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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
VARTEC TELECOM, INC., *et al.*,	§	**CASE NO. 04-81694-SAF-11**
	§	**(Chapter 11)**
DEBTORS.	§	**(Jointly Administered)**

OMNIBUS OBJECTION TO CARRIERS' MOTIONS (OTHER THAN BY SBC TELCOS) TO COMPEL ASSUMPTION OR REJECTION OF EXECUTORY CONTRACTS

TO THE HONORABLE HARLIN D. HALE, U.S. BANKRUPTCY JUDGE:

The above-referenced debtors and debtors in possession (collectively, the "Debtors")[1] file this Omnibus Objection to Carriers' Motions (Other Than By SBC Telcos) to Compel Assumption or Rejection of Executory Contracts[2] and in support thereof the Debtors would show as follows:

[1] The Debtors include VarTec Telecom, Inc., Excel Communications Marketing, Inc., Excel Management Service, Inc., Excel Products, Inc., Excel Telecommunications, Inc., Excel Telecommunications of Virginia, Inc., Excel Teleservices, Inc., Excelcom, Inc., Telco Communications Group, Inc., Telco Network Services, Inc., VarTec Business Trust, VarTec Properties, Inc., VarTec Resource Services, Inc., VarTec Solutions, Inc., VarTec Telecom Holding Company, VarTec Telecom International Holding Company, and VarTec Telecom of Virginia, Inc.

[2] As provided by Order of this Court, the firm of Kane, Russell, Coleman & Logan, P.C. is acting as special counsel on behalf of the Debtors' estates vis-à-vis the SBC Telcos. This objection is limited to the Motions to Compel filed by those parties other than SBC Telcos, and special counsel to the Debtors is responsible for handling any objections to the SBC Telcos' Motion to Compel.

I. **RELEVANT BACKGROUND**

1. Prior to November 1, 2004 (the "Petition Date"), the Debtors entered into various service agreements, interconnection agreements, circuit agreements, and/or billing collection agreements (the "Agreements") with BellSouth Telecommunications, Inc. ("BellSouth"), Qwest Communications Corporation and/or its affiliates ("Qwest"), the operating subsidiaries of Verizon Communications Inc. and/or its affiliates ("Verizon"), and Valor Telecommunications of Texas, LP and Kerrville Telecommunications Company ("Valor" and collectively with Verizon, BellSouth, and Qwest, the "Carriers"). The Carriers each wear two hats, being both direct competitors and creditors of the Debtors.

2. Since the Petition Date, the Debtors have not sought to assume any of the Agreements. The Debtors do have a motion pending to reject specific circuit agreements with certain Carriers. The Debtors have no other pending motions to assume or reject the Agreements.

3. On December 2, 2004, the Court entered its Stipulation and Consent Order by and Among Certain Carriers and the Debtors regarding Adequate Assurance/Adequate Protection of Future Payments [Docket No. 451] (the "Carrier Stipulation").[3] Under the Carrier Stipulation the Debtors pay, generally in advance, set amounts semi-monthly to the Carriers on a postpetition basis. Such payments are more favorable to the Carriers than what is required under the Agreements. The Carrier Stipulation is attached hereto as **Exhibit A**.

[3] Valor Telecommunications of Texas, LP was added to the Carrier Stipulation under the First Notice of Additional Carriers [Docket No. 585]. However, Kerrville Telecommunications Company does not appear to be a party to the Carrier Stipulation thus, references to the "Carriers" being parties to the Carrier Stipulation herein shall exclude Kerrville Telecommunications Company.

