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

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

SUPPLEMENTAL BRIEF IN SUPPORT OF THE DEBTORS' EMERGENCY MOTION TO COMPEL VERIZON TO EXECUTE CERTAIN AGREEMENTS

This supplemental brief is submitted in support of the motion[1] (the "Motion") of Allegiance Telecom of Maryland, Inc., Allegiance Telecom of New York, Inc., Allegiance Telecom of the District of Columbia, Inc., and Allegiance Telecom of Pennsylvania, Inc. (collectively, "Allegiance" or the "Debtors"), for an Order compelling Verizon Maryland, Inc.,

1 The Debtors disagree with Verizon's assertion regarding procedural defects and the Court's ability to enter the relief requested. As the Second Circuit noted: "in bankruptcy proceedings substance should not give way to form and "a bankruptcy judge must not be shackled with unnecessarily rigid rules when exercising the undoubtedly broad power granted to him under the [Bankruptcy] Code." *Virginia Electric & Power Co. v. Caldor, Inc.-NY*, 117 F.3d 646, 650 (2d Cir. 1997) citing *In re Financial News Network Inc.*, 980 F.2d 165, 169 (2d Cir. 1992). *See also In re Marion Steel Co.*, 35 B.R. 188, 195 (Bankr. W.D. Ohio 1983) (by its terms Section 366 empowers court to order continuation of utility service subject to adequate assurance).

Verizon New York, Inc., Verizon Washington D.C., Inc. and Verizon Pennsylvania, Inc. (collectively "Verizon"), to execute certain interconnection agreements, as required under federal law and the Bankruptcy Code. This Supplemental brief addresses certain issues the Court raised and responds to some of the arguments Verizon made at the hearing held on the Motion on May 20, 2004.

ARGUMENT

I. Section 541 – Property of the Estate

Section 252(i) of the Telecommunications Act requires an ILEC such as Verizon to make available for adoption by Allegiance any existing interconnection agreement Verizon has with another carrier, on precisely the same terms. 47 U.S.C. 252(i).[2] In doing so, Section 252(i) creates a federal property right, which under Section 541 of the Bankruptcy Code becomes property of the Debtors' estates. Accordingly, this Court has jurisdiction to adjudicate disputes arising under Section 252(i) of the Telecommunications Act.

A. Statutory Rights as Property

Under the Bankruptcy Code, "Property of the estate encompasses 'all legal or equitable interests of the debtor in property…'" *Official Committee of Unsecured Creditors v. PSS Steamship Company, Inc. (In re Prudential Lines, Inc.)*, 928 F.2d 565, 569 (2d. Cir. 1991), *quoting* 11 U.S.C. 541(a)(1). "Property" is defined under Section 541 of the Bankruptcy Code; Congress intended it to be interpreted broadly. *Id., citing United States v. Whiting Pools, Inc.*,

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2 Debtors submit that Section 252(i) provides an unfettered right to adopt new agreements. Regardless of whether the Court agrees with Debtor's view or adopts Verizon's assertion that Section 252(i) includes a public interest test, the simple fact is that Verizon has refused to allow Debtors to adopt the new interconnection agreements solely because Verizon wants Debtors to cure the prepetition amounts owing under old interconnection agreements that Debtors have noticed they intend to terminate. Therefore, even if this Court does not choose to reach the broader issue, this Court can and should rule on whether Debtors have the right to adopt new interconnection agreements when the only objection being raised by Verizon is a bankruptcy one – that Debtors will be able to avoid curing (but not paying) the pre-petition amounts owing under the old interconnection agreements.

462 U.S. 198, 204, 103 S.Ct. 2309, 2313, 76 L.Ed.2d 515 (1983). Federal courts have embraced this policy as vital to facilitate debtors' reorganization. *Id.*

Under this broad policy, bankruptcy courts have held that, "federally created rights can be property of the estate, which can be protected under the automatic stay." *In re Magnesium Corp. of America, et al.*, 278 B.R. 698, 705 (Bankr. S.D.N.Y. 2002) (hereafter "*Magcorp*"). In *Magcorp*, the Bankruptcy Court determined that the Magnesium Corporation of America had a federal statutory right to receive power under "interruptible rates," and that right constituted property. *Id.*, at 711. This determination meant that actions running counter to the exercise of those rights could be stayed under Bankruptcy Code Section 362(a)(3). *Id.*, at 705.

