EXHIBIT "A"

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	**Chapter 11**
COMM SOUTH COMPANIES, INC.,	§	
	§	**Case No. 03-39496-HDH-11**
Debtor.	§	
	§	

OBJECTION OF THE OPERATING TELEPHONE COMPANY SUBSIDIARIES OF VERIZON COMMUNICATIONS INC. TO DEBTORS' UTILITIES MOTIONS

The operating telephone company subsidiaries of Verizon Communications Inc. (such subsidiaries collectively, "Verizon")[1] hereby object to Emergency Motion for Order Deeming Certain Entities as Non-Utilities or, Alternatively, Deeming Utilities Adequately Assured of Future Performance and Establishing Procedures for Determining Adequate Assurance of Future

[1] The operating telephone company subsidiaries of Verizon Communications Inc. are Verizon North Inc., Contel of the South, Inc., Verizon South Inc., Verizon Northwest Inc., GTE Arkansas Inc. d/b/a Verizon Arkansas, GTE Midwest Incorporated d/b/a Verizon Midwest, GTE Southwest Inc. d/b/a Verizon Southwest, Verizon California Inc., Verizon Delaware Inc., Verizon Florida Inc., Verizon Hawaii Inc., Verizon Maryland Inc., Verizon New England Inc., Verizon New Jersey Inc., Verizon New York Inc., Verizon Pennsylvania Inc., Verizon Virginia Inc., Verizon Washington, DC Inc., and Verizon West Virginia Inc.

Utility Payments (the "Comm South Utilities Motion") filed by Comm South Companies, Inc. ("Comm South") and the Motion by Debtors Altair Communications, Inc., EZ-Tel, Inc. and Comm South Companies of Virginia, Inc. for Order (1) Deeming Certain Telecommunications Carriers Non-Utilities or, Alternatively, Deeming Such Carriers Adequately Assured of Future Performance Under Bankruptcy Code Section 366, and (2) Allowing Continued Payment by Comm South Companies, Inc. of Amounts Owing to Such Carriers by its Subsidiaries (the "Subsidiaries' Utilities Motion"), respectfully showing the Court as follows:

INTRODUCTION

1. The above-captioned debtors and debtors in possession (the "Debtors") describe their business as primarily consisting of provisioning of local and long distance telephone service to pre-paid phone service customers (some 23,000 customers in 40 states). Thus, the Debtors admittedly resell the local telephone service of Verizon and other local telephone companies, for which the Debtors require all their customers to pay for the resold monthly service in advance. In this business, the Debtors act as competitive local exchange carriers ("CLECs").

2. In general, CLECs obtain their telecommunications services or facilities on a wholesale basis from so-called incumbent local exchange carriers ("ILECs"), such as Verizon, that have established local telecommunications networks in specified geographic service areas and are regulated by state agencies as utilities. CLECs then use ILEC facilities or resell ILEC services to the CLECs' own end-user customers on a retail basis. Over the past several years, scores of CLECs similar to the Debtors – generally newly-formed operating companies without significant capital – have filed for chapter 11 in dozens of bankruptcy courts around the country. In many of these cases, the bankrupt CLEC struggles to stay alive for a period of time following its chapter 11 filing, burns up whatever remaining cash it may have, quickly becomes administratively insolvent, and then converts its case to chapter 7 or otherwise goes out of

business unable to pay the ILEC for those telecommunications services the ILEC provided to the debtor on a post-petition basis.

3. The purpose of Section 366 of the Bankruptcy Code is to prevent this result. For a variety of reasons, Congress sought to protect telecommunications service providers and other utilities from the risk that a bankrupt debtor would ultimately become administratively insolvent and unable to pay for its post-petition utility service. Thus, Section 366 provides that in order for a debtor to continue receiving service from a utility on a post-petition basis, it must provide that utility with "adequate assurance of payment, in the form of a deposit or other security" to ensure payment of the post-petition utility services. 11 U.S.C. § 366(b).

