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UNITED STATES BANKRUPTCY COURT  
 SOUTHERN DISTRICT OF NEW YORK

|   |   |                      |
|---|---|----------------------|
| _____                                     | X |                      |
| In re                                     | : |                      |
|   | : | Chapter 11 Case No.  |
| Allegiance Telecom, Inc., <u>et al.</u> , | : | 03-13057 (RDD)       |
|   | : |                      |
| Debtors.                                  | : | Jointly Administered |
| _____                                     | X |                      |

**MOTION OF THE DEBTORS FOR  
 ENTRY OF AN ORDER, PURSUANT TO  
 SECTION 107(b) OF THE BANKRUPTCY CODE AND  
 RULE 9018 OF THE FEDERAL RULES OF BANKRUPTCY  
 PROCEDURE, AUTHORIZING THE DEBTORS TO FILE  
 THAT CERTAIN STIPULATION AND AGREED ORDER  
 RESOLVING, AMONG OTHER THINGS, THE OBJECTION OF  
 ABOVENET, INC. TO CONFIRMATION OF DEBTORS' SECOND  
 AMENDED JOINT PLAN OF REORGANIZATION PURSUANT TO  
CHAPTER 11 OF THE BANKRUPTCY CODE, DATED APRIL 22, 2004, UNDER SEAL**

TO THE HONORABLE ROBERT D. DRAIN,  
 UNITED STATES BANKRUPTCY JUDGE:

Allegiance Telecom, Inc. and its direct and indirect subsidiaries, as debtors and debtors in possession (collectively, the “Debtors”), respectfully represent:

**Introduction**

1. On May 14, 2003 (the “Commencement Date”), each of the Debtors commenced with this Court a voluntary case under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtors are authorized to operate their businesses and

manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

2. No trustee or examiner has been appointed in these chapter 11 cases. On May 28, 2003, pursuant to section 1102 of the Bankruptcy Code, the United States Trustee for the Southern District of New York (the "U.S. Trustee") appointed a statutory committee of unsecured creditors (the "Creditors Committee") in these chapter 11 cases.

### **Jurisdiction**

3. This Court has subject matter jurisdiction to consider and determine this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

### **Background**

4. Prior to the Commencement Date, AboveNet, Inc. (f/k/a Metromedia Fiber Network, Inc.) ("AboveNet") entered into five fiber optic lease and other agreements (collectively, the "AboveNet Fiber Leases") with the Debtors. AboveNet is a party to similar lease agreements with other telecommunications providers.

5. On April 22, 2004, the Debtors filed (a) the Debtors' Second Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code, dated April 22, 2004 (as amended, the "Plan"). The hearing (the "Confirmation Hearing") to consider confirmation of the Plan was held on June 8, 2004.

6. The Debtors have notified AboveNet that they intend to reject two of the AboveNet Fiber Leases (collectively, the "Rejected Agreements") pursuant to Schedule 4 of the

Plan. The Debtors have also notified AboveNet that they intend to assume and assign to XO Communications, Inc. the remaining three AboveNet Fiber Leases (collectively, the “Assumed Agreements”) pursuant to Schedule 2 to the Plan and have proposed an amount that will cure defaults under the Assumed Agreements.

7. On June 3, 2004, AboveNet filed their objection to confirmation of the Plan (the “AboveNet Plan Objection”). In the AboveNet Objection, AboveNet raises, among other things, concerns related to Compromise and Settlement (as defined in the Plan) and the treatment of the proposed rejection of the Rejected Agreements.

8. On June 4, 2004, AboveNet filed its limited objection to cure amounts associated with the assumption and assignment of the Assumed Agreements (the “Limited Cure Objection”).

#### **Settlement with AboveNet**

9. As the Court is aware and as presented to the Court immediately prior to the Confirmation Hearing, the Debtors and AboveNet have negotiated a settlement that consensually resolves the AboveNet Plan Objection and the Limited Cure Objection. In that regard, on June 8, 2004, immediately prior to the commencement of the Confirmation Hearing, the Debtors and AboveNet requested Court approval of the terms of such settlement. The Court, based on the representations made by counsel for the Debtors and AboveNet regarding the terms of the settlement, approved the terms of the settlement, subject to the parties’ definitive documentation of the settlement not inconsistent with the terms approved by Court. As this Court is also aware, AboveNet and XO are in the process of negotiating the terms of the new fiber optic leases, which, if a deal can be reached, will replace the Rejected Agreements. Because of AboveNet’s concerns that the disclosure of the terms of the settlement with the

Debtors could impact AboveNet's negotiations with XO, AboveNet requested at the Confirmation Hearing that the terms of the settlement be kept confidential.

10. Subsequent to the Court considering the relief requested herein, the Debtors intend to submit to the Court a stipulation (the "Stipulation") containing the terms of the settlement. Consistent with the prevailing practice in these chapter 11 cases with respect to other documents, which have been previously filed under seal, complete copies of the Stipulation will be provided solely to the U.S. Trustee, attorneys for the Creditors Committee, attorneys for the Debtors' prepetition senior lenders (the "Prepetition Lenders") and attorneys for AboveNet.

