Hearing Date: May 20, 2004, at 2:30 p.m.
Objection Deadline: May 20, 2004, at 12:00 p.m.

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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)

OBJECTION OF THE TELEPHONE OPERATING COMPANY SUBSIDIARIES OF VERIZON COMMUNICATIONS INC. TO DEBTORS' EMERGENCY MOTION FOR ORDER COMPELLING VERIZON TO EXECUTE NEW AGREEMENTS

The telephone operating company subsidiaries of Verizon Communications Inc. (collectively, "Verizon") hereby object to the Debtors' Emergency Motion for Order Compelling Verizon to Execute New Agreements (the "Emergency Motion"), dated May 17, 2004.

INTRODUCTION

The Debtors' so-called "Emergency Motion" should be denied. First, there is no emergency -- at least none that is not of the Debtors' own making. As the Debtors are forced to admit, they have long known of Verizon's position that if the Debtors wish post-confirmation to continue to obtain the benefits of the services and facilities they have ordered and obtained under interconnection agreements with Verizon, they must do what all debtors must do in those circumstances: assume the contracts and cure any defaults thereunder. Yet, the Debtors have waited until a few weeks before the scheduled hearing on confirmation of their Chapter 11 plan to file -- without any advance notice to Verizon or its counsel -- their "Emergency Motion," forcing Verizon to respond in a matter of three days. Moreover, the Debtors have sought to preempt proceedings that the Debtors themselves commenced months ago, and that are currently pending before at least two state Public Service Commissions, on the very matter that the Debtors now ask this Court to decide on an "emergency basis." Such gamesmanship should not be rewarded.

Second, the Debtors' bankruptcy arguments, such as they are, are utterly meritless. The contention that Verizon is violating the automatic stay under Section 362 of the Bankruptcy Code by insisting that the Debtors must assume their interconnection agreements with Verizon, and cure any defaults thereunder, if they want to continue post-confirmation to obtain Verizon's performance under those agreements is nonsensical. The automatic stay has no applicability post-confirmation; rather, it expressly terminates upon confirmation of a plan and the grant or denial of a discharge to the debtor. Moreover, the whole point of Section 365 of the Bankruptcy Code is that a non-debtor party to an executory contract may decline to continue to perform thereunder if the debtor rejects, rather than assumes, the contract. The exercise of that right by the non-debtor is no more a violation of the automatic stay than is the filing of a proof of claim or any other action by a creditor that the Bankruptcy Code authorizes. And the Debtors' assertion that the existing interconnection agreements in the four jurisdictions in question are no longer in effect and "executory" is flatly wrong. Each specifies that, upon the conclusion of its initial term, it will continue "indefinitely" unless and until it is terminated by either side. The Debtors have not so terminated the agreements -- on the contrary, they have not only continued to seek and obtain services and facilities, and indeed have placed orders for additional services (which Verizon has provided), but have also continued to bill Verizon for charges they claim to be owed, all under those very agreements, belying the Debtors' assertion that the contracts have expired.

As for Section 366, all it does is obligate a "utility" to continue to provide service to a debtor during the pendency of a case, not after confirmation. Nothing in Section 366 purports to trump the basic import of Section 365 -- that, by the time of confirmation, a debtor must assume or reject its executory contracts and, if it chooses the latter, it has no further right to receive continued performance. Indeed, the Section 366 adequate assurance stipulation and order entered in these very cases with respect to Verizon expressly terminates upon confirmation. This basic principle has been applied in dozens upon dozens of telecommunications cases -- including many in this District, such as WorldCom and Global Crossing -- in which the debtors have assumed their interconnection agreements with Verizon and other telecommunications providers under Section 365, and cured their defaults thereunder, without even trying to argue that Section 366 somehow obligated the continued provision of contractually-ordered services and facilities to the debtors post-confirmation regardless of whether if the debtors assumed the relevant contracts.

Third, the "Emergency Motion" is likewise both substantively and procedurally flawed as a matter of telecommunications and contract law. The Debtors claim that Section 252(i) of the federal Telecommunications Act of 1996, 47 U.S.C. § 251 et seq., (the "Telecommunications Act") gives them what they assert is an "absolute" and "unfettered" right to adopt new interconnection agreements with Verizon at any time, for any reason, in good faith or bad, and regardless of the effect of that adoption on the public interest. That proposition is demonstrably wrong. The Telecommunications Act does not permit a competitive local exchange carrier ("CLEC") to adopt a new interconnection agreement where that adoption -- like the adoptions

Debtors propose in this matter -- would contravene the public interest. Instead, as both courts and administrative agencies have repeatedly held, state public utility commissions have the right and responsibility to review adoption applications to ensure that they are in the public interest and to deny such applications, or to condition their approval on the CLEC's agreement to reasonable terms, where the CLEC is otherwise proposing to take action that the commission deems to be inconsistent with the public interest.

The Debtors' suggestion that they can obtain, under newly-adopted agreements, all the same services and facilities as they currently obtain under their existing interconnection agreements, without assuming the existing agreements and without paying their outstanding bills under the existing agreements, is equally unsupportable. Even if the Debtors had absolutely free rein to adopt new interconnection agreements, those newly adopted agreements would, as a matter of basic contract law, govern only new services and facilities ordered by Allegiance after the adoption, not the pre-existing services and facilities that Allegiance ordered, and Verizon provisioned, under the pre-existing contracts. The only way a different result could apply would be if the parties agreed that the newly-adopted agreements would cover the existing arrangements. In practice, Verizon typically does agree that existing service arrangements "roll up" into newly-adopted agreements, but only where any outstanding payables associated with those existing service arrangements also "roll up" into the new agreements. Thus, without the parties' express agreement otherwise, the new interconnection agreements could not require Verizon to provide the services and facilities ordered and provisioned under the old agreements.

Procedurally, the "Emergency Motion" seeks to interfere with the primary jurisdiction of the state Public Service Commissions over issues of telecommunications law. As noted, the Debtors themselves have already filed applications before two such commissions seeking the exact relief they seek here -- an order directing Verizon to enter into new interconnection agreements with the Debtors. As those applications make clear and, indeed, as the Debtors' "Emergency Motion" also makes clear, two of the central issues in dispute are whether the Debtors have the unfettered and unqualified right they claim under Section 252(i) of the Telecommunications Act to require Verizon to enter into the newly-adopted interconnection agreements with the Debtors without having the payables they owe under the existing agreements paid or "transferred" to the new agreements and, if so, whether the new agreements would obligate Verizon to provide the same services and facilities that have been ordered and provisioned under the old agreements -- the very same issues the Debtors seek to raise before this Court with their "Emergency Motion."