The issues in *Magcorp* closely parallel the issues presented here between Allegiance and Verizon. Allegiance has moved[3] to require Verizon to execute interconnection agreements between Verizon and itself on the same terms as between Verizon and other carriers, as is its right under Section 252(i)[4] of the Telecommunications Act. Verizon refuses to execute the agreements on those terms, unless Allegiance agrees to pay Verizon's pre-petition claims in full. This blatant interference with Allegiance's federal rights constitutes actionable interference with the property of the estate and is clearly prohibited by the automatic stay. Such a refusal to recognize the debtor's rights under federal law is exactly what caused the Magnesium Corporation of America to sue to enforce its federally guaranteed access to interruptible rates in *Magcorp*, and exactly the reason the court decided to use Section 362(a)(3) to enforce the debtor's right to interruptible rates. *Id.*, at 711. The Court in this case should do the same: stay actions by Verizon imposing conditions on the execution of new agreements that interfere with

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3 Verizon protests that Allegiance filed a motion rather than an adversary proceeding. *Magcorp* granted a motion, the procedurally correct means for seeking the relief sought by Allegiance.

4 There is no authority that allows Verizon to refuse to allow CLECs to opt in to new agreements because of an outstanding debt. Obviously, in bankruptcy that prohibition is strengthened even further by Section 366 of the Bankruptcy Code.

Allegiance's federally guaranteed right to adopt interconnection agreements between Verizon and other carriers on exactly the same terms, and compel Verizon to execute such agreements pursuant to the statute.

B. Bankruptcy Court Jurisdiction

In *Magcorp*, the defendant creditor utility raised issues of whether the Bankruptcy Court should defer its determination of the meaning of the PURPA ("Public Utilities Regulations Policy Act of 1978," 16 U.S.C. 824a-3 et seq.) there in issue under the doctrine of primary jurisdiction to the Utah Public Service Commission ("PSC"), and determined in some circumstances that it should. For instance, in determining the effect of the terms of agreements governing rates pursuant to a 1968 order of the PSC, the court decided to defer. However, on the issue of whether the debtor had a property right, the Court decided it had jurisdiction. The Court determined that in a case of statutory interpretation of PURPA, where there was no issue particularly in the agency's discretion or under the agency's expertise, it was appropriate for the Court to exercise jurisdiction to decide whether the debtor had a property right. *Magcorp*, 278 B.R. at 709. The Court stated, "In such circumstances, the courts in this Circuit, including the Second Circuit, have construed an applicable statute, even though the statutory construction had an effect on energy policy and came close to issues that might be regarded by some as appropriate for administrative agencies to decide." *Id.*, at 710. This clearly shows that the Bankruptcy Court's exercise of jurisdiction in this matter is appropriate.

The *Magcorp* decision found the PURPA and the regulations promulgated thereunder contained the key provision that the monopoly "shall provide" service to the debtor. *Id.*, at 709. Section 252(i) of the Telecommunications Act says the ILEC's "shall make available" service to Allegiance. "Shall provide" and "shall make available" are equivalent and unambiguous directions, each of which create property tights of the estate that may be interpreted and enforced

by the Bankruptcy Court. This Court (Judge Gerber) did so in *Magcorp*, and for the same reasons, should do so here.

Verizon has argued that because this instant action is to guarantee rights under the Telecommunications Act, the bankruptcy court is not the proper forum for such a dispute. That argument is wrong. As already seen in *Magcorp*, courts can exercise jurisdiction over the property of the estate to enforce federal rights. In addition, under 28 U.S.C. 1334(e), "the district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the property of the estate." In addition, "it is clear that in this Circuit, as elsewhere…the existence of a conceivable effect on the bankruptcy estate now establishes "related to" jurisdiction under Section 1334(b). *In re Adelphia Communications Corp., et al.*, 307 B.R. 404, 414 (Bankr. S.D.N.Y. 2004).