II. THE SALE MOTION AND SALE PROCEDURES ORDER

4. After an extensive marketing effort and negotiations with numerous potential stalking horse bidders, on June 17, 2005, the Debtors filed their Motion for Authority to Sell Assets Free and Clear of All Liens, Claims, Rights, Interests, and Encumbrances and for Related Relief (Substantially All of the Debtors' Remaining Assets) [Docket No. 1399] (the "Sale Motion") and their Expedited Motion for Order (A) Approving Sale Procedures and Bid Protections in Connection with Sale of Certain Assets; (B) Scheduling an Auction and Hearing to Consider Approval of the Sale; (C) Approving Notice Relating to Sale; and (D) Granting Related Relief (Sale of Substantially All of the Debtors' Remaining Assets) [Docket No. 1401] (the "Sale Procedures Motion"). On June 30, 2005, the Court entered its order approving the Sale Procedures Motion [Docket No. 1446] (the "Procedures Order"). In the Sale Motion, the Debtors requested, among other things, approval of the sale of significant assets to Leucadia National Corporation ("Leucadia"), or another successful bidder (the ultimate successful bidder being hereinafter the "Buyer"), under that certain Asset Purchase Agreement dated June 17, 2005, as amended (the "APA"), or a similar agreement executed by the Buyer. Under the Procedures Order the auction will occur on July 25, 2005 (the "Auction Date") and the hearing to approve the sale of the assets will occur on July 27, 2005 at 9:00 a.m. (the "Sale Hearing").

III. CARRIERS' MOTIONS TO COMPEL

5. On July 1, 2005, eight months after the Petition Date, BellSouth [Docket No. 1452], Verizon [Docket No. 1456] and Qwest [Docket No. 1459] each filed a motion to compel assumption or rejection of their respective Agreements (collectively, the "ILEC Motions"). The simultaneous filing of the ILEC Motions was clearly no

coincidence. On July 14, 2005, Valor [Docket Nos. 1510, 1512] filed its joinder, motion to compel assumption or rejection of its respective Agreements, and request for administrative priority expense (the "Valor Motion" and with the ILEC Motions, the "Motions").

A. Summary of Carriers' Motions

6. Many of the issues the Carriers raise in their respective Motions are similar and are summarily described in the chart below. The Carrier specific objections are addressed thereafter.

Motions' Assertions	Carrier	Debtors' Objections
The Agreements should be assumed or rejected on the sale date.	Qwest p. 6 Valor p. 4	(1) Absent regulatory approval the Agreements cannot be assumed and assigned; (2) the Debtors do not have sufficient information to determine which Agreements to assume or reject at that time; (3) the Debtors cannot meet the business judgment standard to either assume or reject the Agreements; (4) the specific cure amount for each of the Agreements will not be established by that date.
The Agreements should be assumed or rejected on the earlier of: (a) commencement of the Management Services Agreement or (b) 60 days after the sale order.	BellSouth p. 1	(1) Absent regulatory approval the Agreements cannot be assumed and assigned; (2) the Debtors do not have sufficient information to determine which Agreements to assume or reject at that time; (3) the Debtors cannot meet the business judgment standard to either assume or reject the Agreements; (4) the specific cure amount for each of the Agreements will not be established by that date.
The Debtors should make an "election" on which Agreements they will assume or rejection on the date the sale is approved.	Verizon p. 3	There is no Bankruptcy Code provision that supports compelling a debtor to "elect" which Agreements to reject or assume in the future.

Motions' Assertions	Carrier	Debtors' Objections
The sale of the Debtors' assets without assumption creates benefits to the Buyer like a *de facto* assignment or control by the Buyer.	BellSouth p. 2 Qwest p. 8 Verizon p. 7 Valor p. 2	Although the Debtors meet the *Intermountain* test under the FCC regulations to not create a transfer of control to the Buyer, that issue is not before the Court because the sale is subject to FCC approval. The FCC, the proper regulatory authority to determine the issue of control, will make that determination when deciding whether to approve the transaction.
The Debtors have all the information on the Agreements to determine whether assumption or rejection is proper.	BellSouth p. 6 Verizon p. 3	There are thousands of Agreements with the Carriers. The Debtors do not know which Agreements they will assume or reject at this time, nor have the Carriers specifically identified which Agreements are at issue in the Motions.
The Carriers will suffer harm because they have to wait until assumption and assignment to receive cure payments.	BellSouth p. 6 Verizon p. 2 Valor p. 3	(1) There is no law that supports "harm" to a counterparty by waiting for assumption for its cure costs as a factor in compelling assumption or rejection; (2) under the Carrier Stipulation, the Carriers are being paid postpetition on better terms than their Agreements provide.
The Carriers will suffer harm and § 365 would be circumvented if no assumption or rejection occurred on the sale date.	Qwest p. 6 Valor pp. 3-4	There is no harm and § 365 will not be circumvented because the Debtors will file a motion with the Court to assume and assign or reject any Agreements after the sale. Filing a motion under § 365 with notice protects the Carriers' interests.
The Carrier is entitled to a postpetition administrative claim for an expense that has not occurred.	Valor p. 5	Since the expense has not occurred, no postpetition amounts are outstanding, and no basis exists under the Bankruptcy Code to seek a ruling on a future, contingent claim. Therefore, the issue is not ripe for adjudication.