Finally, the "Emergency Motion" is also procedurally defective as a matter of bankruptcy law. It seeks a mandatory injunction -- an order directing Verizon "to immediately execute" new interconnection agreements with the Debtors. Under the Bankruptcy Rules, such an injunction can be sought only through an adversary proceeding, requiring the service of a complaint and affording the procedural protections that such a formal proceeding provides, and not by moving this Court for relief on three days notice. The "Emergency Motion" and the extraordinary injunction it seeks must be denied.

BACKGROUND

The Debtors' "Emergency Motion" arises out of an unprecedented ploy by these Debtors. During the course of these bankruptcy cases, the Debtors have obtained services and facilities from Verizon -- services and facilities the Debtors admit are critical to their continued operations. They have obtained these services and facilities pursuant to "interconnection agreements," agreements under which the Debtors interconnect their network with Verizon's and lease facilities from Verizon for the provision of services to the Debtors' end users.

The Debtors nevertheless now assert that their existing interconnection agreements with Verizon in three states (Maryland, New York and Pennsylvania), as well as in the District of Columbia, have expired. The Debtors are flatly wrong. Each of these agreements expressly provides for its continuation, "indefinitely," upon the completion of the initial term unless terminated by either party. Thus, by their terms, the agreements remain in effect. And the Debtors themselves have treated these agreements as very much alive. Each month they have continued to seek and obtain millions of dollars in services and facilities under each of them; indeed, the Debtors have continued, month after month, to order new or different services and facilities under these same agreements. In turn, Verizon has continued to provide such services and facilities. And the Debtors have also continued to bill Verizon for "reciprocal compensation" (amounts owing to a CLEC under an interconnection agreement) under those very same contracts. This mutual conduct establishes a clear course of dealing that, along with the "evergreen" provisions of the contracts, is fundamentally at odds with the Debtors' assertion that the existing interconnection agreements are no longer executory.[1] Thus, the impression that the Debtors seek to create in their "Emergency Motion" -- that the existing interconnection agreements at issue are no longer in existence and that Verizon is presently declining to provide

[1] Under these circumstances, the existing interconnection agreements would remain in effect even if they had terminated by their terms (which they have not). See Lunden's Inc. v. Local Union No. 6, 28 F.3d 347, 355-56 (3d Cir. 1994) ("[G]eneral principles of contract law teach us that when a contract lapses but the parties to the contract continue to act as if they are performing under a contract, the material terms of the prior contract will survive intact unless either one of the parties clearly and manifestly indicates, through words or through conduct, that it no longer wishes to continue to be bound thereby, or both parties mutually intend that the terms not survive.").

services and facilities to these Debtors in four jurisdictions, so that some true "emergency" exists -- is demonstrably false and misleading. See Declaration of Sharolyn Hessenthaler ("Hessenthaler Decl."), filed herewith, at ¶¶ 5 and 6.

To Verizon's knowledge, the tack the Debtors seek to take here is unique -- indeed, unprecedented -- in bankruptcy. Many other telecommunications providers, some small and some large, have filed for bankruptcy. Since 1996, Verizon has been a creditor in approximately 160 Chapter 11 and Chapter 7 telecommunications cases, a dozen or so in this District alone, in which the debtors owed Verizon sums arising under prepetition interconnection and other agreements. In virtually all of the Chapter 11 cases, the debtors have assumed their interconnection agreements (and tariff arrangements) with Verizon and cured their defaults.[2] In

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[2] In WorldCom, for example, the debtors assumed substantially all of their agreements with Verizon and paid Verizon $60 million in cash, 100% of the net amount the parties agreed that WorldCom owed to Verizon for prepetition services (after the debtors had already assumed two other contracts and paid an additional approximately $60 million). See Hessenthaler Decl., Ex. A. The following is a partial list of additional cases, in every one of which the debtors have assumed their interconnection agreements (and/or tariff arrangements) with Verizon and paid a cure under Section 365 of the Bankruptcy Code:

> In re WorldCom, Inc., 02-13533 (Bankr. S.D.N.Y.); In re Global Crossing Ltd., 02-40188 (Bankr. S.D.N.Y.); In re CTC Communications Group, Inc., CTC Communications Corp., CTC Communications of Virginia, Inc., and CTC Communications Leasing Group, 02-12873 (Bankr. D. Del.); In re Network Plus Corp., 02-10341 (Bankr. D. Del.); In re Network Access Solutions Corp. & NASOP, Inc., 02-11611 and 02-11612 (Bankr. D. Del.); In re Adelphia Business Solutions, Inc., 02-11389 (Bankr. S.D.N.Y.); In re Arch Wireless, Inc., 01-47330 (Bankr. D. Mass.); In re ATS Telecomms. Systems, Inc., 01-33453 (Bankr. S.D. Tex.); In re Cable & Wireless USA, Inc., 03-13711 (Bankr. D. Del.); In re EXDS, Inc. (f/k/a Exodus Communications, Inc.), 01-10539 (Bankr. D. Del.); In re FastNet Corp., 03-23143 (Bankr. E.D. Pa.); In re Focal Communications Corp., 02-13709 (Bankr. D. Del.); In re Genuity Inc., 02-43558 (Bankr. S.D.N.Y.); In re Logix Communications Corp. and Logix Communications Enters., Inc., 02-32105 and 02-32106 (Bankr. S.D. Tex); In re Mpower Holding Corp., 02-11046 (Bankr. D. Del.); In re Northpoint Communications Group, Inc., 01-30127 (Bankr. N.D. Cal.); In re Plan B Communications, Inc., 01-11443 (Bankr. S.D.N.Y.); In re Telscape Int'l, Inc., 01-1563 (Bankr. D. Del.); In re PSINet Inc., 01-13213 (Bankr. S.D.N.Y.); In re Rhythms NetConnections Inc., 01-14283 (Bankr.

some of these cases, just as in this one, the initial term of the agreements at issue had expired either during the pendency of the Chapter 11 case or even before the case was filed, yet the debtors properly treated the contracts as executory and assumed them, curing the defaults thereunder. Verizon is not aware of any other debtors who have taken the extraordinary position these Debtors have. Hessenthaler Decl., ¶ 7.

