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**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

| | | |
|---|---|---|
| In re: | § | |
| | § | Chapter 11 |
| FIBERTOWER NETWORK SERVICES | § | |
| CORP., *et al.*, | § | Case No. 12-44027-dml-11 |
| | § | |
| | § | Jointly Administered |
| Debtors. | § | |

**SPRINT SPECTRUM L.P.'S OBJECTION TO (1) THE DEBTORS' MOTION FOR ORDERS PURSUANT TO 11 U.S.C. § 363 AND 365 AND FED. R. BANKR. P. 2002, 6004, 6006, AND 9014 (A) APPROVING AND ESTABLISHING (I) BIDDING PROCEDURES, (II) CERTAIN BID PROTECTIONS, (III) FORM AND MANNER OF SALE NOTICE, AND (IV) SALE HEARING AND (B) AUTHORIZING AND APPROVING (I) SALE OF CERTAIN OF THE DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES, (II) ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND PROPOSED CURE AMOUNTS WITH RESPECT THERETO, AND (III) PURCHASERS' ASSUMPTION OF CERTAIN LIABILITIES, AND (2) THE AMENDED NOTICE OF ASSUMED CONTRACTS AND LEASS AND CURE AMOUNTS IN CONNECTION WITH SALE**

**OF ASSETS TO ICB NETWORKS WASHINGTON, LLC AND ICB NETWORKS TEXAS, LLC (OR OTHER SUCCESSFUL BIDDER)**

TO: THE HONORABLE D. MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE:

Sprint Spectrum L.P. and its affiliates ("Sprint"), by and through their undersigned counsel, hereby file this objection (the "Objection"), and the Confidential Affidavit of Michael Logan in Support of the Objection (the "Logan Affidavit"), filed under seal, to the Motion for Orders Pursuant to 11 U.S.C. § 363 and 365 and Fed. R. Bankr. P. 2002, 6004, 6006, and 9014 (A) Approving and Establishing (I) Bidding Procedures, (II) Certain Bid Protections, (III) Form and Manner of Sale Notice, and (IV) Sale Hearing and (B) Authorizing and Approving (I) Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (II) Assumption and Assignment of Certain Executory Contracts and Unexpired Leases and Proposed Cure Amounts with Respect Thereto, and (III) Purchasers' Assumption of Certain Liabilities (Dkt. 285) (the "Sale Motion") filed by the debtors and debtors-in-possession in the above-captioned cases (the "Debtors") on September 28, 2012 and the Amended Notice of Assumed Contracts and Leases and Cure Amounts in Connection with Sale of Assets to ICB Networks Washington, LLC and ICB Networks Texas, LLC (or Other Successful Bidder) (Dkt. 341) (the "Amended Notice of Assumed Contracts"), filed by the Debtors on October 22, 2012.

## I. Preliminary Statement

1. The Debtors and Sprint are parties to a Master Services Agreement dated February 10, 2003, and various amendments and addenda (the "MSA"), pursuant to which the Debtors provide TDM-based backhaul circuits and related telecommunication services, for transport of voice and data traffic from cellular towers. The scope of these services affects at hundreds of cellular tower sites nationwide and millions of customers in 14 major geographic locations. On September 28, 2012, the Debtors filed the Sale Motion to transfer their assets in

four of these locations to ICB Networks, and on October 22, 2012, the Debtors filed an Amended Notice of Assumed Contracts and Leases and Cure Amounts in connection with the Sale, which included new exhibits and listed various Sprint addenda, service orders, and change orders at each location to be transferred, but did not list the Sprint MSA.

2. When the proposed disposition of an executory contract has a significant public service impact, it must be examined under a higher scrutiny, over and above the Debtors reasonable business judgment. If the MSA is not properly transitioned, telecommunication services will be disrupted to millions of customers including vital federal government and military agencies, emergency responders, and 911 call connectivity. The MSA is designed and intended as a fully integrated contract, and cannot be severed into multiple location-specific addenda and service orders. With respect to the four locations the Debtors propose to sell and assign, the buyer has not demonstrated an adequate assurance of future performance. With respect to the other 10 locations, if the Debtors can sever the MSA, then adequate provision must be given to allow transition of service in a manner that prevents harm to the public.