4. In this case, however, despite the extremely large amount of regulated telephone service the Debtors require from Verizon for their resale, the Debtors do not propose providing Verizon adequate assurance in the form of a deposit. Instead, they have asked the Court to find that Verizon and other utility service providers are not "utilities" within the meaning of section 366 of the Bankruptcy Code, and thus not entitled to any adequate assurance whatsoever. In the alternative, the Debtors, despite already being weeks behind in their postpetition utility obligations for Verizon's resold service while collecting monthly customer revenues in advance for such service, propose paying Verizon and the other utilities "weekly pre-payments" without a deposit as adequate assurance for post-petition service.

5. For the reasons set forth below, Verizon respectfully requests the Court to disregard the Debtors' arguments that Verizon is not a "utility" and – consistent with other bankruptcy courts throughout the country – treat the Debtors' obligations to Verizon as obligations that arise under Section 366 of the Bankruptcy Code. Moreover, Verizon also requests that the Court deny the relief requested in the Utilities Motion, and instead require the

Debtors to provide to Verizon, as adequate assurance of future telecommunications service (a) a deposit in an amount equal to the Debtors' average monthly billing from Verizon for 30 days, (b) weekly prepayments for anticipated use of Verizon service, and (c) immediate payment for the postpetition services already consumed by the Debtors for which they have not yet paid Verizon. Verizon is particularly warranted in making this request, since the Debtors had completely defaulted on their payment obligations to Verizon, had refused to provide Verizon with any pre-filing assurance of their ability to meet payment obligations, and filed their bankruptcy petition just prior to a scheduled hearing on Verizon's termination of its service to Comm South in Indiana.

BACKGROUND

A. Procedural Background

6. On September 19, 2003 (the "Petition Date"), Comm South filed its voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). On September 30, 2003, Comm South's affiliates, Altair Communications, Inc. f/k/a Georgia Comm South, Inc., E-Z Tel, Inc. and Comm South Companies of Virginia, Inc. (collectively, the "Subsidiaries"), each filed petitions for relief under chapter 11 of the Bankruptcy Code. Upon information and belief, the Debtors continue to operate their businesses and manage their property as debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

B. Regulatory and Contract Status of Verizon and the Debtors

7. Before passage of the Telecommunications Act of 1996 (the "Telecom Act"), 47 U.S.C. § 251, et seq., local telephone service around the country was generally provided by ILECs directly to end-user customers through exclusive state-granted franchises. See AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999). In 1996, Congress enacted the Telecom Act

with an intent to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub.L. No. 104-104, 110 Stat. 56 (1996). Consistent with this purpose, the Telecom Act contains mechanisms designed to open the local telephone service markets to competition. Southwestern Bell Telephone Co. v. Brooks Fiber Communications, Inc., 235 F.3d 493, 495 (10th Cir. 2000).

8. In order to facilitate market entry by CLECs such as the Debtors, the Telecom Act imposes a host of duties on ILECs, such as Verizon. See 47 U.S.C. § 251. Foremost among these duties is the duty to interconnect ILEC networks with CLEC networks. 47 U.S.C. § 251(c)(2). Interconnection ensures that consumers who subscribe to one local telephone service can receive calls from, and place calls to, those who subscribe to a different local service. 47 U.S.C. § 251(c)(2)(A).

9. Prior to the Petition Date, Verizon, in its capacity as an ILEC, entered into various interconnection agreements with the Debtors pursuant to which the Debtors obtain certain telecommunications services and facilities from Verizon in 19 states.

10. The interconnection agreements between the Debtors and Verizon establish the terms, conditions and pricing under which Verizon will provide the Debtors with access to Verizon's network and under which the Debtors do resell Verizon's local telephone service for the benefit of the Debtors' end user customers. The FCC and the applicable state agencies that regulate public utilities have established rules and regulations governing the terms, conditions, and prices required to be made available under interconnection agreements.

C. The Debtors' Payment and Service Relationship with Verizon

11. The Debtors had a repeated history of late or nonpayments to Verizon, which put them in default under their interconnection agreements and gave Verizon the right to terminate their services, upon specific notice and cure periods as required in various states. One such interconnection agreement, under which the largest payment defaults had accrued, is the interconnection agreement dated as of August 9, 2002, by and between Comm South, Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (the "ICA"). Because of these defaults, on August 14, 2003, Verizon sent to Comm South and the Indiana Utility Regulatory Commission (the "IURC"), as required by IURC Rule, notice of payment defaults in connection with the ICA and pending disconnection of service on September 24, 2003.