These Debtors have decided to take a different approach, manufacturing the supposed "emergency" that they now rush to this Court with. Beginning in September 2003 -- some eight months ago – the Debtors notified Verizon that they wished to adopt new interconnection agreements with Verizon in four jurisdictions: Maryland, New York, Pennsylvania, and the District of Columbia. Verizon responded to each request by informing the Debtors that it would consent to the adoption provided that the Debtors executed an adoption letter that is routinely used by Verizon. Each state-specific letter specified that, if Allegiance wanted the existing services and facilities, which were ordered under the existing agreement, to instead be provided pursuant to the new agreement, Allegiance's outstanding payables arising from those services and facilities would also be "rolled into" the new agreement, but would also maintain their character as prepetition debt:

> The Amended and Restated Interconnection Agreement is not intended to be, nor should it be construed to create, a novation or accord and satisfaction with respect to the original ICA. All monetary obligations of the parties to one another under the [existing interconnection agreement] shall remain in full force and effect and shall constitute monetary obligations of the parties under the Amended and Restated Interconnection Agreement; provided, however, in the event that Allegiance is currently a debtor in a [bankruptcy] proceeding, nothing herein shall

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S.D.N.Y.); In re RSL COM PrimeCall, Inc. and RSL COM U.S.A., Inc., 01-11457 and 01-11469 (Bankr. S.D.N.Y.); In re Teligent, Inc., 01-12974 (Bankr. S.D.N.Y.); In re TSR Wireless, LLC, 00-41857 and 00-41858 (Bankr. D.N.J.); In re Usinternetworking, Inc., 02-50215 (Bankr. D. Md.); and In re World Access, Inc., 01-1286 (Bankr. D. Del.).

> convert any claim or debt that would otherwise constitute a prepetition claim or debt in Allegiance's [bankruptcy] Proceeding into a post-petition claim or debt.

Hessenthaler Decl., ¶ 8; Ex. B (Letter from Steve J. Pitterle, Director - Contract Negotiations, Verizon, to John C. Gockley, Vice President - Interconnection, Allegiance Telecom of Maryland, Inc. ¶ 1(D) (Nov. 17, 2003); Letter from Steve J. Pitterle, Director - Contract Negotiations, Verizon, to John C. Gockley, Vice President - Interconnection, Allegiance Telecom of the District of Columbia, Inc. ¶ 1(E) (Nov. 17, 2003); Letter from John C. Peterson, Contract Performance and Administration, Verizon, to Gegi Leeger, Director of Agreements, Allegiance Telecom of Pennsylvania, Inc, ¶ 1(E) (April 15, 2004); and Letter from John C. Peterson, Contract Performance and Administration, Verizon, to Gegi Leeger, Director of Agreements, Allegiance Telecom of New York, Inc, ¶ 1(E) (April 15, 2004)).

Thus, the letters sought simply to preserve the status quo with respect to the Debtors' bankruptcy proceedings and the parties' rights and obligations therein. The Debtors would be able to decide before confirmation of a plan whether to assume or reject the restated interconnection agreements. If the Debtors elected to assume them, they would (like any other debtor in bankruptcy) have to cure their defaults thereunder. But they could alternatively elect to reject the agreements, in which case their prepetition debt to Verizon would remain just that -- general unsecured prepetition debt (except to the extent that Verizon has rights of setoff that make it secured). Verizon has included this very same provision in numerous other adoption letters; indeed, it has included this language in its template interconnection agreement with CLECs. And many CLECs -- including at least one in bankruptcy -- have executed these letters. Hessenthaler Decl., ¶ 8.

Verizon's adoption letter also included other reasonable provisions. One simply asked Allegiance to acknowledge that critical aspects of the agreements Allegiance was seeking to adopt had been struck down by the Federal Communications Commission ("FCC") and were therefore no longer valid. Hessenthaler Decl., Ex. B. (Since Verizon sent Allegiance this adoption letter, the D.C. Circuit has affirmed significant parts of this FCC ruling and, even more importantly, has invalidated various other fundamental provisions contained in the agreements that Allegiance nevertheless seeks to adopt.)

These Debtors refused, however, to agree to any of the terms in Verizon's adoption letter. Instead, after waiting months without taking any action, they filed applications before the Public Service Commissions in Maryland and the District of Columbia, asking those agencies to grant the very same relief that the Debtors now seek before this Court: an order approving their unqualified adoption under Section 252(i) of the Telecommunications Act of the new interconnection agreements. In New York and Pennsylvania, the Debtors have not yet filed any papers before the Public Service Commissions. Hessenthaler Decl., ¶¶ 8 and 10.

The proceedings before the Maryland and DC Public Service Commissions are ongoing. The Debtors and Verizon have filed briefs and other papers before both Commissions. The hearing examiner in Maryland has requested the submission of further affidavits and has directed that the parties appear for a hearing on June 9, 2004, less than three weeks from now. But the Debtors evidently are unhappy, either with the pace of the proceedings before these Commissions or the sense they have obtained of their likely outcome, for they have now asked this Court to address the very same dispute that is pending before these Commissions.

The Debtors have proceeded in a most extraordinary way. They filed their "Emergency Motion" on Monday, May 17, 2004, seeking a hearing for three days later. They did so without any advance warning to Verizon. Indeed, even though Verizon's bankruptcy counsel had been in touch with the Debtors' bankruptcy counsel as recently as Friday, May 14, 2004, to discuss

Verizon's outstanding discovery requests with respect to the Debtors' Chapter 11 plan, and even though the parties have been in frequent contact over the last few weeks to see if the parties could consensually resolve their disputes, the Debtors' representatives did not even bother to call Verizon's counsel in advance to see if Verizon's counsel were available for a hearing on Thursday, May 20, 2004, or to provide any "heads up" of the "emergency" papers to be filed. Instead, the Debtors filed the papers without any warning and "served" them by e-mail at 5:13 p.m. on Monday, May 17, 2004, approximately 72 hours before the hearing on this matter.

ARGUMENT

The Debtors' "Emergency Motion" should be denied. First, there is no emergency other than one manufactured by the Debtors themselves after months of delay on their part. Second, the Debtors' bankruptcy arguments are utterly meritless and fly in the face of overwhelming precedent. Third, the Debtors' position is contrary to well-established telecommunications and contract law and would interfere with the jurisdiction of the state Public Service Commissions. Finally, although the Debtors are careful not to call the relief they seek what it is, the Debtors are requesting a mandatory injunction, and such relief cannot be obtained through a motion on three days' notice, but rather requires the filing of an adversary proceeding and the extension of all the procedural safeguards attendant thereto.