With District Court jurisdiction plainly established under the plain language of 28 U.S.C. 1334, the next step to proving bankruptcy court jurisdiction is an analysis under 28 U.S.C. 157. Section 157(b)(1) governs bankruptcy court jurisdiction and states, "bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11…and may enter appropriate orders and judgments." Section 157(b)(2) then sets out a non-exclusive list of enumerated factors that constitute core proceedings, one of which clearly applies here: Section 157(b)(2)(e), which relates to orders to turn over property of the estate. Verizon seeking payment of pre-petition claims out of estate property, and Verizon asking Allegiance to forego its federal rights, which are property, make this a core proceeding. If the Court was not sure whether the instant action fits into the enumerated category of Section 157(b)(2)(e), guidance could be provided by *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 166 (2d. Cir. 2000)(citations omitted), which states, "bankruptcy jurisdiction is to be construed

as broadly as possible…within constitutional constraints." Lastly, Section 157(c)(1) provides that "a bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." This instant action is clearly "related to" a case under title 11.

As shown, Allegiance's rights under the Telecommunications Act are property of the estate, and can be protected under the automatic stay. As property of the estate, the Bankruptcy Court has jurisdiction to adjudicate claims based on those rights. In addition, the Court would have jurisdiction in any case as this is a proceeding related to a case under title 11. As such, the Court should enter an order staying actions by Verizon that impose conditions on the execution of new agreements that interfere with Allegiance's federally guaranteed right to adopt interconnection agreements between Verizon and other carriers on exactly the same terms, and compel Verizon to execute such agreements pursuant to the statute.

II. Section 366

A. Verizon has discriminated against the Debtors

Even if this Court does not compel Verizon to enter into the New Interconnection Agreements, the Court should find that Verizon has violated Section 366 of the Bankruptcy Code. There is no question that Verizon is a utility under Section 366 of the Bankruptcy Code. In these cases, Verizon has negotiated an order providing adequate assurance under Section 366 of the Bankruptcy Code.[5] Section 366(a) provides as follows:

> Except as provided in subsection (b) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement

[5] Not only has Verizon sought the protection of Section 366 in this case, in Comm South Companies, Inc., Case No. 03-39496-hdn (Bankr. N.D. Tex. 2003), Verizon stated: "Verizon respectfully requests the Court to disregard the Debtors' argument that Verizon is not a "utility" and – consistent with other bankruptcy courts throughout the country – treat the Debtors' obligations to Verizon as obligations that arose under Section 366 of the Bankruptcy Code." A copy of Verizon's opposition in that case is attached hereto as Exhibit A. *See also* pp. 10-13 in Exhibit A for Verizon's extensive explanation why it is a utility under Section 366.

> 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) (emphasis added).

In *In re Kiriluk*, 76 B.R. 979, 984 (Bankr. E.D. Pa. 1987), the court held that the utility had a duty under Section 366 to treat the debtor as if he were a new customer.[6] Verizon has discriminated against the Debtors in violation of Section 366(a) by treating the debtors differently solely because of the failure to pay a pre-petition debt. After the commencement of these cases, Verizon attempted to coerce the Debtors into entering into new interconnection agreements (the "New Agreements") on terms different than those agreed to by the original counterparty to the new agreements. Specifically, Verizon has refused to the sign the New Agreements unless the Debtors consent to the inclusion of language requiring payment of all pre-petition amounts owed to Verizon. As can be seen in Verizon's letter to the Debtors regarding the Maryland New Agreement, a copy of which is attached hereto as Exhibit B, Verizon has refused to comply with its obligation to allow the Debtors to opt in to the New Agreements unless the Debtors agree to the following language:

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6 Section 252(i) applies to both telecommunications carriers with existing interconnection arrangements as well as new telecommunications carriers. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, 11 FCC Rcd 15499, paras. 1314-1321 (1996) (subsequent history omitted). Because Debtors will be treated as a completely new customer (and the prior default not taken into account) when considering a service request, Verizon has no legitimate reason under Section 252(i) to discriminate against Debtors. Moreover, even if Debtors rejected the existing interconnection agreements (the "Old Agreements"), Verizon would be obligated to enter into the new agreements because Verizon would be unable to use Debtor's prior pre-petition defaults as a legitimate reason to deny the new agreements. Verizon claims that the reason it refuses to enter into the New Agreements is because it is not being paid. However, as the Court observed, this dispute is really around whether Verizon gets full value or bankruptcy value for its claim. Under no circumstances would Verizon not be paid whatever its claims end up being resolved to be – but in all instances Verizon will be paid.

All monetary obligations of the parties to one another under the [Old Agreement] shall remain in full force and effect and shall constitute monetary obligations of the parties under the [New Agreement].[7]

That language is not contained in the New Agreement and Verizon seeks to add it solely because the Debtors are in bankruptcy.[8] Verizon has acknowledged that it seeks to add the language solely to secure payment of its pre-petition debt.[9] "Verizon's Proposed Adoption Agreement [requiring payment of pre-petition debt] would preserve the status quo in the bankruptcy proceedings and leave for the Bankruptcy Court any such issues of bankruptcy law." (See Exhibit B to the Debtors' Emergency Motion, Verizon's Opposition in the Maryland PSC Proceeding, at p. 20). Verizon also suggested that the Public Service Commission of Maryland: "merely condition Allegiance's adoption of the New Sprint Agreement on Allegiance's consent to the language Verizon has proposed – language making clear that Allegiance's existing obligations to pay its debt under its service arrangements with Verizon will continue under the newly-adopted interconnection agreement under which Allegiance proposes to continue those

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7 *See* letter from Steven J. Pitterle, Director – Contract Negotiations Wholesale Markets of Verizon, to John C. Gockley, Vice President – Interconnection of Allegiance (Nov. 17, 2003), a copy of which is attached hereto as Exhibit B.

8 Verizon could have inserted this language into the original agreement with the counterparty, but for whatever reason did not. What Verizon is asking this Court to do is make bad law in an effort to fix Verizon's mistake. This Court should not do that. Debtors submit that this Court should not torture the law in this instance to support an action that Verizon had an obligation to negotiate if it wanted it in the agreement in the first place. Further, Debtors understand that Verizon may have inserted this language into its new model agreements, so this issue should not arise in the future.

9 Verizon has engaged in a shell game by claiming that this issue is not ripe at this Court as well as the public service commissions. This Court should not allow that to continue, nor require the Debtors to continue to play this shell game. Verizon has admitted that the sole "public interest" justification for refusing to allow Debtors to adopt the New Agreements is based on its view of how the Bankruptcy Code operates. Because those are issues that this Court should rule on, there is no need to defer this issue to the state public utility commission on primary jurisdiction grounds. This Court, not the state public utilities commissions, is the primary jurisdiction for bankruptcy law rulings.

same service arrangements."[10] (See Exhibit B to the Debtors' Emergency Motion, Verizon's Opposition in the Maryland PSC Proceeding at p. 22).

This Court need look no further for evidence that Verizon is discriminating against the Debtors based solely upon a pre-petition debt. Moreover, the fact that many other CLECs may or may not have agreed to the new language Verizon seeks does not excuse or in any way justify Verizon's actions.[11] The discrimination here arises in connection with the Debtors' desire and right to opt into the New Agreements and Verizon's refusal to do so. Other agreements and the terms they contain are simply not at issue and cannot be used to justify Verizon's discrimination.[12]

Verizon has sought to compel payment of a pre-petition debt to which it is not entitled under the Bankruptcy Code. Acknowledging their inability to collect a pre-petition debt from debtors under Section 366, Verizon now includes the provision at issue in its new interconnection agreements. Presumably, this will protect Verizon in the event of future CLEC bankruptcies. However, here Verizon is stuck with the New Agreements, which do not contain such language. Therefore, Verizon cannot discriminate against the Debtors by seeking to collect