B. <u>BellSouth's Motion</u>

7. BellSouth requests the Court to compel assumption or rejection of its Agreements on the earlier of (a) the effective date of any Management Services Agreement or change in control of the Debtors and (b) 60 days after the entry of an

order approving the sale of the Debtors' assets. (BellSouth Motion, p. 1). BellSouth alleges the sale of assets to a purchaser absent the assumption or rejection is a *de facto* assignment. (BellSouth Motion, p. 2). BellSouth argues the Debtors have all the information to decide to assume or reject the BellSouth Agreements that are alleged by Bell South to be principal assets of the Debtors' estates. (BellSouth Motion, p. 6). Lastly, BellSouth alleges it will sustain economic harm because BellSouth will have to wait to get its cure payment until the Agreements are assumed and assigned to a third party. (BellSouth Motion, p. 6).

C. Qwest's Motion

8. Qwest requests the Court compel the assumption or rejection of its Agreements as of the date of the sale of the Debtors' assets. (Qwest Motion, p. 6). Qwest submits it would somehow be harmed and Bankruptcy Code § 365 would be circumvented if assumption or rejection is not immediately accomplished as of the date of the sale. (Qwest Motion, p. 6). Further, Qwest claims no third party is entitled to the benefits of Qwest's Agreements until such Agreements are assumed and assigned to the third party. (Qwest Motion, p. 8).

D. Verizon's Motion

9. Verizon seeks to have the Debtors "make their election" whether to assume or reject its Agreements as of the entry of an order approving the sale, with such assumption or rejection occurring on the Early Funding Date as defined by the APA. (Verizon Motion, p. 3). Verizon alleges the Debtors need no further time to evaluate Verizon's Agreements. (Verizon Motion, p. 3). Verizon claims it will be harmed because the Debtors will not pay Verizon its alleged cure amount until the Agreements are assumed and assigned. (Verizon Motion, p. 2). Lastly, Verizon makes

an allegation as to when it believes the Buyer will acquire control over the Debtors. (Verizon Motion, p. 7).

E. Valor's Motion

10. Valor seeks not only to compel the assumption and assignment or rejection of its Agreements as of the date of the sale, but to "join" BellSouth and Qwest's Motions. (Valor Motion, p. 5). Valor also requests an order compelling the Debtors or Leucadia (who is currently only a stalking horse bidder and not the successful bidder) to make immediate payment of any accrued postpetition "payments as an administrative expense claim **as and when they become due**." (Valor Motion, p. 5) (emphasis added). Apparently, Valor seeks an administrative priority claim for expenses that have not occurred as of the filing of its Motion. (Valor Motion, p. 5). Valor unilaterally set its Motion (filed July 14th) for expedited treatment on July 25, 2005 at 1:30 p.m. [Docket No. 1513] without the Court's approval as required under paragraph 2.b on page 2 of the this Court's Order Granting Complex Chapter 11 Bankruptcy Case Treatment [Docket No. 59].[4]

IV. OBJECTION

11. The Motions are meritless. The Carriers fail to satisfy the criteria to compel the Debtors to assume or reject their respective Agreements on an accelerated schedule. The ILEC Motions, all filed on the same day, appear to be a concerted effort by the Carriers to chill the bidding process by discouraging new bidders, who now face the risk of having to decide in short order and prior to regulatory approval, which of the

[4] Valor also attempts to set an objection deadline of July 21, 2005 for its Motion, meanwhile, the objection deadline for the ILEC Motions is not until July 25, 2005. The Debtors have included objections to Valor's Motion herein, out of an abundance of caution, despite the fact Valor's Motion is not properly before the Court on the day Valor has set it for hearing.

thousands of Agreements they will choose for assumption and assignment several months from now. The Carriers' conduct also appears to be an attempt to gain leverage for negotiating possible deals with the potential Buyer related to, *inter alia*, cure costs. There is no way to quantify how the unsupported assertions in the Motions will negatively impact the auction process, however, two prospective bidders who had been very active dropped out just prior to the bid deadline.