I. There Is No Emergency of Any Kind that Could Conceivably Justify the Emergency Hearing that the Debtors Seek.

The Debtors ask this Court to grant a permanent, mandatory injunction based on papers filed only three days ago. That requested injunction is intended to deny Verizon its rights under the Bankruptcy Code to the cure of many millions of dollars in prepetition defaults under the four contracts at issue. There is no "emergency," let alone one that could plausibly warrant affording Verizon such limited due process on a matter of such significance, both for this case and potentially for numerous other pending and future cases. And, if there is any emergency at all, the Debtors themselves are at fault.

The Debtors cannot and do not contend that Verizon is failing today to provide any services or facilities that the Debtors have requested. On the contrary, Verizon has continued to provide all the services and facilities that the Debtors continue to order. The "emergency" the Debtors cite has nothing to do with the present. It has to do with the indefinite and speculative future. The Debtors are concerned that <u>if</u> they elect to reject their existing interconnection agreements in these jurisdictions, and <u>if</u> their legal position turns out to be wrong and the consequences of that rejection are the same for them as for all other debtors -- i.e., they can no longer demand the same performance post-confirmation from Verizon -- they will have lost the benefits of the agreements. But, if that happens, the Debtors will have no one to blame but themselves. After all, it will be these Debtors who chose to reject their existing interconnection agreements and head down a path on which no other telecommunications debtor has ever proceeded.

If the Debtors truly thought that it was critical to resolve before the hearing on confirmation of their plan the effect of their potential rejection of the four interconnection agreements at issue, the Debtors could have brought the matter to the four Public Service Commissions, or to this Court if the Debtors believed this Court was the appropriate forum, many months ago. The Debtors have long known Verizon's position -- at least from the time they received Verizon's adoption letters last year. It is the Debtors who have delayed for months on end, first by waiting for several months from the time they received Verizon's adoption letters before filing their applications for adoption before the Maryland and D.C. Public Utilities Commissions, and then by waiting until the last moment to raise the same issues before this

Court. The Debtors should not be permitted to take advantage of a sudden "emergency" of their own construction.

The Debtors do not even claim that their pending sale agreement with XO Communications is threatened by anything Verizon has done or might do. Under that agreement, the Debtors are obligated to pay all cure amounts required for all contracts with any incumbent local exchange carriers, such as Verizon, and XO has no right to terminate the agreement simply because the Debtors must pay more or less than the Debtors had hoped in cures.[3] Moreover, XO has recently announced that it may well be prepared to close (a "soft closing" has apparently already occurred) on its purchase of Allegiance's operations even if the Debtors' chapter 11 plan is not confirmed. Thus, the only real consequence that will be felt if the Debtors must meet their obligations under Section 365 and cure their defaults under their interconnection agreements to the extent that they wish to continue to obtain Verizon's performance is that the current holders of the Debtors' bonds -- who expressly agreed that they would be structurally subordinated to all the Debtors' trade creditors in any event -- may receive a few pennies less on the dollar on their investments.

Before filing their "Emergency Motion," the Debtors were required to make "a clear and specific showing" by affidavit of "good and sufficient reasons" why they needed to proceed by order to show cause. See Local Bankruptcy Rule for the Southern District of New York 9077-1. The affidavit of Debtors' counsel does nothing of the kind. It makes no attempt to explain why the Debtors have waited months to file their papers. And it makes no attempt to explain why these Debtors are not proceeding as virtually all other telecommunications providers that have

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3 See Asset Purchase Agreement by and among Allegiance Telecom, Inc. and Allegiance Telecom Company Worldwide jointly and severally as Sellers and XO Communications, Inc. as Buyer dated February 18, 2004, at § 3.5.

filed for Chapter 11 bankruptcy have proceeded in this District and around the country -- by assuming their interconnection and other agreements with Verizon and curing the defaults thereunder.

In short, the Debtors have utterly failed to meet their burden to justify such extraordinarily truncated notice and opportunity for Verizon to be heard, particularly on a matter of enormous significance to Verizon and the entire telecommunications industry. The "Emergency Motion" should be denied.

II. The Debtors' Contentions of Bankruptcy Law Are Baseless.

The Debtors' charge that Verizon's assertion of its legal rights violates the Bankruptcy Code is nothing short of frivolous. The Debtors claim that Verizon is violating the automatic stay, and in particular Section 362(a)(6) of the Bankruptcy Code, because it is insisting that the Debtors assume their interconnection agreements with Verizon if they want to continue, after confirmation, to obtain the same services and facilities they are now obtaining under those contracts. Emergency Motion at 13-16. The Debtors fail to cite a single case, and Verizon is unaware of one, that holds that a non-debtor party to an executory contract or unexpired lease violates the automatic stay, and its prohibition against acts to collect a prepetition debt, by requiring the debtor to assume the contract or lease and cure any defaults thereunder if the debtor wishes post-confirmation to continue to obtain the same contractual benefits. Section 365 expressly requires a debtor, by confirmation, to assume or reject all of its executory contracts and unexpired leases; it specifically obligates the debtor to an assumed agreement to cure all defaults thereunder; and it plainly authorizes the non-debtor party to a rejected contract to cease performing. 11 U.S.C. § 365(b)(1)(A); id. § 365(d)(2); See, e.g., Stoltz v. Brattleboro Housing Auth., 315 F.3d 80, 94 (2d Cir. 2002) ("In order to assume an unexpired lease, the executory contract provision requires the bankruptcy trustee [or the debtor-in-possession] to cure defaults, … compensate for losses, … and provide adequate assurance, … thereby protecting the creditor's pecuniary interests before requiring a creditor to continue a contractual relationship with a debtor."); 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).

Simply put, under Section 365, the non-debtor party to an executory contract or unexpired lease has an absolute right to insist on the assumption of the contract or lease, and the cure of all defaults -- whether arising prepetition or postpetition -- if the debtor wishes to continue to obtain performance from the non-debtor party. This is black-letter law, and it is sheer nonsense to say that such a non-debtor violates the automatic stay by simply vindicating its legal rights.[4]

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4 The courts have routinely held that a creditor does not violate the automatic stay's prohibition against acts to collect prepetition debt by exercising rights otherwise granted to the creditor under the Bankruptcy Code. See United States v. Inslaw, Inc., 932 F.2d 1467, 1474 (D.C. Cir. 1991) ("For obvious reasons . . . courts have recognized that § 362(a) cannot stay actions specifically authorized elsewhere in the bankruptcy code."). For example, a creditor does not violate the stay by filing a proof of claim, by seeking a reaffirmation agreement, or by filing a nondischargeability complaint, even though each of these could technically be deemed an act to collect a prepetition debt. See, e.g., In re Duke, 79 F.3d 43, 45-46 (7th Cir. 1996) (solicitation of a reaffirmation agreement with respect to an otherwise dischargeable debt did not violate section 362(a)(6) of the Bankruptcy Code); Sears, Roebuck & Co. v. Hodges (In re Hodges), 83 B.R. 25, 26 (Bankr. N.D. Cal. 1988) ("As a matter of law. . . a nondischargeability action can never violate the automatic stay"). Verizon's assertion of its rights under Section 365 of the Code is no different.