12. On September 2, 2003 Comm South filed a verified complaint before the Indiana Utility Regulatory Commission for emergency relief against Verizon North, Inc., Case No. 42507 (the "IURC Case"), requesting the IURC to enjoin Verizon's pending termination of service.

13. On September 11, 2003 Verizon filed its response in the IURC Case asserting that the Comm South complaint was legally deficient to support the relief requested.

14. On September 15, 2003, the assigned administrative law judge in the IURC Case notified Verizon and Comm South of an emergency hearing to be held on September 23, 2003, directed both parties to provide proposed orders for potential submission to the IURC on September 24, 2003, and directed Comm South to provide a list of its Indiana customers for use in their potential notification of termination of telephone service. Four days later, Comm South commenced this bankruptcy case.

D. The Utilities Motions

15. On October 1, 2003, Comm South filed the Comm South Utilities Motion and, on October 15, 2003, Altair Communications, Inc., E-Z Tel, Inc. and Comm South Companies of Virginia, Inc. filed the Subsidiaries' Utilities Motion (the Comm South Utilities Motion and the Subsidiaries' Utilities Motion are collectively referred to herein as the "Utilities Motions"). In the Utilities Motions, the Debtors request that the Court determine that the telecommunications carriers listed on the exhibits attached to the declarations in support of the Utilities Motions (the "Telecom Carriers") are not "utilities" for purposes of section 366 of the Bankruptcy Code. "Verizon" and "Bell Atlantic"[2] are among those entities identified as Telecom Carriers on the exhibit to the Comm South Utilities Motion and "Verizon" is identified on the Subsidiaries' Utilities Motion. (See Declaration of Barry A. Amrich in Support of Comm South Utilities Motion, Exhibit A; Declaration of Barry A. Amrich in Support of Subsidiaries' Utilities Motion, Exhibit A.)

16. Citing nothing more than the legislative history of Section 366 (which specifically identifies telephone companies as "utilities") the Debtors state that the Telecom Carriers are not utilities because (i) they have no special position with the Debtors, (ii) the Debtors can obtain comparable services from competing carriers, and (iii) the services provided by the Telecom Carriers are not vital services. (Comm South Utilities Motion at p. 2; Subsidiaries' Utilities Motion at p. 5.) After having made these representations to the Court, the Debtors, in subsequent sections of the Utilities Motions, state virtually the opposite – namely, that "the failure to maintain service from the [Telecom Carriers] will cause [Comm South] to lose its going concern value," (Comm South Utilities Motion at p. 2.), "[w]ithout [the Telecom Carriers'] ongoing

[2] Bell Atlantic Corporation and its operating telephone company subsidiaries were predecessors in interest to Verizon.

service, [Comm South] will have to shut down and liquidate," (Comm South Utilities Motion at p. 3.), and "the failure to maintain service from the [Telecom] Carriers will substantially impair the Debtors ability to reorganize," (Subsidiaries Utilities Motion at p. 2). The Debtors make these contradictory statements in support of their request to have the Utilities Motions heard on an expedited basis and their request that the Court deem certain procedures fashioned by the Debtors to constitute "adequate assurance of payment" under Section 366, should the Court find the Telecom Carriers to indeed be "utilities."

17. Comm South sets forth two proposals for adequate assurance: "Plan A" if Comm South obtains postpetition financing by October 9 and "Plan B" if the financing has not been arranged by October 9. Since October 9 has come and gone without Comm South obtaining financing, "Plan A" is a nonstarter. For "Plan B," Comm South has proposed, as so-called adequate assurance of payment of postpetition utility service, the following: (i) all postpetition arrearages will be brought current with six weekly catch-up payments in equal amounts; (ii) weekly prepayments for estimated services with monthly true-ups of the advance payments against the actual charges; and (iii) should Comm South's fail to make any of its proposed payments, each Telecom Carrier shall have the right upon three days' written notice to terminate all services to Comm South. (Comm South Utilities Motion at pp. 6-7.) The Subsidiaries propose the same adequate assurance as Comm South's "Plan B." (Subsidiaries Utilities Motion at pp. 7-8.)