12. Notably absent from all the Motions is a list of each Carriers' Agreements for which the Carriers seek to compel assumption or rejection. As there are over three thousand Agreements between the Carriers and certain Debtors, the determination of which Agreements are to be assumed or rejected is no small task, despite Qwest's claim that the Buyer should do it as part of its due diligence. (Qwest Motion, p. 6). Moreover, since the Carriers fail to specifically identify which Agreements they seek to compel the Debtors to assume or reject, there is no relief this Court can fashion under the Motions. Further, since the Carriers have not identified the specific Agreements, they have also not identified with particularity any specific harm they allegedly are suffering under each Agreement in the absence of a prompt decision.

13. Certain Carriers argue that the case has been pending for eight (8) months with no assumption or rejection of the Agreements by the Debtors. Yet, the Carriers are not clear as to why they did not seek to compel assumption or rejection until right now. Obviously, the issue had no urgency, which is understandable given the Carrier Stipulation. In fact, the Carriers have greater protections postpetition than they do under the terms of their own Agreements, where, under the Carrier Stipulation the Carriers are generally paid in advance, semi-monthly on a postpetition basis. What

then has created the sudden urgency to force assumption or rejection? Is it because the Carriers know the Debtors currently lack sufficient financing to assume and cure?

14. Finally, assumption or rejection decisions cannot be made in a vacuum. For the Debtor (or Buyer) to make an informed decision, it must know the cure cost for each affected Agreement. These costs, if any, for many of the Agreements are currently the subject of pending litigation, not scheduled for trial until after mid-November.

A. <u>The Carriers are Required to Perform Under Executory Contracts</u>

15. Pursuant to Bankruptcy Code §§ 362 and 365, a party to an executory contract with a debtor in possession must continue to perform under the contract during the pendency of the bankruptcy case until the debtor in possession assumes or rejects the contract. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984); *In re Mirant Corp.*, 303 B.R. 319, 328 (Bankr. N.D. Tex. 2003) ("[T]here is overwhelming authority to the effect that other parties to a contract with the debtor must perform under a contract with the debtor prior to the debtor's decision to assume or reject."); *In re El Paso Refinery, L.P.*, 220 B.R. 37, 43 (Bankr. W.D. Tex. 1998) (holding that "from the moment of filing to the moment of assumption or rejection, the non-debtor party is held to be barred from enforcing the contract and its terms," but the debtor may enforce the contract against the non-debtor party); *In re BCE West, L.P.*, 257 B.R. 304, 307 (Bankr. D. Ariz. 2000) ("noting that executory contracts may, generally, be enforced by, but not against, a debtor prior to assumption); Bordewieck, *The Postpetition, Pre-Rejection, Pre-Assumption Status of an Executory Contract*, 59 Am.Bankr.L.J. 197, 200 (1985) ("[D]uring the period from the date of filing until the date on which the DIP rejects or assumes an executory contract, the non-debtor party is bound to perform").

16. In *Bildisco*, the National Labor Relations Board sought to enforce the terms of a collective bargaining agreement against the debtor. *Bildisco*, 465 U.S. at 532. The Supreme Court held that the enforcement of the agreement against the debtor "would run counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space." *Id.* Therefore, the Supreme Court found the collective bargaining agreement to be unenforceable against the debtor in possession pending its decision to assume or reject the agreement. *Id.* at 531-33.

17. Because a non-debtor party cannot enforce an executory contract prior to its assumption or rejection, the non-debtor party cannot terminate the contract due to the debtor's default under that contract. *Golding v. Putnam Lovell, Inc. (In re Monarch Capital Corp.)*, 163 B.R. 899, 907 (Bankr. D. Mass. 1994). Pursuant to Bankruptcy Code § 365, a debtor in possession is not required to cure a prepetition default under an executory contract until the time that it assumes that contract. 11 U.S.C. § 365(b).

