to executory contracts governed by Section 365 of the Bankruptcy Code. If the ATCW Debtors want the benefit of those services after they emerge from bankruptcy, they need to do what all other debtors with executory contracts must do: assume the agreements, cure the defaults, and provide adequate assurance of future performance. The Court should strike the contrary, unlawful provisions of sections 1.117, 6.2, 6.3 and 6.5 of the Plan.

C. In any Event, Many of the Tariffs are Incorporated into Interconnection Agreements That are Unquestionably Executory Contracts.

34. Even if the Tariffs did not in and of themselves give rise to executory contracts, many such Tariffs are incorporated into interconnection agreements. For instance, it is not uncommon for an interconnection agreement to specify that services or facilities to be provisioned thereunder to a CLEC, such as the ATCW Debtors, will be charged at the rates specified in a Tariff.[21] In these cases, the ATCW Debtors' failure to pay the charges would be a default under the interconnection agreement. And the ATCW Debtors must cure any such default as part of their assumption of the agreement or the applicable Objecting ILEC cannot be required under Section 365 of the Bankruptcy Code to continue to provide the service in question post-confirmation.

35. This is black-letter law. "Under general principles of contract law, a contract may incorporate another document by making clear reference to it and describing it in such terms that its identity may be ascertained beyond doubt." New Moon Shipping Co., Ltd. v. Man B&W Diesel AG, 121 F.3d 24, 30 (2d Cir. 1997) (citing 4 Williston on Contracts § 628, at 903-04 (3d ed. 1961)); see also Sharon Steel Corp. v. National Fuel Gas Distribution Corp., 872 F.2d 36 (3d Cir. 1989) (service contract between a utility and a debtor that incorporated filed rate schedules was an executory contract subject to assumption or rejection under Section 365); WorldCom Technologies, Inc. v. Sequel Communications, Inc., 158 F. Supp.2d 368, 369 (S.D.N.Y. 2001)

[21] By way of example, Verizon's interconnection agreement with the Debtors for telecommunications services in New York State provides that "[w]here there is an applicable and effective Tariff, the rates and charges contained in that Tariff shall apply . . .." See Agreement between New York Telephone Company d/b/a/ Bell Atlantic - New York and Sprint Communications Company L.P., dated June 23, 2000 (later adopted by Allegiance Telecom of New York, Inc.), at § 24.11.2. A copy of this agreement is attached hereto as Exhibit G.

(summary judgment awarded to WorldCom on breach of contract claim, where Sequel failed to pay charges specified in tariffs incorporated into the parties' contract, which provided that WorldCom would "provide telephone services to defendant pursuant to WorldCom Tariff FCC No. 1 and No. 2"). Indeed, a tariff incorporated by reference into a large service contract cannot be severed from the contract as a whole. See, e.g., Net2Globe Int'l, Inc. v. Time Warner Telecom of New York, 273 F. Supp.2d 436, 445 (S.D.N.Y. 2003) ("N2G's contracts with TWTC incorporated TWTC's published tariffs. It is axiomatic under New York law that courts interpret a contract so as to give effect to all of its provisions and cannot and should not accept an interpretation that ignores the interplay of the terms, renders certain terms inoperable, and creates a conflict where one need not exist.") (internal citations and quotation marks omitted). And it is settled law that a debtor must assume (or reject) an executory contract as a whole, and not cherry pick those provisions it likes, just as it is crystal clear that, if the debtor chooses to assume the contract, it must cure all defaults (other than breaches of ipso facto clauses). See NLRB v. Bildisco and Bildisco, 465 U.S. at 531-532; In re Leslie Fay Cos., Inc., 166 B.R. 802, 808 (S.D.N.Y. 1994) ("An executory contract cannot be assumed in part and rejected in part"); In re Atlantic Computer Systems, Inc., 173 B.R. 844, 849 (S.D.N.Y. 1994) (noting that a debtor may not "cherry-pick" pieces of a contract it wishes to assume or reject); 11 U.S.C. § 365(b)(1)(A).