18. While Verizon has not yet completed its analysis of all of the Debtors' accounts, it has already verified that it is owed at least $643,817.06 for prepetition services. Further, Verizon's initial estimates show that the Debtors incur charges to Verizon in the minimum amount of $136,350.00 per month. The Debtors have not obtained any postpetition financing

that provides Verizon any comfort that its postpetition bills will be paid. Furthermore, the Subsidiaries have no means of paying bills on their own because, as disclosed in the Subsidiaries' Utilities Motion, they have no bank accounts of their own. (Subsidiaries' Utilities Motion at p. 4.)

19. The Debtors' proposals offering Verizon the right to terminate service to the Debtors upon three days written notice following a default rings hollow because of the fact that the Federal Communications Commission ("FCC") and state public utility commissions ("PUCs") will likely require the Debtors to fully comply with all applicable notice requirements to their own end users before those agencies will permit the Debtors to terminate telecommunications services to such end users. In fact, under applicable FCC and PUC regulations, the Debtors (and Verizon, as the Debtors' underlying service provider) may be required to continue providing telecommunications service to the Debtors' end users for a month or longer following notice to such end users – even if the Debtors default in their post-petition payment obligations to Verizon and announces that they have run out of money and intend to go out of business and liquidate their assets.

20. In addition, the Debtors' proposal to true-up advance payments against actual charges on a monthly basis is unreasonable and unduly burdensome on Verizon. The true-up process is a highly time-consuming process. Requiring true-ups every month would be unnecessarily onerous. The standard interval for true-ups is generally 90 days and Verizon sees no reason in this case to shorten this interval.

21. Accordingly, the Debtors' proposed adequate assurance is, in fact, wholly inadequate. And, while Verizon agrees with the Debtors that weekly prepayments of anticipated charges are a necessary component of adequate assurance (provided that true-ups are to be done

every 90 days rather than every month), Verizon submits that the circumstances of these cases also require that the Debtors provide Verizon with a deposit equal to 30 days of their average billings with Verizon. Further, the Debtors should be required to immediately pay Verizon all outstanding amounts due for postpetition services.

ARGUMENT AND CITATION TO AUTHORITY

I. Verizon is a "Utility" Within the Meaning of Section 366

22. Section 366 of the Bankruptcy Code entitles utilities to a "deposit or other security" as adequate assurance of payment. Specifically, Section 366 provides as follows:

> (a) 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 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.
>
> (b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On a request of a party in interest and after notice and a hearing, the Court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

11 U.S.C. § 366.

23. Section 366, however, does not define the term "utility." Among the several definitions of "utility" offered by Black's Law Dictionary is the following: "a business enterprise that performs essential public service that is subject to government regulation." Black's Law Dictionary at 1544 (7th ed. 1999). The term "public utility" is defined as "a company that provides necessary services to the public, such as telephone, electricity and water." Id. Thus, Verizon is clearly a "utility" within the ordinary meaning of that term, because it provides telephone service to the public and is subject to regulation by the federal government and state

public utility commissions in each state in which Verizon provides telecommunications service. Further, Comm South's own actions in filing a complaint against Verizon with the Indiana ***Utility*** Regulatory Commission show that – despite what Comm South may be asserting in its pleadings now in an effort to avoid its obligations under Section 366 – Comm South does believe that Verizon falls within the definition of a utility (at least in the State of Indiana where Comm South accrued its largest payment obligations to Verizon).

24. The legislative history of Section 366 also sheds some light on what Congress meant by "utility." Congress wrote that the section was intended "to cover utilities that have some special position with respect to the debtor, such as an electric company, gas supplier, or telephone company that is a monopoly in the area so that the debtor cannot easily obtain comparable service from another utility." House Report No. 95-595, 95th Cong., 1st Sess., p. 350 (1977), U.S. Code Cong. & Admin. News, 1978, pp. 5787, 6306. The Debtors rely upon this language in the legislative history to argue that Verizon and the other Telecom Carriers are not "utilities" because none of the Telecom Carriers have a "special position" with respect to the Debtors. The realities of the relationship between the Debtors and Verizon, however, demonstrably refute the Debtors' bald assertion that Verizon does not hold a special position with regard to the Debtors.