18. Therefore, the Carriers are compelled to perform under the Agreements pending the Debtors' decision. Moreover, under the Carrier Stipulation, the Carriers agreed to provide postpetition services under the Agreements and are being compensated on preferred terms for doing so.

B. <u>The Bankruptcy Code Does Not Require the Debtors to Assume or Reject the Agreements Now</u>

19. Bankruptcy Code § 365(d)(2) provides,

> In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired leases of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

11 U.S.C. § 365(d)(2).

20. Under Bankruptcy Code § 365(d)(2), the Debtors have until confirmation of a plan of reorganization to assume or reject executory contracts and unexpired leases. If a party to an executory contract is suffering economic losses waiting for the debtor to assume or reject the contract, it may move the court to compel the debtor to assume or reject the contract within a certain time period. *See e.g. Memphis-Shelby County Airport Authority v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 783 F.2d 1283, 1285 (5th Cir. 1986); *Pub. Serv. Co. of New Hampshire v. New Hampshire Elec. Coop., Inc. (In re Pub. Serv. Co. of New Hampshire)*, 884 F.2d 11, 15-16 (1st Cir. 1989). A debtor, however, is entitled to a reasonable time within which to make the decision whether to assume or reject the contract. *See Braniff Airways*, 783 F.2d at 1285 (citing 2 Collier on Bankruptcy ¶ 365.03, at 365-24-25 (15th ed. & Supp. 1985)). In exercising its discretion on whether to compel a debtor to make the assumption/rejection decision earlier than confirmation of the plan, the court must weigh the potential harm to the respective parties. *See In re Republic Technologies International, LLC*, 267 B.R. 548, 554 (Bankr. N.D. Ohio 2001). In a complex case such as this one, the movant has a "very high burden of proof." *Id.*[5]

21. The Bankruptcy Court for the Northern District of Illinois discussed the policy underlying Bankruptcy Code § 365(d)(2): "Permitting the debtor to makes [sic] its decision as late as the plan confirmation date enables the debtor to carefully evaluate the possible benefits and burdens of an executory contract." *In re Kmart Corp.*, 290

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[5] The court in *Republic Technologies* found the bankruptcy case to be "complex" where the debtor was "party to at least 200 executory contracts." *Republic Technologies*, 267 B.R. at 554 n.2. Here, VarTec has *thousands* of executory contracts.

B.R. 614, 619 (Bankr. N.D. Ill. 2003); *see also In re Wheeling-Pittsburgh Steel Corp.*, 54 B.R. 385, 388 (Bankr. W.D. Pa. 1985). The Seventh Circuit expounded,

> Since a debtor is in limbo until confirmation of a plan, it is understandably difficult to commit itself to assuming or rejecting a contract much before the time for confirmation of a plan . . . This procedure insures that the debtor is not in the precarious position of having assumed a contract relying on confirmation of a particular plan, only to find the plan to have been rejected.

Moody v. Amoco Oil Co., 734 F.2d 1200, 1215 (7th Cir. 1984); *see also Skeen v. Denver Coca-Cola Bottling Co. (In re Feyline Presents, Inc.),* 81 B.R. 623, 626 (Bankr. D.Colo. 1988) ("It is the clear policy of the Bankruptcy Code that a debtor is to have a 'breathing space' following a filing of a petition, continuing until confirmation of the plan, in which to choose to assume or reject an executory contract.").

22. Denying a motion to compel the assumption or rejection of an executory contract, the *Kmart* court noted,

> Courts rarely force a debtor into assuming or rejecting a contract. *See* 734 F.2d at 1216 (to rush the debtor into what may be an improvident decision "to assume or reject an executory contract does not further the purposes of the reorganization provisions."). **The reason for the reluctance is that the "interests of the creditors collectively and the bankruptcy estate as a whole will not yield easily to the convenience or advantage of one creditor out of many."** *See In re Public Service Co. of New Hampshire*, 884 F.2d 11, 14-15 (1st Cir. 1989), *Wheeling-Pittsburgh*, 54 B.R. at 388, *see also In re Physician Health Corporation*, 262 B.R. 290 (D. Del. 2001) (denying motion compelling assumption or rejection of executory contract when bankruptcy case was only five months old) and *In re St. Mary Hosp.*, 89 B.R. 503, 513-14 (Bankr. E.D. Pa. 1988) **("the interests of the Debtor here in denying a precipitous assumption or rejection appear to us much greater than the interests of HHS in forcing a prompt resolution.").**