**II. The Sprint Master Service Agreement**

3. The MSA provides backhaul circuits to enable wireless service in the following 14 markets: Atlanta, Boston, Cleveland, Dallas-Ft. Worth, Denver, Detroit, Houston, Lansing, New York, Pittsburgh, Richmond, San Antonio-Austin-Waco, Tampa, and Washington, DC. The MSA services a substantial portion of Sprint's cellular towers in those 14 markets. Overall, there are several million Sprint customers whose service will be impaired unless there is a suitable buyer or there is a reasonable amount of time to conduct an orderly transition to an alternative provider. *See* Logan Affidavit, ¶ 8-9, which provides more specific information about the number of cellular sites and customers affected. The MSA is attached to the Logan Affidavit as an exhibit.

4. The MSA required several months to implement, and was intended as a fully integrated nationwide service agreement for any and all locations. Article 4.1 of the MSA provides that for each geographic area or market where services are provided, Sprint receives itemized invoices with whatever the agreed upon discount for service factored into the monthly recurring service charge. In one particular amendment to the MSA, the Debtors agreed to give Sprint steeper discounts on its service prices in all locations in exchange for Sprint's commitment to purchase additional services.

5. The MSA contains an "entire agreement" clause providing that the MSA cannot be modified except in writing as signed by both parties. *See* MSA Art. 26. Accordingly, each Addendum refers to Article 26.1 of the MSA and provides that the terms and conditions set forth in the MSA shall have full force and effect unless specifically superseded by that particular Addendum. All Addenda provide that the scope of their amendment to the MSA is limited; that all terms and conditions set forth in the MSA shall have full force and effect unless specifically superseded by this [sequential number] Addendum." This language reflects that each Addendum is a subsidiary agreement contemplated by the overarching MSA; serving to "set forth additional terms and conditions that shall apply to the MSA" for the Debtors' services provided to Sprint in that specific region. Each Addendum provides for the establishment of mutually acceptable Sprint sites for the Debtors' backhaul services to be provided following the Debtors' review of the sites for economic viability, as well as the schedule for service deployment, circuit terms and conditions, modified circuit installation intervals and provisions regarding any delay of site readiness.

6. On September 28, 2012, the Debtors filed the Sale Motion, and on October 4, 2012, the Court entered an Order Approving and Establishing (I) Bidding Procedures, (II) Certain Bid Protections, (III) Form and Manner of Sale Notice, and (IV) Sale Hearing (the "Sale

Procedures Order"). The Sale Procedures Order scheduled the sale hearing on November 6, 2012, and required the Debtors to file a Notice of Assumed Contracts no later than 24 days prior to the sale hearing. On October 12, 2012, the Debtors filed a Notice of Assumed Contracts (Dkt. 326), which listed only two Sprint cell tower leases, unrelated to the MSA. However, on October 22, 2012, the Debtors filed the Amended Notice of Assumed Contracts, listing several hundred additional contracts, including at least 58 Sprint switch sites, access agreements, change orders, addenda, amendments, and supplements. Most of these "contracts" were listed as Customer Service Orders and organized by location: Dallas, Houston, San Antonio, and Washington, D.C. The MSA was not listed as an Assumed Contract.

7. Because the Debtor purports to transfer only 4 of the 14 locations to ICB, and essentially break apart the MSA into transferred and non-transferred locations, Sprint has requested that (a) the Purchasers provide evidence to support its burden of adequate assurance of future performance with respect to the 4 transitioned locations, and (b) the Debtor provide information to ensure an orderly disposition or migration with respect to the 10 non-transferred locations. ICB has not yet provided any evidence of adequate assurance, and the Debtors have refused to even discuss a plan for the transition of service at the remaining locations. Sprint, meanwhile, has been forced to assess the overall impact of diminished capacity and disruption to its customers' service if the MSA is not assumed in its entirety.