25. Verizon stands in a "special position" with respect to the Debtors because, among other reasons, the Debtors cannot "easily obtain comparable services from another utility." Id. Indeed, the Debtors' own statements contained in the Utilities Motions concede that fact. (Comm South Utilities Motion at pp. 2-3 (stating that "the failure to maintain service from the [Telecom Carriers] will cause [Comm South] to lose its going concern value" and "[w]ithout [the Telecom Carriers'] ongoing service, [Comm South] will have to shut down and liquidate."));

(Subsidiaries' Utilities Motion at p. 2 (stating that "the failure to maintain service from the [Telecom] Carriers will substantially impair the Debtors ability to reorganize")). Further, in the complaint commencing the IURC Case, Comm South stated that it "will be irreparably harmed if the [IURC] does not grant the requested stay which would effectively prevent it from provisioning services to its end user customers, thereby putting Comm South out of business." (IURC Complaint at p. 7 (attached hereto as Exhibit A)). One would be hard pressed to imagine a more "special position" than that where a debtor concedes will control its ability to continue to operate.

26. Courts also have defined the scope of "utilities" covered by Section 366 expansively, including many entities not falling within the traditional definition of a utility. See In re Good Time Charlie's Ltd., 25 B.R. 226, 227 (Bankr. E.D. Pa. 1982) (finding a commercial landlord that supplied tenant debtor with electricity from local power company to be a utility under Section 366); In re Hobbs, 20 B.R. 488, 489 (Bankr. E.D. Pa. 1982) (condominium association deemed a utility under Section 366). A monopoly is not required for an entity to constitute a "utility" under Section 366. See In re Agrifos Fertilizer L.P., 2002 WL 32054779, *7 (Bankr. S.D. Tex. 2002) (holding that the determination of whether an entity is a "utility" under Section 366 does not turn on whether it is a monopoly); In re One Stop Realtour Place, Inc., 268 B.R. 430 (Bankr. E.D. Pa. 2001) (finding that a non-monopoly telephone exchange carrier that was regulated by the FCC and which provided necessary service to the debtor that could not easily be replaced was a "utility" for the purposes of Section 366).

27. Moreover, courts routinely apply Section 366 to telecommunications providers. See, e.g., In re One Stop Realtour Place, Inc., 268 B.R. 430 (Bankr. E.D. Pa. 2001) (telephone exchange carrier was a "utility" for the purposes of Section 366); In re Tel-Central

Communication, Inc., 212 B.R. 342 (Bankr. W.D. Mo. 1997) (court noting that it entered preliminary order finding that a telecommunications service provider was a "utility" under Section 366 where such entity provided services to a reseller); In re Sun-Tel Communications, Inc., 39 B.R. 10, 10-11 (Bankr. S.D. Fla. 1984) (local exchange carrier providing services to reseller was a "utility" under Section 366); In re Roberts, 29 B.R. 808 (E.D. Pa. 1983) (applying Section 366 to provider of residential telephone service).

28. Indeed, virtually all CLECs and other debtors in the telecommunications industry that obtain telecommunications services from Verizon have asserted that Verizon is a "utility" within the meaning of Section 366, in part, no doubt, because they wished to continue receiving such services from Verizon without interruption. For example, debtors in the following cases, among many others, have filed motions recognizing that Verizon is a "utility" for purposes of Section 366: In re Coserv, LLC, Chapter 11 Case No. 01-48684, United States Bankruptcy Court, Northern District of Texas; In re Allegiance Telecom, Inc., Chapter 11 Case No. 03-13057, United States Bankruptcy Court, Southern District of New York; In re Worldcom, Inc., Chapter 11 Case No. 02-13533, United States Bankruptcy Court, Southern District of New York; In re Focal Communications Corporation, Chapter 11 Case No. 02-13709, United States Bankruptcy Court, District of Delaware; In re Winstar Communications, Inc., Chapter 11 Case No. 01-1430, United States Bankruptcy Court, District of Delaware; and In re Vitts Networks, Inc, Chapter 11 Case No. 01-0372, United States Bankruptcy Court, District of Delaware.