The Debtors' automatic stay claim fails for another reason as well. Even if Verizon's actions could somehow be deemed an impermissible attempt to collect a prepetition debt, the automatic stay terminates upon the grant or denial of a discharge to the Debtors -- i.e., upon confirmation of a plan. 11 U.S.C. § 362(c)(2)(C). The Debtors do not propose to reject any of their interconnection agreements with Verizon until confirmation of their plan. Verizon could not violate the automatic stay following confirmation of such a plan by declining to provide services or facilities under contracts that the Debtors elected to reject for the simple reason that the stay would no longer be in effect.

The Debtors' only other bankruptcy claim -- that Verizon is violating Section 366 of the Bankruptcy Code -- is equally unavailing. Even if Section 366 applies to the largely wholesale telecommunications services that Verizon provides to these Debtors, Verizon has not refused to provide any services to the Debtors during the pendency of these chapter 11 cases. Rather, it has simply made clear that once the Debtors emerge from bankruptcy, they will need to assume their agreements with Verizon if they wish to continue to require Verizon to perform thereunder, just as Section 365 specifies. The Debtors again fail to cite a single case holding that Section 366 has any continued application after a debtor emerges from Chapter 11 or that Section 366 somehow trumps and renders inoperative Section 365.[5] On the contrary, Section 366 applies only "during

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5 One reason Section 366 cannot be read to require the "utility" to continue to provide services post-confirmation under an executory contract without the debtor's assumption of that contract is that doing so would violate the basic principle of statutory construction that two sections of the same act (here Sections 365 and 366) should be interpreted in a way that nullifies neither and, instead, gives effect to both. 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). Moreover, if Section 366 had continued application post-confirmation, then the bankruptcy court would have to entertain indefinitely, long after confirmation of a plan and the closing of a chapter 11 case,

the pendency of the bankruptcy case[.]" Collier Pamphlet Edition - Bankruptcy Code - Part I 317 (Alan N. Resnick & Henry J. Sommer, eds.-in-chief, 2003). Indeed, this is consistent with the Debtors' own position in this very case. The Section 366 Stipulation and Order between the Debtors and Verizon, which was approved by this Court (docket no. 585), expressly provides that the stipulation "shall terminate immediately and without need for any order of the Bankruptcy Court upon the effective date of a chapter 11 plan for the Debtors."[6]

Moreover, even if Section 366 were at all applicable following confirmation of a chapter 11 plan, Verizon would not be violating it by insisting that the Debtors assume their executory contracts and cure their defaults if they wish to obtain Verizon's continued performance. As the Supreme Court has held time and time again, the Bankruptcy Code must be construed in accordance with its plain meaning. 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); Perrin v. United States, 444 U.S. 37, 42 (1979) (statutory words should be given their ordinary meaning). By its express terms, Section 366 bars a utility from altering, refusing or discontinuing service to a debtor only if the utility so acts "solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due." 11 U.S.C. § 366(a). If

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issues of adequate assurance under Section 366(b), a result that would make no sense as matter of bankruptcy court jurisdiction.

6 Accordingly, even if Section 366 could apply post-confirmation, Verizon could terminate services under the express terms of Section 366, since there would be no ongoing adequate assurance of payment. 11 U.S.C. § 366(b); see, e.g., In re 499 W. Warren Street Assocs. Ltd. P'ship, 138 B.R. 363, 364-365 (N.D.N.Y. 1991) ("However, once the 20-day period [of § 366(a)] has expired, Code § 366(b) allows a utility to terminate service if adequate assurance of future payment has not been provided, and is also effective regardless of the status of the debtor's pre-petition account.").

Verizon exercised its rights under Section 365 to decline to perform following the Debtors' rejection of its interconnection agreements, Verizon would not be so acting "solely" -- indeed, at all -- on the basis of either the commencement of the Debtors' cases or the Debtors' failure to pay their prepetition payables "when due" (i.e., before the Debtors filed for bankruptcy); on the contrary, Verizon has continued to provide the same services and facilities to the Debtors throughout these bankruptcy cases, notwithstanding their filing for bankruptcy and their failure to pay their prepetition payables when due. Rather, Verizon would be taking action because of the Debtors' failure to assume the relevant executory contracts before confirmation of the Debtors' plan, as Section 365 would expressly allow it to do. Moreover, the Debtors are not merely asking Verizon to provide them generic telecommunications services (and facilities) under Section 366, but rather the very same services, service arrangements, and facilities that Allegiance ordered under its existing interconnection agreements, something that Section 365 makes clear the Debtors can require only if they assume those agreements. In short, the Debtors' Section 366 claim is just as meritless as their Section 365 claim.

III. The Basic Premises on Which the Debtors Rest Their Motion Are Substantively and Procedurally Flawed as a Matter of Telecommunications and Contract Law.

A. Debtors Do Not Have an "Absolute" and "Unfettered" Right to Adopt Under Section 252(i).

The Debtors are wrong that section 252(i) of the Communications Act[7] gives them an "absolute" and "unfettered" right to adopt new interconnection agreements with Verizon at any time, for any reason, in good faith or bad, and regardless of the effect of that adoption on the public interest. The Communications Act does not permit a carrier to adopt a new

[7] Communications Act of 1934, 48 Stat. 1064, as amended by the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151, et seq.) (the "Communications Act").

interconnection agreement where that adoption -- like the adoptions Debtors propose in this matter -- would contravene the public interest.