## III. Section 365 of the Bankruptcy Code Requires Executory Contracts to be Assumed or Rejected in Their Entirety

8. Section 365 of the Bankruptcy Code allows debtors to assume executory contracts or unexpired leases that benefit the estate while also allowing them reject those that are burdensome. *See* 11 U.S.C. § 365; *e.g.*, *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513 (1984); *In re Nat'l Gypsum Co.*, 208 F.3d 498, 504 (5th Cir. 2000). However, when assuming executory contracts it is well-established that a debtor may not "cherry-pick" and assume only the most beneficial parts of a particular contract; in other words, the debtor must assume or reject entire contracts as a whole. *E.g. In re Mirant Corp.*, No. 05-10038, No. 05-10419, 2006 U.S. App. LEXIS 18129, at **9 (5th Cir. Jul. 19, 2006) (pursuant to Section 365, executory contracts must be rejected *in toto* to prevent a debtor from picking through an agreement, accepting the benefits while sloughing the burdens); *In re FFP Operating Partners, L.P.*, No. 03-90171, 2004 Bankr. LEXIS 1192, at *4 (Bankr. N.D. Tex. Aug. 12, 2004) (citing *Stewart Title Gaur. Co.* v. *Old Republic Nat'l Title*, 83 F.3d 735, 741 (5th Cir. 1996) (affirming that the general rule under section 365 that executory leases and contracts must be assumed in their entirety, and that "[a] debtor is not entitled to assume those portions of a lease or contracts it likes, while rejecting the portions it no longer cares for.")). However, if a single executory contract contains separate and distinct executory agreements within it, Section 365 allows for a debtor to assume or reject the severable portions. *In re Mirant Corp.*, 2006 U.S. App. LEXIS 18129, at **8 ("[T]o reject a contract under § 365, a debtor must establish that 1) the contract is executory, and 2) the contract is either an entire agreement, or a severable portion of an agreement."); *Stewart Title*, 83 F.3d at 739; *In re Cafeteria Operators, L.P.*, 299 B.R. 384, 389 (Bankr. N.D. Tex. 2003); *In re Convenience USA, Inc.*, No. 01-081478, 2002 Bankr. LEXIS 348, at *2 (Bankr. M.D.N.C. Feb. 12, 2002).

## IV. The MSA and All Addenda Constitute a Single, Non-Severable Contract Under Applicable State Law

9. State law controls the severability of a contract. *E.g.*, *Stewart Title*, 83 F.3d at 741. The MSA provides that the law of the state in which service is provided governs, so the Dallas, Houston, and San Antonio markets are governed by Texas law; and the Washington, D.C. market (which includes circuits in Virginia and Maryland), is governed by Washington D.C., Maryland and Virginia law. The law of severability of contracts in each of these jurisdictions features certain variations but generally affirms that the intent of the parties is the most critical consideration when determining if one portion of a contract is severable from another.

A. *Texas Law*

10. Drawing regularly from the Black's Law Dictionary, under Texas law "a contract is divisible or severable, when one party's performance consists of more than one distinct and separate item and the price paid by the other party is apportioned to each item." *In re Foothills Texas, Inc.*, 476 B.R. 143, 153 (Bankr. D. Del. 2012) (applying Texas law) (citing *Johnson* v. *Walker*, 824 S.W.2d 184, 187 (Tex. App. – Ft. Worth 1991); *Stewart Title*, 83 F.3d at 739 (citing *Johnson*, 824 S.W. 2d at 187). Whether a contract is severable under Texas law depends on the consideration of three factors:

(i) intent of the parties;

(ii) subject matter of the agreement; and

(iii) conduct of the parties.

*E.g. Johnson*, 824 S.W. 2d at 187.

11. It is widely recognized under Texas law that the intent of the contracting parties is the critical and most dispositive factor to consider when determining the severability of a particular contract. *E.g. In re Foothills Texas*, 476 B.R. at 153 (citing *Sheline* v. *Dun & Bradstreet Corp.*, 948 F.2d 174, 177 (5th Cir. 1991) (finding that unenforceable contract not to compete could not be severed from the remainder of a severance agreement because severability is governed by the intent of the parties); *Stewart Title*, 843 F.3d at 739 (finding that under Texas law "the intent of the parties is the principal determinant of divisibility"). Intent of the parties is determined by the language of the agreement as well as the surrounding circumstances. *Stewart Title*, 83 F.3d at 740 (citing *Nat'l Iranian Oil Co.* v. *Ashland Oil, Inc.*, 817 F.2d 326, 333 (5th Cir. 1987) (finding that under Texas law, whether an agreement is entire or severable turns on the parties' intent at the time the agreement was executed, as determined from the language of the contract and the surrounding circumstances). The unambiguous language of a contract controls, but where the plain language is ambiguous, courts may look to parol evidence as proof of the parties' intent. *See Stewart Title*, 843 F.3d at 739; *In re FFP Operating Partners, L.P.*, 2004 Bankr. LEXIS 1192, at *7; *Norman* v. *Apache Corp.*, 19 F.3d 1017, 1024 (5th Cir. 1994); *Nat'l Iranian Oil Co.*, 817 F.2d at 333.