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[10] Verizon has also raised the unique interpretation that interconnection agreements remain in effect even though new agreements are entered into between the parties. This flies in the face of long established practice between the parties and the industry. The simple fact is that when the parties enter into a new interconnection agreement, it governs the relationship between the parties for all services – both those ordered previously and those ordered prospectively. Indeed, to the extent that the new agreement includes different pricing or terms, the new prices or terms affect all services prospectively – not just those ordered after the effective date of the new agreement. Verizon's interpretation would have the parties being forced to amend terminated agreements long after a new agreement was entered into between the parties.

[11] Similarly, whether or not other debtors have chosen to assume utility agreements rather than hold Verizon to its obligations under Section 366 should not control the outcome of these proceedings. Moreover, the facts here are different. In the cases Verizon cites, the debtors' assets were sold to a third party. Here, where the parent company's stock is being sold, the reorganized debtors who are Verizon's customers will remain as Verizon's customers after confirmation.

[12] Debtors agree with the Court's view that the fact that Verizon has forced other parties to enter into these amendments does not alter the fact that in this instance Verizon is discriminating against a debtor protected by Section 366 of the Bankruptcy Code. Moreover, as pointed out earlier, Verizon will be paid for its unsecured pre-petition claims as is its entitlement.

a pre-petition debt to which Verizon is not entitled under the New Agreements and the collection of which is prohibited under Section 366 of the Bankruptcy Code.

Verizon's refusal to sign the New Agreements also constitutes a refusal to provide service in violation of Section 366.[13] While Verizon is providing service currently, Verizon has not signed the New Agreements which should govern the terms and conditions of the continued service, including post-confirmation service. This refusal is the functional equivalent of refusal to provide service.

B. Verizon's rights and obligations arise solely under Section 366

Section 366 governs the rights of utilities, like Verizon, when a customer files for bankruptcy. Section 366 does not allow a utility to terminate or refuse service based up a pre-petition debt. Section 365 governs the rights of a non-debtor party to an executory contract upon rejection or assumption. Because Section 366 does not require the cure of pre-petition defaults but Section 365 does, both sections cannot apply simultaneously. *See In re Gerhke*, 57 B.R. 97, 98 (Bankr. Ore. 1985). In *Gehrke,* the court held that Section 366 is an exception to Section 365 and the former governs utility agreements. *Id.* In light of the fact that the utility had a practical monopoly, the court concluded that the electric company was a utility under Section 366 and Section 365 was inapplicable. *Id.*

As the court noted in *In re Kiriluk*, 76 B.R. at 982, from the debtor's standpoint, the difference between the requirements of Sections 366 and 365 is striking. Section 365 requires a prompt cure of a pre-petition default for a debtor to assume an executory contract. *Id.* However,

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[13] Nor does Verizon's tortured reading of Section 366 support its position. Section 366(a) prohibits discrimination against a debtor which is the result of debts owed by a debtor for service rendered before the order for relief which were *not paid when due*. There is no debate that Verizon billed significant amounts prior to the commencement date of Debtor's bankruptcy case and such amounts were not paid when due. Although Debtors are not clear what argument Verizon was attempting to make at oral argument regarding the distinction between when debts were due, it is plain that the amounts sought by Verizon in its proof of claim are claimed to be due pre-petition and Verizon's refusal to provide the New Agreements relates solely to Debtor's refusal to agree to pay those amounts in full when due (*e.g.*, before the commencement of the case).

under Section 366, a debtor need not cure a pre-petition default to a utility in order to maintain service. *Id.* Moreover, a supplier governed under Section 365 that has a pre-petition monetary default on an executory contract with the debtor will be required to perform under the executory agreement without any assurance of future performance until such time that its executory contract is assumed. By contrast, a utility governed by Section 366 *must* receive adequate assurance within twenty days of filing of bankruptcy or else it can terminate service.