As more fully explained in Verizon's pending oppositions to the Debtors' applications for adoption before the Maryland and D.C. Public Service Commissions,[8] numerous regulatory agencies have recognized and exercised their duty to ensure that section 252(i) adoptions do not contravene the public interest and have either granted or denied carriers' adoption applications on that basis.[9] To take just one example, one state Public Utilities Commission has "consistently

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[8] See Opposition of Verizon Maryland Inc., Petition of Allegiance Telecom of the District of Columbia Inc. for Expedited Approval of an Interconnection Agreement Adopted under Section 252(i) of the Telecommunications Act of 1996, Case No. 8999, at 20 n.24 (Md. Pub. Serv. Comm'n Apr. 21, 2004) (listing state public service commissions decisions in which the state commission examined public interest factors in determining whether to grant a CLEC's petition for adoption of an interconnection agreement under Section 252(i)). A copy of this Opposition is annexed to the Debtors' "Emergency Motion."

[9] See, e.g., Order Approving Negotiated Interconnection Agreement, In re Joint Application of Verizon Washington, DC, Inc. and Networks Plus, Inc. for Approval of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996, Order No. 12296, FC No. TIA 01-13, 2002 WL 1009261 (D.C. P.S.C. Jan. 11, 2002) (recognizing parties' acknowledgement that interconnection agreement adopted under Section 252(i) "must be consistent with the public interest, convenience, and necessity"); Re BellSouth Telecommunications, Inc., Docket No. 990959-TP, PSC-99-1930-PAA-TP, 1999 WL 1037143, at *2 (Fla. P.S.C. Sept. 29, 1999) (although "Section 252(i) of the Act is silent on a state's authority to reject an adoption . . . . [w]e believe that this Commission has the authority to reject [a CLEC]'s adoption of [an existing interconnection] [a]greement as not being consistent with the public interest"); Re MCI Telecommunications Corp., Cause No. 41268-INT-03, 1998 WL 971880, at *2 (Ind. U.R.C. Nov. 25, 1998) (reviewing an interconnection agreement submitted for adoption pursuant to section 252(i) and "find[ing] that the adoption is consistent with the public interest, convenience and necessity"); Joint Petition of CTSI, LLC and Sprint Spectrum, L.P. et al. for Approval of a Negotiated Interconnection Agreement under Section 252(i) of the Telecommunications Act of 1996, by Means of Adoption of an Interconnection Agreement between CTSI, LLC and Cellco Partnership and Allentown SMSA Limited Partnership d/b/a Verizon Wireless, Docket No. A-310513F7008, 2003 WL 22908789, at *2-*3 (Pa. P.U.C. Oct. 2, 2003) (recognizing application of Section 252(e)'s public interest test in considering requests for adoption under Section 252(i)); Joint Petition of Verizon Pennsylvania Inc. and Broadview NP Acquisition Corp d/b/a Broadview Net Plus for Approval of an Interconnection Agreement Under Sections 25[2](i) of the Telecommunications Act of 1996, by Means of Adoption of an Interconnection Agreement Between Verizon Pennsylvania Inc. and Level 3 Communications LLC, Docket No. A-311188F7000, 2003 WL 21916399, at *3 (Pa. P.U.C. July 10, 2003) (same);

held that it may reject the adoption of previously-approved agreements and require modifications in the public interest":

> The Commission does not read 47 U.S.C. § 252(i) to preclude the Commission from modifying the terms of previously-approved contracts in order to apply the insight and experience it has gained through numerous interconnection proceedings. To hold otherwise would be poor public policy and would also render meaningless the Act's requirement that negotiated agreements, including § 252(i) agreements, be submitted for state commission approval.[10]

Indeed, within the last two weeks, a U.S. District Court has confirmed that section 252(i) does not grant CLECs an absolute, unconditional right to adopt new agreements, rejecting the very same arguments the Debtors make here. Global NAPS, Inc., v. Verizon New England Inc., No. Civ. A 03-10437-RWZ, 2004 WL 1059792 (D. Mass. May 12, 2004). The Global NAPs case began before the Massachusetts Department of Telecommunications and Energy (the "DTE"), where Global NAPs, Inc. ("GNAPs") attempted to escape the results of an arbitration before the DTE over the terms of an interconnection agreement it sought with Verizon by purporting to adopt another agreement just one day before the date the DTE was to enter its arbitration order. See Order on Verizon New England, Inc. for Approval of Final Arbitration Agreement or, in the Alternative, for Clarification, Petition of Global NAPs, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Interconnection Agreement with Verizon New England, Inc., Docket No. 02-45 (Mass. Dep't of Telecom. and Energy Feb. 19, 2003). Verizon asked the DTE to reject GNAPs' adoption of the

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Order Rejecting Interconnection Agreement, Requiring Further Filing, In re Application for Approval of an Interconnection Agreement Adopted Under the Federal Telecommunications Act of 1996, Section 252(i), Docket No. P-407, 5654/M-98-1920, 1999 WL 33595189 (Minn. P.U.C. Feb. 19, 1999) ("the Commission has consistently held that it may reject the adoption of previously-approved agreements and require modifications in the public interest").

[10] Order Rejecting Interconnection Agreement, Requiring Further Filing, In re Request to Approve the Adoption Agreement of GTE Midwest and AT&T Communications Interconnection Agreement for Use Between GTE Midwest and OCI Communications, Docket No. p-407, 5478/M-98-511, 1998 WL 1305525 (Minn. P.U.C. June 9, 1998).

new agreement because GNAPs had sought to adopt that agreement solely to avoid the effect of the DTE's arbitration order – just as the Debtors' purpose here is plainly to avoid the requirements of section 365 of the Bankruptcy Code. Like the Debtors here, GNAPs contended that section 252(i) granted it "an unconditional right to avoid obligations under a state-arbitrated agreement and to enter into another agreement of its choosing." Id. at 8. The DTE rejected GNAPs' position and issued an order finding that GNAPs' attempt to circumvent the arbitration process by exercising the section 252(i) adoption option violated the Communications Act:

> The § 252(i) adoption process . . . allows a CLEC to avoid the costs and delay associated with negotiating its own contract. *In the present case, we find that GNAPs' invocation of the § 252(i) adoption process is merely an attempt to avoid the Department's rulings in the Arbitration Order, and we agree with Verizon that such use is improper. The § 252(i) adoption process is not a loophole to evade the effectiveness of an arbitrated decision.* Accordingly, we reject GNAPs' attempted adoption of the Sprint Agreement as somehow satisfying its obligations under our Arbitration Order.

Id. at 12 (emphasis added). The DTE made clear that to allow CLECs to misuse the section 252 adoption process would "establish precedent that encourages 'strategic' arbitrations and permits carriers to game the system." Id. at 13. GNAPs appealed.