### **Relief Requested**

11. By this Motion, the Debtors request entry of an order, pursuant to section 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018, for authorization to file the Stipulation under seal in order to protect the confidential information contained therein. In that regard, the Debtors respectfully request that the Court grant them leave (a) to file the Stipulation under seal, (b) order that the contents of the Stipulation remain confidential and (c) authorize that the Stipulation be served on and made available only to the U.S. Trustee, attorneys for the Creditors Committee, attorneys for the Prepetition Lenders and attorneys for AboveNet, and not otherwise be made available to the general public or any parties in interest in these chapter 11 cases.

### **Basis For Relief**

12. Section 107(b) of the Bankruptcy Code provides bankruptcy courts with the power to issue orders that will protect entities from potential harm:

On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may -

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information . . . .

11 U.S.C. § 107(b).

13. Bankruptcy Rule 9018 defines the procedure by which a party may move for relief under section 107(b) of the Bankruptcy Code:

On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information . . . .

Fed. R. Bankr. P. 9018.

14. Based upon these provisions, courts have limited access to filed documents where parties have demonstrated good cause. See, e.g., In re Epic Assoc. V, 54 B.R. 445, 450 (Bankr. E.D. Va. 1985); In re Nunn, 49 B.R. 963, 964-65 (Bankr. E.D. Va. 1985). “In limited circumstances, courts must deny access to judicial documents - generally where open inspection may be used as a vehicle for improper purpose.” Video Software Dealers Assoc. v. Orion Pictures Corp. (In re Orion Pictures Corp.), 21 F.3d 24, 27 (2d Cir. 1994) (citing Nixon v. Warner Comm’n, Inc., 435 U.S. 589, 597 (1978)). Once it is established that the information sought to be protected fits in any of the categories in section 107(b) of the Bankruptcy Code, “the court is required to protect a requesting interested party and has no discretion to deny the application.” Id.

15. Similarly, section 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018, permit the court to protect confidential information by holding in camera proceedings.<sup>1</sup> See In re Farmland Indus., Inc., 290 B.R. 364, 369-70 (Bankr. W.D. Mo. 2003).

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<sup>1</sup> An in camera proceeding is a proceeding held in a place not open to the public. Black’s Law Dictionary (6th ed. 1990).

### **Cause Exists to File the Stipulation Under Seal**

16. The Debtors submit that good cause exists for the Court to grant them leave to file the Stipulation under seal. Specifically, AboveNet has requested that the terms of the Stipulation be kept confidential to prevent XO from getting an unfair advantage in its negotiations with AboveNet regarding the terms of the new leases between AboveNet and XO. It is the Debtors' understanding that if the information contained in the Stipulation is disclosed to XO, AboveNet's position in negotiating the terms of the new leases will be undermined. Accordingly, the Debtors submit that the filing of the Stipulation under seal is appropriate under the circumstances and should be approved.

### **Waiver of Memorandum of Law**

17. Because there are no novel issues of law presented herein, the Debtors respectfully request that the Court waive the requirement that the Debtors file a memorandum of law in support of this Motion pursuant to rule 9013-1(b) of the Local Bankruptcy Rules for the Southern District of New York.

### **Notice**

18. Pursuant to Bankruptcy Rule 9018, the Debtors submit that no notice need be provided.

### **No Prior Request**

19. No prior Motion for the relief requested herein has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto, granting the relief requested herein and granting such other and further relief as may be just and proper.

Dated: New York, New York  
June 10, 2004

Respectfully submitted,

/s/ Jonathan S. Henes

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AMENDED JOINT PLAN OF REORGANIZATION PURSUANT TO  
CHAPTER 11 OF THE BANKRUPTCY CODE, DATED APRIL 22, 2004, UNDER SEAL**

Upon consideration of the motion (the "Motion"), dated June 9, 2004, of Allegiance Telecom, Inc. and its direct and indirect subsidiaries, as debtors and debtors in possession (collectively, the "Debtors"), seeking entry of an order, pursuant to section 107(b) of the Bankruptcy Code<sup>1</sup> and Bankruptcy Rule 9018, authorizing the Debtors to file the Stipulation under seal, as more fully set forth in the Motion; and it appearing that this Court has jurisdiction to consider and determine the Motion as a core proceeding pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that the relief requested in the Motion is in the best interest of the Debtors' estates and creditors; and it appearing that no notice of the Motion need be provided; and after due deliberation and sufficient cause appearing therefor; it is

ORDERED that the Motion is granted; and it is further

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<sup>1</sup> Unless otherwise defined herein, capitalized terms shall have the meaning ascribed to them in the Motion.



ORDERED that, pursuant to section 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018, the Debtors are authorized to file the Stipulation under seal; and it is further

ORDERED that, except as set forth herein, the contents of the Stipulation shall remain confidential, shall be served on and made available only to the U.S. Trustee, attorneys for the Creditors Committee, attorneys for the Prepetition Lenders and attorneys for AboveNet, and shall not be made available to the general public or any other parties in interest in these chapter 11 cases; and it is further

ORDERED that the parties who are provided with copies of the Stipulation pursuant to this Order are prohibited from disclosing or providing to third parties any information set forth in the Stipulation.

Dated: New York, New York  
\_\_\_\_\_, 2004

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UNITED STATES BANKRUPTCY JUDGE