29. For the reasons set forth above, Verizon respectfully submits that it is a "utility" for purposes of Section 366 and is entitled to adequate assurance of payment from the Debtors for the postpetition use of Verizon's services and facilities.

II. Verizon is Entitled to Meaningful Adequate Assurance of Payment from the Debtors

A. The Debtors Bear the Burden of Proof as to Adequate Assurance Under Section 366.

30. As an initial matter, the Debtors bear the burden of proof on adequate assurance issues. In re Stagecoach Enterprises, Inc., 1 B.R. 732, 734 (Bankr. M.D. Fla. 1979) ("At a Section 366 hearing, the debtor, as the petitioning party, bears the burden of proof."). Accordingly, the Debtors must demonstrate that any protections they propose would, in fact, adequately assure Verizon of payment for postpetition services.

B. The Debtors' Proposal Does Not Constitute Adequate Assurance of Payment For The Purposes of Section 366.

31. Adequate assurance of payment must be sufficient to protect a utility from an unreasonable risk of nonpayment for postpetition services. See In re Heard, 84 B.R. 454 (Bankr. W.D. Tex 1987); In re Caldor, Inc., 199 B.R. 1, 3 (S.D.N.Y. 1996). What constitutes adequate assurance of payment "depends upon the facts and circumstances of each case, keeping in mind the intent of Congress to protect the utility company while preventing discrimination against the debtor." In re Keydata Corp., 12 B.R. 156, 158 (1st Cir. B.A.P. 1981).

32. In determining the amount of a deposit necessary for adequate assurance of payment, courts "have considered the length of time necessary for the utility to effect termination once one billing cycle is missed." Begley v. Philadelphia Elec. Co., 760 F. 2d 46, 49 (3d Cir. 1985). Other factors that courts take into consideration when determining the sufficiency of adequate assurance include "the debtor's payment history, the debtor's net worth, and the debtor's present and future ability to pay post-petition obligations." See In re 499 W. Warren Street Associates Ltd. Partnership, 138 B.R. 363, 366 (Bankr. N.D.N.Y. 1991).

33. The Debtors has not met and cannot meet their burden of demonstrating, under the facts and circumstances of these cases, that weekly prepayments alone will protect Verizon from an unreasonable risk of nonpayment. Numerous factors make it clear that prepayments are not sufficient. First, the Debtors repeatedly defaulted prepetition on their payment obligations to Verizon. Those defaults were not trivial; they amounted to hundreds of thousands of dollars. (See Default Letter attached hereto as Exhibit B (citing $203,175.62 payment default by Comm South)). Second, the Debtors continue to incur substantial monthly charges with Verizon. Based on the average monthly billings during the three months preceding the Petition Date, it is anticipated that the Debtors will owe Verizon at least $136,350.00 each month for postpetition services. Last, unless a deposit is required in addition to weekly prepayments, if the Debtors are unable to pay for its postpetition services from Verizon, Verizon will likely provide as much as two months of service before the Debtors' service is actually terminated – which could result in $289,400.00 in unpaid Verizon services.

34. The Fifth Circuit has recognized that payment of a deposit is a proper means of providing a utility with adequate assurance of payment. Matter of Delta Towers, Ltd., 924 F. 2d 74 (5th Cir. 1991) ("Section 366 provides a utility company the opportunity to obtain protection in the form of a security deposit."). Other courts agree. For example, in In re Hanratty, 907 F.2d 1418 (3d Cir. 1990), the debtors sought to require an electric utility company to provide utility service without the payment of a security deposit. The court found that "[u]nder sub-section (b) [of Section 366], a utility is expressly authorized to request a debtor to furnish adequate assurance of payment in the form of a security deposit and may discontinue service if it is not provided within 20 days after the order for relief." Id. at 1423. The court added that "[w]e could only reach the result urged by the debtors by engrafting a court-created exception on 11 U.S.C. §