The District Court affirmed, endorsing two of the fundamental propositions underlying Verizon's objection to the Debtors' proposed adoption. First, the right to adopt under section 252(i) is not -- as the Debtors claim here -- absolute and unconditional. Second, and again contrary to the Debtors' arguments, a CLEC's motivation in seeking to adopt a new interconnection agreement is highly relevant to whether that adoption should be permitted, particularly where that motivation is contrary to the public interest. In particular, the District Court held that GNAPs could not then use its section 252(i) adoption rights to avoid the consequences of the arbitration it chose to commence. 2004 WL 1059792, at *2. The Global NAPs Court found that GNAPs was "attempting to avoid the agreement it arbitrated by opting into another one" and that GNAPs' "refusal to cooperate with the arbitrator's order constitutes a failure to negotiate in good faith." Id. at *2-3.

The Global NAPs Court's analysis applies equally here. Having chosen voluntarily to initiate bankruptcy proceedings, the Debtors should not be permitted to turn around and misuse their claimed "adoption rights" to avoid their obligations under Section 365 of the Bankruptcy Code. They should not be allowed effectively to assume the benefits of their existing interconnections agreements with Verizon while failing to cure their debts under those same agreements, as Section 365 requires.[11]

Allegiance's request that this Court order Verizon to allow Allegiance to adopt various interconnection agreements pursuant to Section 252(i) should also be rejected for another, related reason: the agreements with other carriers that Allegiance seeks to adopt are clearly inconsistent with applicable law. Since those agreements were executed, the FCC and, more recently, the D.C. Circuit have struck down many of the requirements that were previously imposed on Verizon and other ILECs in their dealings with CLECs. See United States Telecom Association v. Federal Communications Commission, 359 F.3d 554 (D.C. Cir. 2004). Those now-invalid

[11] Even without this federal and state authority demonstrating that section 252(i) adoptions are subject -- at the very least -- to public policy review by state commissions and federal courts to ensure their consistency with the public interest, this Court still would have cause to be suspicious of Debtors' suggestion that they can insist that Verizon continue to provide the very same services and facilities as Verizon currently provides under the existing interconnection agreements, even if the Debtors fail to assume those agreements and cure the defaults thereunder. If that were true, why then would some of the largest telecommunications providers in the nation -- WorldCom, Global Crossing, and others -- represented by some of the leading law firms in this country -- have assumed their interconnection agreements with Verizon and paid tens of millions of dollars in cures? And why would the regulators impose such a patently inequitable regulatory scheme that would require Verizon to continue to provide services and facilities ordered and provisioned under a contract without payment of the outstanding debt thereunder and deny Verizon the right that every other non-debtor party to an executory contract has: the right to insist on an assumption and cure by the debtor if Verizon is to be required to continue to perform? The Debtors provide no answers because there are none.

requirements are incorporated in the agreements (which were drafted before the recent FCC and D.C. Circuit rulings) which Allegiance seeks to adopt. Plainly, Verizon cannot be forced to execute those agreements without significant modifications; yet, that is precisely what the Debtors are demanding.

Indeed, as described more fully in Verizon's pleadings before the Maryland and D.C. Public Service Commissions, the public interest considerations that the Communications Act requires those Commissions to consider strongly counsel against permitting the Debtors to walk away from its payment obligations arising under the very same contractual arrangements they seek to maintain. Such a result would, of course, be contrary to the fundamental policy judgment that Congress made in Section 365 of the Code: that a debtor must take the burdens (in this case, the cure of its defaults) with the benefits (the contractual right to the services and facilities provisioned thereunder) of any contract. See N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513 (1984). Moreover, the "have-its-cake-and-eat-it-too" result that Allegiance demands would also contravene the public policy that animates the Communications Act. Under that statute, incumbent local exchange carriers, such as Verizon, are entitled to recover their costs of operation when they are required interconnect with CLECs like Allegiance. 47 U.S.C. §§ 251(c)(3) & 252(h). Indeed, the implementing regulations adopted by the Federal Communications Commission make absolutely clear that a CLEC's right of adoption is qualified by the ILEC's right to fully recover its costs. See 47 C.F.R. § 51.809(b)(1) (the right of adoption under section 252(i) does not apply where "[t]he costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement . . ."). Here, if Allegiance were allowed to adopt a new interconnection agreement and at the same time walk away from its payment obligations, Verizon's costs of providing service to Allegiance would be much greater than its costs of providing those same services to the carrier whose contract Allegiance would be adopting, since Allegiance would not have to reimburse Verizon for the costs it incurred in providing those services to Allegiance.

Allegiance's "Emergency Motion" is thus fundamentally contrary to both bankruptcy and telecommunications law and policy and must be denied.

B. Section 252(i) Does Not Negate the Basic Principles of Contract Law That Underlie Verizon's Rights.

Even if Debtors were permitted to adopt new interconnection agreements -- indeed, even if Debtors were somehow found to have an "absolute" and "unfettered" right to adopt new interconnection agreements regardless of the public interest -- those new adoptions would not affect Verizon's ability under both bankruptcy and contract law to discontinue service under the existing interconnection agreements if the Debtors reject those agreements at the confirmation. Unless Verizon agreed otherwise, the newly-adopted agreements would, as a matter of basic contract law, govern only *new* services and facilities ordered by Allegiance *after* the adoption, not the pre-existing services and facilities which Allegiance ordered, and Verizon provisioned, under the current contracts before any adoption of new agreements.

In the past, when the Debtors wished to continue receiving services ordered under previous agreements, the Debtors transferred the debt associated with those services, along with the service arrangements themselves, to the new agreement. Hessenthaler Decl., ¶ 9. There is no reason that the same result should not obtain here. As it has done in the past, Verizon is more than willing in this case to transfer the Debtors' existing service arrangements from their existing interconnection agreements into any newly-adopted interconnection agreements, just so long as the Debtors' payment obligations related to those same service arrangements are also transferred into the newly-adopted agreements as well. Verizon is equally willing to accept the Debtors' choice to reject its existing agreements, so long as that rejection applies equally to Verizon's service obligations as well as to Allegiance's payment obligations under those existing agreements. Thus, what the Debtors so dramatically mischaracterize as a "hold-up" is simply Verizon's insistence that, if the Debtors are going to use the section 252(i) adoption process in effect to assume their current service arrangements, they not be relieved of the obligation to cure the defaults thereunder, that goes hand-in-hand with that assumption under both bankruptcy law and general principles of contract law.