36. Thus, to the extent that any interconnection agreement incorporates a Tariff and provides for certain services or facilities to be provided in accordance with the rates or other terms and conditions specified in the Tariff, the Debtors must either assume the interconnection agreement and cure all defaults thereunder – including all charges owing for the services provided pursuant to the incorporated-tariff – or they cannot continue to demand the applicable Objecting ILEC to continue to provide such services and facilities post-confirmation. In this

respect, as well, the Plan must be changed – the definition of "Tariff Services" is sufficiently broad as to plausibly be read to include services furnished in accordance with such incorporated Tariffs – or the Plan cannot be confirmed.

II. The Plan Violates Section 366 of the Bankruptcy Code.

37. In addition to violating Section 365, the Plan also appears to violate Section 366 of the Bankruptcy Code. The most glaring violation is contained in Section 6.2 of the Plan, which, as currently drafted, is virtually incomprehensible.[22]

[22] Section 6.2 states that "Utility Companies shall not be entitled to request any additional deposits, payments or other financial security from the Debtors, Reorganized STFI, the Reorganized Subsidiaries or Buyer as a result of, arising out of, or in connection with, the Chapter 11 Cases. On and after the Initial Effective Date, all Utility Companies that provided Utility Services pursuant to Tariffs prior to the Initial Effective Date shall continue to provide such services to the Debtors, Reorganized STFI, the Reorganized Subsidiaries or Buyer after the Initial Effective Date without interruption in the same manner as they did prior to the Initial Effective Date and as the Tariffs for such Utility Services may be amended from time to time in accordance with applicable law. On and after the Initial Effective Date, all Utility Companies that provided Utility Services pursuant to an unexpired contract, which has been assumed or assumed and assigned by the Debtors to the Buyer, shall continue to provide to the Debtors, Reorganized STFI, the Reorganized Subsidiaries or Buyer without interruption all Utility Services provided pursuant to such contract in accordance with the terms of such contract and applicable law; provided, however, that to the extent such contracts are deemed to be executory contracts, the Debtors have cured all defaults and otherwise satisfied the requirements for the assumption or assumption and assignment of such contracts under section 365 of the Bankruptcy Code. To the extent that a contract for Utility Services has expired, has been rejected, or has been terminated by Debtors prior to the Initial Effective Date, no action will be taken by the Debtors, Reorganized STFI, the Reorganized Subsidiaries or Buyer with respect to such expired, rejected or terminated Utility Services contract. Any Claim against a Debtor by a Utility Company (or a Holder of a Claim of a Utility Company) for the provision of Utility Services prior to the Commencement Date to such Debtor pursuant to a Tariff or expired, terminated, or rejected contract shall be deemed to be an ATCW Unsecured Claim and shall be treated in accordance with Section 3.4 of the Plan. The Buyer shall have standing with respect to Claims arising out of Utility Services. During the Chapter 11 Cases, a number of interconnection agreements ("ICAs") between the Debtors and certain telecommunications provider terminated by their terms or by notice. As such, the Debtors adopted new ICAs. The Debtors believe that any Claims arising out of the ICAs that terminated during these Chapter 11 Cases are prepetition claims. The telecommunications providers may take a different position, which, if decided unfavorably to the Debtors, may ultimately result in the Debtors paying more cure costs."

38. The Objecting ILECs believe that the Debtors intend section 6.2 to require the Objecting ILECs and other alleged providers of "Utility Services" to continue, indefinitely, to provide those services post-confirmation to the extent they have provided such services under contracts that the Debtors claim have now expired. Indeed, there is language in section 6.2 referring to interconnection agreements that have allegedly terminated.[23]

39. If this is in fact the Debtors' purpose behind section 6.2 – to purport to obligate the Objecting ILECs or other telecommunications providers to continue to provide the same circuits and other services and facilities that the Debtors ordered under interconnection agreements that the Debtors claim have expired and therefore intend to take "no action" with respect to – the Plan has no basis in bankruptcy law. Whatever the ATCW Debtors' rights may be under telecommunications law, nothing in the Bankruptcy Code entitles a debtor to force a party to an allegedly terminated contract to continue to provide the same services or facilities that were the subject of the contract.