366 which would not further the purpose of that section. This we will not do." Id. at 1424. See also In re Northwest Recreational Activities, Inc., 8 B.R. 7 (Bankr. N.D. Ga. 1980) (deposit required for continued supply of water); In re Smith, Richardson & Convoy, Inc., 50 B.R. 5 (Bankr. S.D. Fla. 1985) (deposit required for continued supply of electricity); In re Stagecoach Enters., Inc., 1 B.R. 732 (Bankr. M.D. Fla. 1979) (deposit required for continued supply of gas service; court also specifically rejected concept of administrative expense claim serving as "adequate assurance" and stated that "[i]f the debtor is to be allowed to continue to operate its business, it should pay its utility bills on a current basis and should furnish adequate assurance of payment in the traditional forms of a cash deposit, a payment bond, or some similar device"); In re Sun-Tel Communications, Inc., 39 B.R. 10 (Bankr. S.D. Fla. 1984) (after reciting that the debtor had incurred a pre-petition bill of over $400,000, the court commented that "[t]he debtor proposes to earn its way out of its current financial embarrassment ... [t]he issue is whether Bell South may be compelled to finance that effort," and the court required the debtor/reseller of long distance to provide a deposit to Bell South).

35. Weekly prepayments are necessary to ensure that the Debtors, contrary to their prepetition conduct, will in fact pay for postpetition services provided by Verizon. If the Debtors were permitted to pay in arrears, given the billing cycle delay between the provision of service and the time at which such services are invoiced and become due, Verizon could be required to provide months of service before it can be determined whether the Debtors can, and will, in fact pay for such services. For many, if not most, services under current billing arrangements, Verizon bills for service in arrears, and payment is not due until thirty days after the date the bill is rendered. Thus, even if Verizon rendered all of its bills for services in a particular month by the end of that month, Verizon would not become aware of any payment default by the Debtors

on those invoices until an entire additional month had expired – that is, Verizon would have rendered, minimally, two months of outstanding unpaid services. In light of the Debtors' extraordinarily poor payment history with Verizon, it should not be given the benefit of the doubt on this issue. Further, these prepayments should not impinge on Comm South's ability to operate. Comm South operates a pre-paid phone service. As such, Comm South's customers prepay Comm South for the telecommunications service they will obtain from Comm South. Since Comm South obtains in advance from its customers the funds necessary to pay Verizon and the other Telecom Carriers, there is no reason why Comm South would not be in a position to pay Verizon in advance for the services it obtains from Verizon in order to provide service to its prepaying customers.

36. The fact that this is a telecommunications case in which the debtors are CLECs substantially increases the risk of non-payment that Verizon faces. Federal and state regulations often prohibit telecommunications providers, such as the Debtors, from discontinuing service to their end user customers unless such carriers first obtain authorization from the regulatory agencies having jurisdiction over the carrier's activities. For example, the Telecom Act requires the Debtors to provide their customers with thirty-one days' notice in order to discontinue providing telecommunications service. Before discontinuing service to their customers, the Debtors are required, among other things, to file an application with the Federal Communications Commission (the "FCC") requesting authority under section 214(a) of the Communications Act of 1934, 47 U.S.C. § 214(a), and section 63.71 of the FCC's rules, 47 C.F.R. § 63.71, to discontinue its domestic telecommunications services. Such an application is deemed filed on the date the FCC releases public notice of the filing. 47 C.F.R. § 63.71(c). Although applications to discontinue service should normally become effective upon the thirty-