Here, Verizon has sought the protection of Section 366 and has acknowledged that it provides services as a utility. Verizon cannot now also argue that it only has to provide services post-confirmation if the interconnection agreements are assumed under Section 365. Because Section 366 controls Verizon's rights, not Section 365,[14] the concept of assumption has no relevance. Section 366 does not require the payment of cure amounts for pre-petition obligations if the debtors have provided adequate assurance, as the Debtors have done in these cases.

There is also no basis to assert, as Verizon does,[15] that Verizon's obligations under Section 366 terminate at confirmation.[16] To the contrary, it is clear that a utility cannot refuse to

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14 Section 365 also does not apply because, by Verizon's own admission, these interconnection agreements are not really contracts. Rather, they are "creatures of federal law that operate much like federal tariffs," "1996 Action interconnection agreements are agreements in name only." (See Exhibit A to the Debtor's Emergency Motion, Verizon's Response Brief in the Starpower case, at pp. 25, 26). *See also In re Woodland Corp.*, 48 B.R. 623, 626 (Bankr. D. N.M. 1985) (utility agreement to provide electrical service was not executory contract); *In re Martinez*, 92 B.R. 916, 919 (Bankr. D. Colo. 1989) (court found no merit in public service company's contention that modified budget billing payment plans were executory contracts).

15 It should be noted that, contrary to Verizon's repeated attempts to make this a post-confirmation issue, the Debtors first sought to terminate the Old Agreements and to opt into the New Agreements more than seven months ago. See Debtors' termination letter, attached hereto as Exhibit C. Accordingly, the Debtors have argued that the agreements have been effectively terminated, pending Verizon's execution of the New Agreements. The termination is another reason Verizon is not entitled to "cure" costs.

16 Although Verizon would have this Court believe that the Old Agreements have not been terminated – the plain fact is that Debtors have done all they can to terminate the Old Agreements and still preserve the property of the estate. Originally, Debtors sent Verizon termination letters seeking the termination of the Old Agreements on the 90th day following the notice. When Verizon discriminated against Debtors and refused to enter into the New Agreements, Debtors were forced to amend the notices as to when the termination was to be effective – but Debtors did not change their intent to terminate the Old Agreements. Indeed, the Old Agreements by ordinary operation of law would remain in effect until the termination was effectuated. *See 13-68 Corbin on Contracts at §68.9.* In addition, this Court should not view the termination notice as anything other than

provide service post-confirmation. In *In re Morris*, 66 B.R. 28 (E.D. Mich. 1986), in January 1985, debtors filed bankruptcy petitions, scheduling a utility, Detroit Edison, as a creditor for a debt owed in 1982. Detroit Edison did not object to the debtors' discharge. *Id.* at 28. Approximately one year after the petition date, Detroit Edison alleged that the debtors' house was illegally receiving electric service, and terminated the service. *Id.* The debtors then moved the bankruptcy court for an order to show cause why Detroit Edison should not be held in contempt for violating Bankruptcy Code section 366. *Id.* at 29. The court denied the motion because the debtors had tampered illegally with the electric lines and meters but noted: "It is undoubtedly true that if Detroit Edison were refusing service based on the amounts owed by Wilma Morris prior to 1982, this would be improper under § 366. However, Edison has admitted that the amount due from Wilma Morris prior to 1982 was discharged in bankruptcy. Edison acknowledges that it cannot refuse service to a debtor solely on the basis of an unpaid pre-petition debt." *Id.* at 29 (emphasis added). Though not expressly mentioned, it is apparent that the acts of Detroit Edison occurred after the bankruptcy case had ended and the debtors had obtained their discharge. Accordingly, this case supports the view that Bankruptcy Code section 366 applies post-bankruptcy.