B. *District of Columbia*

12. The law of the District of Columbia echoes the law of Texas' emphasis on the intent of the parties in determining contract severability. The well-established test of severability under D.C. law is whether the parties, at the time of the agreement, intended the contract to be severable. *In re Mirant Corp.*, 2006 U.S. App. LEXIS 181129, at **10-11 (applying D.C. law); *Howard University* v. *Durham*, 408 A.2d 1216, 1219 (D.C. 1979) (holding that while no set answer to when a contract is divisible, the intention of the parties controls); *Holiday Homes* v. *Briley*, 122 A.2d 229, 232 (D.C. 1956) (finding that whether multiple promises constitutes one contract or more than one is primarily a question of intention of the parties). With the intent of the parties being the central consideration, under D.C. law, a court should look to the following factors:

(i) whether parties assented to all promises as a single whole;

(ii) whether there was a single consideration covering various parts of the agreement or whether consideration was given for each part of the agreement; and

(iii) whether the performance of each party is divided into 2 or more parts, the number of parts due from each party being the agreed exchange for a corresponding part by the other party.

*In re Mirant Corp.*, 2006 U.S. App. LEXIS 18129, at **11; *Howard University*, 408 A.2d at 1219; *Cahn* v. *Antioch Univ.*, 482 A.2d 120, 129 (D.C. 1994).

C. *Maryland Law*

16. Maryland law contains some differences from Texas and D.C. law with respect to contract severability. The Fourth Circuit in *In re Driggs*, noted the lack of Maryland law specifically addressing "when two or more agreements should be considered one integrated contract," and found it instructive to follow the three-prong test employed in *In re Plitt Amusement Co.*, 233 B.R. 837 (Bankr. C.D. Cal. 1999). *In re Driggs*, No. 02-1028, 2003 U.S.

App. LEXIS 55, at **6 (4th Cir. Jan. 2, 2003) *Jorgenson* v. *United Commc'ns Grp. L.P.*, No. 10-CV-00429, 2011 U.S. Dist. LEXIS 95426, *30 (D. Md. Aug. 11, 2011). To determine whether two separate agreements constituted a single contract between the parties in *Plitt*, the bankruptcy court evaluated:

(1) whether the nature and purpose of the obligations are different;

(2) whether the consideration for the obligations is separate and distinct; and

(3) whether the obligations of the parties are interrelated.

*In re Driggs* at *620; *Jorgenson*, 2011 U.S. Dist. LEXIS 95426 at *30-31.

*D. Virginia Law*

17. Virginia law with respect to contract severability echoes Texas and D.C. law with its primary focus being on the intention of the parties. Under *Eschner* v. *Eschner*, 146 Va. 417, 131 S.E. 800 (Va. 1926), the test for whether a contract is entire or severable is primarily "one of intention which intention is to be determined from the language which the parties have used and the subject matter of the agreement. *Eschner*, 131 S.E. at 802. In assessing the intention of the parties under Virginia law, courts should look to: (i) the situation of the parties, (ii) the subject matter of the agreement, and (iii) the object which the parties had in view at the time and intended to accomplish. *SunTrust Mortgage*, 806 F. Supp. 2d 872, 907 (citing *Eschner*, 121 S.E. at 802); *O'Quinn* v. *Looney*, 194 Va. 548, 74 S.E. 2d, 157, 159 (Va. 1953).

*E. Analysis*

18. *In re Mirant Corp.*, 2006 U.S. App. LEXIS 18129, **9 (5th Cir. Jul. 19, 2006), the debtors had agreed to purchase PEPCO's electric generating facilities and to take assignment of certain purchase power agreements ("PPAs"), an agreement that involved related facilities sale agreements, lease agreements, easements and interconnection agreements as well as a "back to back" agreement with respect to the PPAs, which the debtors, Mirant, sought to reject.