40. To the extent the Debtors claim that Section 366 provides them with such a right, they are simply wrong. Section 366 is intended to apply while a debtor is in bankruptcy, not after it emerges. The Objecting ILECs have addressed this matter in three separate briefs, in response to the Debtors' so-called "Emergency Motion for Order Compelling Verizon to Execute New Agreements," two filed by Verizon and one by BellSouth.[24] Rather than repeat the points

[23] The Debtors also suggested this construction of section 6.2 at the hearing on the Disclosure Statement when this Court as well questioned what that section is intended to mean. See Transcript of Disclosure Statement Hearing, April 16, 2004, at pp. 97-98 and p. 110.

[24] See Objection of the Telephone Operating Company Subsidiaries of Verizon Communications Inc. to Debtors' Emergency Motion for Order Compelling Verizon to Execute New Agreements (May 20, 2004) (Dkt. no. 1286); Supplemental Brief of the Telephone Operating Company Subsidiaries of Verizon Communications Inc. In Opposition to Debtors' Emergency Motion for

set forth therein, the Objecting ILECs incorporate those briefs by reference. Briefly stated, and as more fully set forth in those briefs, Section 366 cannot be read to continue to require telecommunications companies to provide reorganized debtors telecommunications services post-confirmation for several reasons:

- Such a reading of Section 366 would nullify Section 365 and its requirement that a debtor assume any executory contract by confirmation if it wants, after confirmation, to continue to obtain the same services and facilities. Section 366 cannot be construed to trump Section 365. See, e.g., TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citations omitted); In re Kentech Corp., 36 B.R. 552, 553 (Bankr. W.D. Ky.1 983) (rejecting debtor's demand for the continuation of utility services under Section 366 after the debtor rejected the contract pursuant to which such services had been provided; [t]o so allow would emasculate the creditor's remedies under § 365 and permit the debtor to totally circumvent the effect of a rejection while retaining the fruits of the contract through § 366. This was not the intent of the Code and will not be here permitted.").

- Construing Section 366 to continue to apply post-confirmation would render it utterly unworkable: if Section 366 continued to apply post-confirmation, then bankruptcy courts would have to entertain indefinitely, long after confirmation of a plan and the closing of a chapter 11 case, issues of adequate assurance under Section 366(b), a result that would make no sense as matter of bankruptcy court jurisdiction. In re Craig's Stores of Texas, Inc., 266 F.3d 388, 390 (5th Cir. 2001) (quoting Pettibone Corp. v. Easley, 935 F.2d 120, 122 (7th Cir. 1991)) ("Once the bankruptcy court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval. The firm also is without the protection of the bankruptcy court. It may not come running to the bankruptcy judge every time something unpleasant happens."); In re Sunbrite Cleaners, Inc., 284 B.R. 336, 339-40 (N.D.N.Y. 2002) ("[I]n the Second Circuit, as a general rule, a bankruptcy court's jurisdiction extends until the debtor's plan of reorganization has been confirmed."); In re Baker, 118 B.R. 24, 27 (Bankr. S.D.N.Y. 1990) ("[T]he court retains limited post-confirmation jurisdiction pursuant to 11 U.S.C. § 1142 for the purpose of implementing the plan").

Order Compelling Verizon to Execute New Agreements (May 26, 2004) (Dkt. no. 1314); Post-Hearing Brief of BellSouth Telecommunications, Inc. in Support of Verizon's Objection to the Debtors' Emergency Motion for Order Compelling Verizon to Execute New Agreements (May 26, 2004) (Dkt. no. 1310).

- The Bankruptcy Code already includes a provision that expressly bars "governmental units" – but not companies such as the Objecting ILECs – from discriminating against a person or entity that "has been a debtor." 11 U.S.C. § 525(a). There is no comparable language in Section 366, and Section 525, by its terms, does not apply to the Objecting ILECs.

41. Accordingly, the Debtors have no basis under the Bankruptcy Code to compel Verizon to provide contractually-ordered services after the Plan goes effective, unless they acknowledge (as they have already in the hearing on their "Emergency Motion") that the relevant contracts remain in effect, assume those agreements, and cure any defaults thereunder. The contrary provisions of section 6.2 must be stricken.