first day after filing, the FCC can easily delay or deny the proposed termination merely by providing notice to the telecommunications service provider that the proposed termination is not permitted. Id. The FCC has acted to delay service discontinuance beyond the minimum thirty days prescribed under its regulations in more than one recent bankruptcy case. See, e.g., In re e.spire Application to Discontinue Domestic and International Telecommunications Services, FCC Order, Comp. Pol. File No. 592, 2002 WL 1782176 (Aug. 2, 2002) (denying application to discontinue service with respect to certain customers, until such customers have "a reasonable period of time," not to exceed an additional 29 days, to migrate to other carriers); In re Telergy Network Services, Inc., et al., Section 63.71 Joint Application to Discontinue Domestic Telecommunications Services, FCC Order, NSD File No. W-P-D 547, 2002 WL 47030 (Jan. 14, 2002) (extending 30 day notice period for at least eight more days). Accordingly, if the Debtors run out of money or even convert their cases to chapter 7, it is likely that the FCC or state regulatory agencies may nevertheless require the Debtors to continue providing services to their customers (and, in turn, require Verizon to continue providing service to the Debtors) until and unless such thirty-one day or longer notice period expires. Verizon should not be required to bear the risk associated with the Debtors' regulatory obligations as such a requirement would be contrary to the provisions of the Bankruptcy Code. Therefore, Verizon should be entitled to a deposit in the amount of at least thirty-one days' average usage, plus the additional protections requested herein, as adequate assurance of payment for the post-petition utility service it provides to the Debtors.

C. Alternatively, the Court Should Authorize Verizon to Terminate Services to the Debtors.

37. Section 366 permits a utility to discontinue service if the debtor fails, within 20 days after the filing of the petition, to furnish such utility with adequate assurance of payment for

postpetition services rendered by the utility. See 11 U.S.C. § 366(b); see also In re Hanratty, 907 F.2d 1418, 1423-24 (3d Cir. 1990). In the event that the Debtors are unable to provide Verizon with the adequate assurance of payment requested herein, Verizon requests authority from the Court to terminate all services to the Debtors.

38. As discussed above, without the adequate assurance of payment requested herein, Verizon would be subject to unreasonable risk of nonpayment for postpetition services. Verizon should not be forced to provide services to the Debtors without receiving payments for those services. The Debtors have made no payments to Verizon for postpetition services to date. The Debtors have not disclosed any significant assets, cash flow or other means with which it will be able to pay for such services during the postpetition period, nor have they obtained any debtor in possession financing. In fact, the Subsidiaries have stated that they do not have their own bank accounts nor do they have any assets other than their interconnection agreements with the Telecom Carriers. (Subsidiaries Utilities Motion at p. 4.) The papers filed in the Debtors' bankruptcy case reveal little prepetition debt service obligations that could be alleviated by a bankruptcy filing, which might facilitate an improvement in cash flow. There is no indication that the Debtors should be any better positioned in bankruptcy to pay for Verizon's services than they were prepetition.

39. Therefore, unless the Debtors provide the adequate assurance of payment requested herein by Verizon, Verizon should be granted authority to terminate all service to the Debtors in accordance with the agreements it has with the Debtors and applicable non-bankruptcy law, as it was in the process of doing with Comm South when these cases were filed.

CONCLUSION

40. For the foregoing reasons, the Utilities Motions should be denied with respect to Verizon and the Debtors should be required to provide Verizon with real and meaningful adequate assurance of payment for postpetition utility services. To this end, Verizon respectfully requests the Court to order the Debtors to (i) post a deposit with Verizon in the amount of $136,350.00; (ii) make weekly prepayments in amounts equal to one-quarter of Verizon's average monthly billings to the Debtors (which would be subject to true-ups to be made every 90 days); (iii) immediately pay for the postpetition services already provided to the Debtors by Verizon; and (iv) authorize Verizon to commence its service termination process immediately and without further order of the Court in the event the Debtors fail to make the weekly prepayments. Alternatively, in the event that the Debtors are unable to provide Verizon with the adequate assurance of payment requested herein, Verizon requests authority from the Court to terminate all services to the Debtors.

WHEREFORE, Verizon respectfully requests that the Court (i) deny the Utilities Motions, (ii) provide Verizon with adequate assurance of payment as requested herein or, in the alternative, authorize Verizon to terminate service to the Debtors; and (iii) grant Verizon such further relief as the Court deems just and proper.

DATED: October 18, 2003.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the persons listed below by facsimile, and the parties shown on the attached Service List via ECF or first class mail, postage prepaid, on this 18th day of October, 2003.

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