The Debtors cite no authority that would allow the Debtors to obtain under the newly-adopted agreements -- not only new services and facilities ordered and provisioned after the adoption of those agreements -- but the existing services and facilities that have been ordered and provisioned under the existing agreements. That is certainly not the normal result under contract law. To use a simple example, if a party contracts to lease one parcel of real estate from a lessor and then enters into a second agreement to lease a second parcel from the same party, the second agreement clearly would not govern the parties' rights and relationship with respect to the first parcel unless the parties expressly agreed to such a result. Rather, the first agreement would continue to govern the lease of the first parcel, and the second agreement would govern the lease of the second parcel.[12]

[12] See, e.g., Heidtman Steel Products, Inc. v. Compuware Corp., No. 3:97CV73892000, WL 621144 (N.D. Ohio Feb. 15, 2000) ("[A] subsequent contract does not supersede ... unambiguous terms in a preceding contract unless the subsequent [contract] specifically evidences an intent to do so.") (internal quotation marks and citations omitted); Haft v. Dart Group Corp., 841 F. Supp. 549, 568 (D. Del. 1994) ("Whether the parties to a contract intended a new contract to supersede an old one, whether partially or entirely, depends on their intent"; "[a] new contract . . . does not destroy the obligation of the former agreement, except as it is inconsistent therewith, unless it is shown that the parties intended the new contract to supersede the old contract entirely.") (internal quotation marks and citations omitted).

The same analysis applies here. As a matter of basic contract law, unless Verizon and the Debtors mutually agree otherwise, any new interconnection agreements that the Debtors adopt will govern only, and will entitle the Debtors to obtain only, any new services and facilities first ordered and provisioned under the new agreements, not the current services and facilities ordered and provisioned under the existing agreements. If the Debtors then reject the existing agreements, they will release Verizon from any obligation to continue to perform under those agreements. Both bankruptcy and contract law compel this result, and nothing in the Communications Act -- whether or not the Debtors are permitted to adopt new agreements -- requires a different result.

C. In the First Instance, the State Commissions Should Decide the Telecommunications and Administrative Law Issues Presented by the Debtors' Motion.

Finally, while this last issue (whether, as a matter of contract law, the Debtors' adoption of new interconnection agreements would somehow entitle the Debtors to obtain the services and facilities they ordered under their existing agreements) may ultimately be one that this Court can decide, the former issues (whether, under Section 252(i) of the Telecommunications Act, the Debtors have the "absolute" and "unfettered" right in the first place to adopt new agreements without any conditions and, if not, whether the public interest requires that the Debtors' existing payables attach to the new, restated agreements) are surely ones this Court cannot. They are quintessential issues of telecommunications law and policy that Congress has entrusted to the regulatory bodies charged with administering the Telecommunications Act to resolve.

Indeed, this Court's interference in those issues would be particularly inappropriate here. After all, the Debtors themselves commenced the pending proceedings before the Maryland and District of Columbia Public Service Commissions. This Court should allow those tribunals to decide the effect of Section 252(i) and the questions of telecommunications policy posed by Allegiance's petitions before the Commissions. See, e.g., MCI Telecommunications Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1103 (3d Cir. 1995) (deferring to state PUC issues concerning the "reasonableness, adequacy and sufficiency of public utility services" and citing the PUC's enforcement power over its tariffs and regulations along with its particular expertise on matters that pertain to those tariffs.) (internal quotation marks and citations omitted); Total Telecommunications Servs., Inc. v. AT&T Co., 919 F. Supp. 472, 478 (D.D.C. 1996) ("case will require resolution of issues, which, under a regulatory scheme, have been placed in the hands of an administrative body") (internal quotation marks and citations omitted), aff'd, 99 F.3d 448 (D.C. Cir. 1996); Telecom Int'l America, Ltd. v. AT&T Corp., 67 F. Supp.2d 189, 220 (S.D.N.Y. 1999) (citing FCC cases addressing and deciding the issue and finding that the issue is "solely within the institutional competence of the FCC"); In re Megan-Racine Assoc., Inc., 180 B.R. 375, 382 (Bankr. N.D.N.Y. 1995) (deferring to Federal Energy Regulatory Commission on complex issues within agency expertise); In re Brown Transport Truckload, Inc., 176 B.R. 82 (Bankr. N.D. Ga. 1994) (deferring to the ICC issues of reasonableness of rates).

IV. The Debtors Cannot Obtain the Injunctive Relief They Seek by Motion.

Although the Debtors seek to disguise what they are requesting from this Court, it is clear they are seeking a mandatory injunction. The proposed order that the Debtors have submitted would require Verizon "to immediately execute" new interconnection agreements with the Debtors. Such an order requiring a party to take affirmative action is a mandatory injunction. See, e.g., Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 34 (2d Cir. 1995) ("A mandatory injunction . . . is said to alter the status quo by commanding some positive act.") (citing Abdul Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir. 1985)). And such an injunction may issue "only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief." Id. (internal quotation marks and citation omitted). These Debtors have made no such showing or, for that matter, any showing that they have no adequate remedy at law, another basic prerequisite of injunctive relief.

In any event, an injunction can be issued only in connection with an adversary proceeding, not by motion. See Fed. R. Bankr. P. 7001(7) ("The following are adversary proceedings: . . . (7) a proceeding to obtain an injunction or other equitable relief, except when a . . . chapter 11 . . . plan provides for the relief"). An adversary proceeding, of course, requires the filing of a complaint and all the attendant due process that the formal complaint procedure mandates -- an opportunity for the defendant to answer or move in response, to take discovery, and otherwise to be heard on more than three days notice.

This jurisdictional defect is fatal to the relief the Debtors are seeking. See, e.g., In re Entz, 44 B.R. 483, 485 (Bankr. D. Ariz. 1984); In re Garnett, 47 B.R. 170, 172 (E.D.N.Y. 1985); Dahlquist v. First Nat'l Bank (In re Dahlquist), 33 B.R. 101, 103 (Bankr. D.S.D. 1983); In re Brookfield Tennis, Inc., 29 B.R. 1, 2 (Bankr. E.D. Wis. 1982). The Debtors have not filed an adversary proceeding and they have afforded Verizon none of the necessary procedural safeguards. Thus, even if the Debtors were substantively entitled to the relief they seek -- and they most surely are not -- their "Emergency Motion" would be procedurally defective and would have to be denied.

CONCLUSION

WHEREFORE, Verizon requests that this Court (i) deny the Emergency Motion in its entirety, (ii) award Verizon its fees and expenses in having to respond to the Emergency Motion, and (iii) grant Verizon such other and further relief as this Court deems appropriate.

Dated: May 20, 2004

Respectfully Submitted,

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