42. Even if it is interpreted differently, section 6.2 still violates the Bankruptcy Code. By its terms, section 6.2 purports to address "Utility Services," which the Plan defines to be "services generally provided by utility providers and telecommunications vendors pursuant to a Tariff . . ." Plan, § 1.126. But if section 6.2 concerns only services provided by Tariff, then it is utterly redundant of section 6.3, which is infirm for the reasons previously discussed. Moreover, section 6.2 expressly refers in several places to "Utility Services" provided by "contract." If it is intended to require "Utility Companies" to continue, post-confirmation, to provide services rendered under an executory contract without the ATCW Debtors' assumption of the agreement, it plainly runs afoul of Section 365, which expressly allows the non-debtor party to a rejected contract to cease performing thereunder. See, e.g., Manhattan King David Restaurant Inc. v. Levine, 154 B.R. 423, 429 (S.D.N.Y. 1993) ("If a debtor is in default of an unexpired lease, it may not assume the lease without promptly curing the default or providing adequate assurances. 11 U.S.C. § 365(b)(1). If a debtor fails to satisfy these conditions, the lease is deemed rejected and the debtor must surrender the premises."); Medical Malpractice Ins. Ass'n v. Hirsch (In re Lavigne), 183 B.R. 65, 72 (Bankr. S.D.N.Y. 1995) ("A decision to reject a contract relieves the

parties of their obligations under the contract.") aff'd, 199 B.R. 88 (S.D.N.Y. 1996), aff'd, 114 F.3d 379 (2d Cir. 1997). Indeed, the Debtors appear to recognize that this is the law, stating that Utility Providers that provide Utility Services to the Debtors pursuant to an "unexpired contract" shall continue to provide such services provided that the Debtors have "assumed or assumed and assigned" the contract and "cured all defaults and otherwise satisfied the requirements for the assumption or assumption and assignment of such contract[ ] under section 365 of the Bankruptcy Code." Plan, § 6.2.

43. Section 6.2 is improper in two other respects. First, like section 6.3, it purports to bar any "Utility Companies" from requesting "any additional deposits, payments or other financial security." But, even if Section 366 applied post-confirmation, it expressly permits, at any time, a utility to request, and the bankruptcy court to order, "reasonable modification of the deposit or other security necessary to provide adequate assurance of payment." 11 U.S.C. § 366(b). Similarly, Section 365 requires that a debtor that wishes to continue to obtain for itself or a buyer the benefits of further service under an executory contract must not only cure all defaults, but also provide adequate assurance of future performance. 11 U.S.C. §§ 365(b)(1)(C) and 365(f)(2)(B).[25] And the Objecting ILECs' interconnection agreements and tariffs also specifically allow the Objecting ILECs to demand deposits and other forms of security, as appropriate. The Debtors are not simply free in the Plan to ignore the law and disregard the

[25] See, e.g., In re Peterson's Ltd., Inc., 31 B.R. 524, 527-28 (Bankr. S.D.N.Y. 1983) (deposit determined to be adequate assurance of future performance under section 365); In re Luce Industries, Inc., 8 B.R. 100, 107 (Bankr. S.D.N.Y. 1980) (deposits recognized as a form of adequate assurance under section 365); see also In re Currivan's Chapter of the Sunset, 51 B.R. 217, 218-19 (N.D. Cal. 1985) (court required posting of deposit as adequate assurance under section 365); In re The Gold Standard at Penn. Inc., 74 B.R. 669, 674 (Bankr. E.D. Pa. 1987) (deposits recognized as a form of adequate assurance under section 365); Pan American World Airways, Inc. v. Belize Airways Ltd. (In re Belize Airways Ltd.), 5 B.R. 152, 156 (Bankr. S.D. Fla. 1980) (court required posting of deposit as adequate assurance under section 365).

Objecting ILECs' rights. The no-further-assurance-of-payment provision in both sections 6.2 and 6.3 of the Plan must be deleted.