Applying D.C. law, the Fifth Circuit held that the parties clearly assented to all the promises as a single whole where they were executed or closed simultaneously and were each identified in the asset purchase and sale agreement. *Mirant*, 2006 U.S. App. LEXIS 18129, at **12-13. Additionally, the Court found that the debtors' focus on the exchange of money as the only evidence of consideration was misplaced; and that it was clear that the parties had negotiated one single consideration, a single amount for the entire transaction, which covered multiple related agreements. *Id*. at **14-15. The Fifth Circuit also noted the common sense reality of the complex transaction involving many subsidiary agreements indicated that the parties only entered into each individual agreement in light of the entire deal and the overarching consideration. *Id.*

> [T]here are many ongoing rights and obligations under the [asset purchase and sale agreement] other than the [back to back] agreement, i.e. the lease and easement agreements and the inter-connection agreements. Common sense suggests this view of the consideration supporting the parties' agreement. Why would Mirant enter a legal obligation requiring it to pay an above-market rate for power unless Mirant was taking on that obligation in exchange for something Mirant deemed valuable – in this case the generation facilities and associated agreements.

*see In re United Air Lines, Inc.*, 453 F.3d 463, 468, 470 (7th Cir. 2006) (evaluating the severability of an agreement to lease airport space and to repay bond issue for building on that space under Colorado law, which also looks to the intention of the parties as the critical consideration, finding that they were not independent agreements as the parties would not have entered into the bond-related portion in the complete absence of the leasing portion, holding that even if the parties entered into a multi-part contract, it could not severed after the fact if the parties entered into it 'as a single whole,' so that there would have been no bargain whatever, if any promises or set of promises were struck out); *In re Foothills Texas Inc.*, 474 B.R. at 154 (applying Texas law and holding that the chapter 11 debtors and non-debtor royalty owner had

manifestly intended to execute a non-severable instrument in favor of the royalty owner, since there was one single consideration and the parties appeared to have contemplated agreement to the entire bundle of rights and duties); *In re Plum Run Serv. Corp.*, 159 B.R. 496, 499 (Bankr. S.D. Ohio 1993) (evaluating the severability of a contract for several related facilities services at a military base under Ohio law, which also focuses centrally on the intent of the parties, and finding it non-severable because the parties intended to consider the contract as a single, interdependent contract).

19. Following this guidance in the *Mirant* case, and the general considerations under state law, particularly intent of the parties, clearly favors a finding of non-severability. The MSA introductory section contemplates that Sprint and the Debtors would be entering into subsequent agreements for individual circuit requirements in different regions and that they would be governed by the MSA's overall terms. By agreeing to the terms of the MSA and each subsequent Addendum that incorporated the MSA as its governing agreement, the Debtors and Sprint assented to the entire set of promises contained within the MSA and each subsequent Addendum.

20. Sprint's payments to the Debtors are made on account of monthly invoices for services provided, broken down by geographic region, however, such a billing arrangement is typical in the telecommunications industry and is presumably in place for ease of administration in such a large-scale servicing contract with thousands of Sprint sites involved. Moreover, there was one single consideration that applies to the MSA as a whole; Sprint's site commitment in exchange for steeper discounts it received on the Debtors' services. The exact discount rate varies by regional location but the consideration provided for the discount applied across all regions.

21. Additionally, Article 25.3 of the MSA contains a severability clause with respect to provisions deemed to be invalid or illegal and provides that they may be severed from the MSA, leaving the rest of the agreement legally intact. Under state law, these types of limited severability provisions have been held to only address that specific occurrence and not to be contrary to the parties' intent to make an entire agreement non-severable. *In re Mirant Corp.*, 2006 U.S. App. LEXIS 18129 at **11 (holding that a severability clause that served to prevent the termination of the entire agreement should something outside of the control of the parties – invalidity, illegality, or impossibility – occur, that the clause only served with respect to that purpose and did not provide insight into the parties' view on of the interconnectedness of the various portions of the agreement for which the 5th Circuit applied D.C. law to determine the severability of various portions of it)

22. Thus, the intent of Sprint and the Debtors was to enter into a single non-severable contract. Sprint and the Debtors contemplated several subsequent region-specific Addenda in the MSA and assented to all the promises as a whole. Further, Sprint gave a single consideration: a site commitment in exchange for the increased discount would apply to the entire MSA. Since Sprint and the Debtors intended to create a single integrated contract, the MSA is not severable.