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evidencing Debtors' intent to terminate and that is all that is required under the agreements. *See Atlantic Aviation Corp. v. Provident Life & Accident Ins. Co.*, 1989 U.S. Dist. LEXIS 10261 (D. Del. 1989)(clause in contract that allowed termination "upon ten days notice" was found to mean that termination would not be effective until 10 days after notification of intent to terminate). Here, Debtors' notices clearly evidence Debtors' intent to terminate the interconnection agreements. Verizon caused the delay in the effective date of termination of the Old Agreements. This Court should not let Verizon engage in self-help by refusing to allow termination of an agreement and then claim that the Debtors must assume that agreement because it is not terminated. Accordingly, because any delay in termination (and the adoption of the New Agreements) was caused by Verizon's discrimination, the Court should ignore Verizon's point that the Old Agreements have not been terminated and instead find that the Old Agreements were effectively terminated for purposes of its analysis.

Verizon has suggested that this Court should read the text of Section 366 literally.[17] Section 366 does not say that the requirements for a utility not to discriminate and to provide service terminate at confirmation. Indeed, Verizon has failed to cite a single case where a court held that Section 366 is inapplicable after confirmation. The only source cited, Colliers, is only cited in part. The entire quote is:

> Section 366 (a) protects the debtor from being denied utility service during the pendency of the bankruptcy case because of a bankruptcy filing or prepetition debts to the utility. Section 366(b) protects the utility by requiring that the debtor provide adequate assurance of payment for the services it receives after the bankruptcy filing." Collier Bankruptcy Code Pamphlet Edition 2003, comments to Section 366.

Nothing in Colliers suggests that Section 366 does not apply post-confirmation. Presumably, even Verizon would concede that an electric company could not simply terminate service to a debtor post-confirmation. The same obligation applies to Verizon which has acknowledged its status as a utility and has reaped the benefits of being accorded utility status. Furthermore, under Section 1141, the Debtors' property revests after confirmation. As stated above, the Debtors have a property right to continue to receive utility service from Verizon and this right does not terminate with confirmation.

III. Verizon's Actions Violate the Automatic Stay

Verizon's actions also violate the automatic stay imposed by § 362 of the Bankruptcy Code which specifically prohibits a creditor from performing "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." Aside from the limited exceptions listed in § 362(b) (which are not applicable here), the automatic stay

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17 Verizon's counsel argued at the hearing that: "I think 366 is to be read like every other section of the bankruptcy codes [sic] in accordance with its plain meaning in giving independent wording, independent meaning, your Honor, to every word." May 20 Hearing transcript at p. 81.

prohibits almost any type of formal or informal act, direct or indirect, to collect on or advance a claim against a debtor or the property of the debtor's bankruptcy estate. *In re Crane*, 206 B.R. 594 (M.D. Fla. 1997) (*citing* COLLIER ON BANKRUPTCY ¶ 362.04 (15th Ed. 1986). *See also* H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), U.S. Code Cong. & Admin. News 1978, 5787, 6296.

As the court concluded in *In re Kiriluk*, 76 B.R. at 982, "by virtue of § 362(a)(6), a utility cannot attempt to collect upon its prepetition debt, yet it must continue to provide service to the debtor, subject only to § 366(b)." That is precisely what Verizon is attempting. Verizon seeks to coerce the Debtors to reaffirm and pay an alleged pre-petition obligation by refusing to allow Allegiance to adopt and receive service under the New Agreements unless the Debtors agree to forego their federally mandated rights under Section 252(i) of the Telecommunications Act and to add the discriminatory reaffirmation language into the New Agreements post-petition. Verizon is a monopoly utility, with which the Debtors have no choice but to continue to deal to stay in business. Verizon has willfully and knowingly violated Section 362(a)(6) by refusing to allow Allegiance to adopt the New Agreements.

[concluded on the following page]

CONCLUSION

For the foregoing reasons, the Debtors respectfully request that this Court issue an order compelling Verizon to execute the New Agreements or deem such agreements adopted; order that Verizon's refusal to sign the unaltered Sprint Agreement violates Sections 366 and 362(a)(6) of the Bankruptcy Code; and grant such other and further relief as the Court deems just and proper.

Date: May 26, 2004

Respectfully submitted,

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