44. Second, the Plan purports to require the Objecting ILECs and other providers of telecommunications services to continue to provide those services post-confirmation, not merely to the Debtors, as reorganized entities, but also to XO. Thus, Section 6.2 provides that "[o]n and after the Initial Effective Date, all Utility Companies that provided Utility Services pursuant to Tariffs prior to the Initial Effective Date shall continue to provide such services to the Debtors, Reorganized STFI, the Reorganized Subsidiaries or ***Buyer*** after the Initial Effective Date without interruption in the same manner as they did prior to the Initial Effective Date[.]" Plan, § 6.2 (emphasis added). Section 6.3 contains a comparable provision. But, even if Section 366 applied post-confirmation, it expressly requires service to be provided only to "the trustee or the debtor." 11 U.S.C. § 366(a). And Section 365 only permits a buyer of a debtor's assets to obtain the benefits of an executory contract to which the debtor is a party if the debtor assumes the contract and the buyer provides adequate assurance of future performance. Id. § 365(f)(2). Again, the Debtors are not free to run rough-shod over the plain meaning of the Code and the Objecting ILEC's rights thereunder. See, e.g., BFP v. Resolution Trust Corp., 511 U.S. 531, 552 (1994) (party seeking to defeat plain meaning of the Bankruptcy Code bears an "exceptionally heavy burden") (quoting Patterson v. Shumate, 504 U.S. 753, 760 (1992)) (internal quotation marks omitted).

45. In short, the Plan is just as inconsistent with Section 366 as it is with Section 365. It is not confirmable.

III. The Plan Violates Section 553 of the Bankruptcy Code.

46. In their proposed Plan, the ATCW Debtors appear to take the position that they are entitled to set off any prepetition debt that an ILEC owes them against any claim by that ILEC for the cure of any defaults under any interconnection agreements or other executory contracts that the ATCW Debtors elect to assume -- even if the ILEC also has a separate prepetition claim against the Debtors. Section 7.7 of the Plan thus provides: "Pursuant to Section 3.5(a) of the Purchase Agreement, all pre-Commencement Date accounts receivable of the Debtors owed by ILECs shall be set off against the ILEC Cure Amounts . . . and thereby used as currency to pay the ILEC Cure Amounts." See Plan, at § 7.7. This provision violates both Section 553 and Section 365 of the Bankruptcy Code.

47. An example will help illustrate the point: Assume that one of the Objecting ILECs is owed by the ATCW Debtors $20 million in unpaid prepetition charges, $10 million of which arises under contracts to be assumed by the ATCW Debtors and $10 million of which arises under contracts to be rejected by the ATCW Debtors. Assume that the Objecting ILEC, in turn, owes the ATCW Debtors $10 million on a prepetition debt. The ATCW Debtors appear to be suggesting that they should have the right to satisfy their obligation under Section 365(b)(1)(A) to cure the $10 million in defaults arising under the contracts to be assumed by setting off that amount against the Objecting ILEC's $10 million in prepetition debt, leaving the ILEC with a general unsecured claim, in Class 4 (ATCW Unsecured Claims) for the remaining $10 million.

48. That would be improper. Rather, in this example, the Objecting ILEC would be entitled to set off its $10 million prepetition claim arising under the contracts to be rejected against its $10 million prepetition debt, and the ATCW Debtors would then be obligated to cure

the $10 million in defaults under the contracts to be assumed by paying cash.[26] Well-established case law so provides.

49. The seminal case on this issue is In re Braniff Airways, Inc., 42 B.R. 443 (Bankr. N.D. Tex. 1984). In Braniff, the debtor filed a motion for authority to allow it to set off its prepetition claim of $4.5 million against the United States against its priority debt owed to the United States for unpaid postpetition taxes, as opposed to permitting the United States to offset the $4.5 million it owed to the debtor against its $8.9 million prepetition non-priority claim. The Braniff court flatly rejected the debtor's approach on two independent grounds. First, the court found a lack of mutuality because it determined that the prepetition debtor and the postpetition debtor-in-possession were different entities for purposes of the "mutuality" requirements of Section 553. As the Braniff court emphasized:

> [N]either a creditor nor a debtor may offset pre-petition debts and claims against post-petition debts and claims because of the absence of mutuality of the parties. A debtor's pre-petition claim against a creditor does not involve the same parties as the debtor-in-possession's claims against the same creditor. Absent irremediable injustice, a court should not exercise its discretionary equitable powers to allow offset where the requirements of mutuality of obligations and parties are lacking.

Braniff, 42 B.R. at 449.