23. The MSA constitutes a nationwide service contract for the provision of certain TDM-based backhaul services by the Debtors at existing Sprint sites. At the time of the execution of the MSA and subsequently, the situation of the Debtors has been one of a backhaul telecommunications service provider with national capabilities. Sprint at that time was and has continued to be one of the United States' major wireless telecommunications service providers, with a need for the backhaul connection services to support its nationwide network. At the time that the Debtors and Sprint entered into the MSA, their stated objective was to enter into a master

agreement for the provision of the Debtors' telecommunications services at Sprint sites around the U.S. that would provide the terms and conditions and overall framework for the agreement. By the plain language contained in the MSA as well as in each of the Addenda and related Change Orders and Sprint Market Supplements, the Debtors and Sprint plainly contemplated that the MSA would be complemented by various region-specific Addenda once the detailed engineering and cost review processes were completed, and that each Addenda and related agreement would constitute part of the MSA, which remained completely in effect to the extent its terms remained unmodified by the subsequent agreements.

## V. The Debtors Have Not Provided Adequate Assurance of Future Performance Under Section 365(b) of the Bankruptcy Code

24. Prior to assuming an executory contract a debtor must (i) cure all defaults or provide adequate assurance that it will promptly cure all defaults; (ii) compensate or provide adequate assurance that it will compensate the other party to the contract for any actual pecuniary loss resulting from the default, and (iii) provide the non-debtor party to the contract with adequate assurance of future performance. *See* 11 U.S.C. § 365(b)(1); *see e.g.*, *In re Tex. Health Enters., Inc.*, No. 02-40734, 2003 U.S. App. LEXIS 15490, at **5-6, (5th Cir. Jul. 31, 2003) (citing *In re Nat'l Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000) for the principle that although Section 365 benefits the debtor by allowing it to assume contracts beneficial to the estate, the adequate assurance requirement serves as a specific limitation on which contracts may be assumed, providing a measure of protection for the non-debtor). Congress' intent in imposing the requirements of section 365(b) was to ensure that contracting parties receive the full benefit of their bargain if they are forced to continue performance. *In re Escarent Entities, L.P.*, No. 10-50410, 423 Fed. App'x 462, 465 (5th Cir. Apr. 28, 2011) (citing *In re Superior Toy & Mfg. Co.*, 78 F.3d 1169, 1174 (7th Cir. 1996); Senate Rep. No. 989, 95th Cong., 2nd Sess. 59 (1978),

reprinted in 1978 U.S.C.C.A.N. 5787, 5845; H.R. Rep. No. 595, 95th Cong., 2nd Sess. 348 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6304-05.

25. The Debtors bear the burden of proof with respect to providing adequate assurance of future performance or payment. *In re Tex. Health Enters., Inc.*, 72003 U.S. App. LEXIS 15490, at **5-6 (citing *In re Rachels Indus., Inc.*, 109 B.R. 797, 802 (W.D. Tenn. 1990)); *In re PRK Enters., Inc.*, 235 B.R. 597, 603 (Bankr. S.D. Tex. 1999). Whether a debtor has provided adequate assurance is fact-specific and in making this determination, courts have consistently considered:

(i) whether the debtors' financial data indicates its ability to generate an income stream sufficient to meet its obligations; and

(ii) the general economic outlook in the debtor's industry; and

(iii) the presence of a guarantee.

*In re Tex. Health Enters., Inc.*, 2003 U.S. App. LEXIS 15490, at **5-6; (citing *Richmond Leasing Co.* v. *Capital Bank, N.A.*, 762 F.2d 1301, 1310 (5th Cir. 1985)).

26. The Debtors are required to provide service to hundreds of Sprint sites in the markets that they propose to transfer to ICB. Neither the Sale Motion nor the Notice of Assumed Contracts addresses whether ICB is capable of performing the various obligations under the MSA. Despite numerous requests from Sprint since it was added to the "Assumed Contracts" list, neither the Debtors, nor the Purchasers, have provided Sprint any assurances that they are capable of maintaining the level of timely and quality service that is required by the MSA. The concept of "adequate assurance of future performance" pursuant to Section 365 requires more than a bare assertion in a pleading that the Debtors' reasonable business judgment supports it. As such, the Debtors have failed to meet their burden of proof with respect to adequate assurance of future performance, and assumption should therefore not be permitted.

## VI. The Court Must Consider the Public Interest in Proper Disposition of the MSA

27. The Debtors state that the standard governing bankruptcy court approval of a debtor's decision to assume or reject executory contracts is the debtor's reasonable business judgment. Sale Motion, ¶ 39. The Fifth Circuit has held, however, that an executory contract subject to government regulation and with an impact on the public interest is subject to a much higher standard:

> Use of the business judgment standard would be inappropriate in this case because it would not account for the public interest in the transmission and sale of electricity … If the district court decides that a more rigorous standard is required, then it might adopt a standard by which it would authorize rejection of an executory power contract only if the debtor can show that it 'burdens the estate, [ ] that, after careful scrutiny, the equities balance in favor of rejecting' that power contract, and that rejection of the contract would further the Chapter 11 goal of permitting the successful rehabilitation of debtors …. When considering these issues, the courts should carefully scrutinize the impact of rejection upon the public interest and should, inter alia, ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers.

*Mirant*, 378 F.3d at 525 (5th Cir. 2004) (*quoting NLRB* v. *Bildisco & Bildisco*, 465 U.S. at 526-27).

28. On remand, the District Court for the Northern District of Texas decided that the agreement was non-severable, thus mooting the remaining issues. The court, however, affirmed that the standard which would have been applied is as follows:

> To be entitled to an order authorizing rejection of the Back-to-Back Agreement, Debtors must prove that it burdens the bankrupt estates, that, after careful scrutiny and giving significant weight to comments and findings of the FERC relative to the effect such a rejection would have on the public interest inherent in the transmission and sale of electricity in interstate commerce, the equities balance in favor of rejecting the Back-to-Back Agreement, and that rejection of the Back-to-Back Agreement would further the Chapter 11 goal of permitting the successful rehabilitation of Debtors.
>
> As the Fifth Circuit has suggested, when applying this standard, the court would carefully scrutinize the impact of rejection upon the public interest and would, inter alia, ensure that rejection will not cause any disruption in

> the supply of electricity to other public utilities or to consumers or lead to unjust or excessive rates. If the rejection would compromise the public interest in any respect, it would not be authorized unless Debtors show that they cannot reorganize without the rejection. Before authorizing a rejection, the court would give the FERC an opportunity to participate as a party in interest for all purposes in this case under 11 U.S.C. § 1109(b) and Fed. R. Bankr. P. 2018 (a), and would afford the FERC an opportunity to engage in appropriate inquiry to enable it to evaluate the effect that such a rejection would have on the public interest.

*Mirant*., 318 B.R. at 108 (N.D. Tex. 2004).

29. The public interest in wireless communications is analogous to the public interest relating to electricity transmission in *Mirant*. Sprint submits that careful consideration must be given to the public interest, when determining the disposition of a contract that affects service to millions of people, multiple government agencies including the military, and emergency responders.

30. Whether or not the Debtors can segregate the MSA into dozens of individual contracts (which the Debtor should not be authorized to do without Sprint's consent), the circumstances require a period of 180 days until May 14, 2013, coincident with the Debtors' requested extension of their exclusive plan solicitation period, to transition all affected telecommunications services to a capable provider. The Debtors' attempt to transfer a few profitable locations to ICB while having the majority of locations unresolved without a migration plan is a de facto rejection of the MSA, and the Debtors unwillingness to discuss an adequate transition of services necessary to avoid a significant disruption of wireless communications is adverse to the public interest.

## VII. Conclusion

31. The Debtor filed this case with a prepackaged plan that unfortunately could not go forward. The case is now in liquidation, but the liquidation must be conducted in an orderly fashion and in a manner responsible to the public interest. If the Debtors cannot find a buyer

willing to assume the MSA and all of the locations, then Sprint needs an adequate period of time to itself conduct an orderly transition to an alternative provider, and avoid disruption of wireless communications to the public. The Sale Motion, therefore, should be denied to the extent that the Debtors are seeking to assign only certain portions of the MSA to ICB.

Respectfully submitted,

Dated: November 2, 2012

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