[26] It would be irrelevant in this example against which of the ATCW Debtors the ILEC's claim arose and whether that was the same ATCW Debtor to whom the ILEC owed its prepetition debt arising under the contracts to be rejected. The Plan provides for the substantive consolidation of the estates of all the ATCW Debtors. Accordingly, the mutuality of parties' requirement is satisfied. Indeed, the Debtors so provide in their Plan: "The deemed substantive consolidation of the ATCW Debtors shall not adversely affect the right of set-off of any Holder of an Allowed Claim; on the contrary, because of the deemed substantive consolidation of the ATCW Debtors, any creditor holding an Allowed prepetition Claim against an ATCW Debtor shall be entitled to offset that Claim against any debt owing by that creditor to ***any*** ATCW Debtor." Plan, § 7.7 (emphasis added).

50. Moreover, the Braniff court found that granting the debtor's request would destroy the priority scheme set out in the Bankruptcy Code. Braniff, 34 B.R. at 452. The court recognized that the priorities set forth in Section 507 of the Bankruptcy Code are "expressions of Congressional policy that certain claims against a debtor should be given priority in payment above others." Id. Accordingly, the court held that "[I]t would completely defeat this statutory scheme if a debtor were allowed to setoff its claims against the creditor, first against the creditors priority claims and secondly against the creditors general non-priority claims." Id.

51. The same principles apply fully here. First, the ATCW Debtors' obligation to cure defaults on contracts they assume postpetition gives rise, of course, to a postpetition, administrative expense claim, not a mere prepetition claim. See, e.g., Adventure Resources, Inc. v. Holland, 137 F.3d 786, 798-99 n.18 (4th Cir. 1997) ("postpetition assumption of its executory . . . contract . . . transformed the prepetition claims of the [counter contract party], once not cured, into new claims arising postpetition."); In re Wingspread Corp., 145 B.R. 784, 787 ("Courts have held that a right to immediate cure, such as that provided for in § 365, gives rise to a priority administrative expense under § 507(a)(1)."); In re Mushroom Transp. Co., 78 B.R. 754, 759 (Bankr. E.D. Pa. 1987). Indeed, under Section 365, the ILEC has an immediate right to payment in full of all amounts owed to them under any contract that is assumed, a right not accorded even to most administrative expense claims. Thus, because of the lack of mutuality of parties, the ATCW Debtors cannot offset a prepetition debt owed to them against a postpetition administrative expense liability they have.

52. Second, permitting the ATCW Debtors to effect such a setoff in the circumstances described above would destroy the priority rights Congress created in both Sections 365 and 553 of the Bankruptcy Coded. In order to assume a contract, a debtor is required to first cure all

defaults. 11 U.S.C. § 365(b)(1). And these cure obligations give rise to first-priority administrative expense claims. 11 U.S.C. § 507(a)(1). Similarly, the Bankruptcy Code preserves a creditor's right, at its election, to offset any prepetition claim it has against any prepetition debt it may owe, and treats such right as giving rise to a secured claim. 11 U.S.C. §§ 553(a), 506(a). Under the clear reasoning of Braniff and other cases following its reasoning, the ILECs are entitled to enjoy these priorities. See, e.g. In re Lawson, 187 B.R. 6, 8 (Bankr. D. Idaho 1995) (allowing IRS to exercise right of setoff against debtor's general unsecured tax debt, rather than against priority tax obligations, would not be inequitable); In re Inslaw, Inc., 81 B.R. 169, 170 (Bankr. D.C. 1987); In re Jarvis Kitchenware of D.C., 13 B.R. 230. 231-32 (Bankr. D.C. 1981) ("[T]he trustee has no right to set-off the post-petition rent with the security deposit as there are pre-petition rental arrearages that exceed the amount of the security deposit.").

CONCLUSION

53. Based on the foregoing, and for the additional reasons amplified in the Trade Creditor Group Objection, the Plan plainly violates several Sections of the Bankruptcy Code in numerous respects and, hence, cannot be confirmed. 11 U.S.C. § 1129(a)(1).

WHEREFORE the Objecting ILECs request that this Court (i) deny confirmation of the Plan, and (ii) grant the Objecting ILECs such further relief as the Court deems appropriate.

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Respectfully Submitted,

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