Kmart, 290 B.R. at 620 (emphasis added). Further, the *Kmart* court noted that "as a general proposition, it is unrealistic and imprudent to require [the Debtor] to make decisions on executory contracts in a vacuum on a piecemeal basis." *Id.*

23. The Carriers have shown no manifest injustice nor economic harm they will suffer if the Debtors have until confirmation to assume or reject the Agreements. The advantage to the Carriers of receiving cure payments, if any are owed, at the time of the sale should not trump the interests of the Debtors' creditors as a whole or of other counterparties to the thousands of executory contracts to which the Debtors are a party. The Debtors' non-payment of cure costs without an assumption and assignment does not create the economic harm or manifest injustice contemplated by the Fifth Circuit in *Braniff Airways*; to conclude that the existence of a prepetition claim that needs to be cured prior to assumption supports compelling a debtor to assume or reject an executory contract would render Bankruptcy Code § 365(d)(2) meaningless (as well as Bankruptcy Code § 365(b)(1)). *See In re Physician Health Corp.*, 262 B.R. 290, 294 (Bankr. D. Del. 2001)("[E]ven if the Debtors were in default of the [executory contract] pre-petition, it is not a legally cognizable reason to compel the Debtors to decide on an expedited basis whether to assume or reject that agreement."). If the Carriers' position is adopted, a debtor could be compelled to assume or reject almost all of its executory contracts prior to the confirmation of a plan, and debtors would not receive the breathing spell underlying Bankruptcy Code § 365(d)(2) to maximize value for its creditors. *See Republic Technologies*, 267 B.R. at 554 ("[T]he potential harm to [the counterparty to an equipment lease] in waiting for an assumption or rejection decision is no greater than to any other creditor who has negotiated a lease in this case.").

24. Moreover, if the cure amounts are at the levels the Carriers allege, then the Debtors are economically unable to satisfy the cure absent simultaneous assignment to the Buyer, which cannot occur prior to regulatory approvals. Accordingly,

the collective interests of the Debtors' creditors should not be compromised for the sole convenience or advantage of the Carriers, especially since the Carriers are not simply creditors, but direct competitors who would benefit from the Debtors' demise. The Carriers are well aware that the Debtors need certain of the Agreements to continue current operations, yet lack the ability to currently assume them. What better way to pressure a competitor such as the Debtors than by forcing such a decision now?

C. The Carrier Stipulation Provides for Postpetition Payment on Better Terms than the Agreements

25. Not only are the Carriers unable to show harm, their position has improved postpetition as the Carrier Stipulation provides for postpetition payment terms **superior** to their Agreements. Under the Carrier Stipulation, the Carriers are receiving adequate protection/assurance payments semi-monthly. Not surprisingly, the Carriers fail to mention these postpetition payments. Perhaps it is because the Carriers know that they agreed in the Carrier Stipulation that the payments they are receiving and will continue to be receiving under the Carrier Stipulation are "adequate assurance/adequate protection of future payments" and that the Carriers agreed that they would seek a modification of the adequate assurance payments only "in the event of a material adverse change in the liquidity of the Debtors or other material adverse change in the Debtors' circumstances *that would affect the Debtors' ability to make a Payment under this Stipulation*." (Carrier Stipulation, ¶ 17). The sale will not affect the Carrier Stipulation or the adequate protection/assurance payments, which will continue pending assumption or rejection. Thus, there is no harm – economic or otherwise – to the Carriers if assumption or rejection occurs in the future.

D. <u>The Debtors Cannot Assume or Reject the Agreements at this Time under the Business Judgment Test and Considering the Public's Interest</u>

26. In order to assume or reject an executory contract, Bankruptcy Code § 365(a) provides, "[T]he trustee, subject to the Court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). A debtor operating its business pursuant to Bankruptcy Code §§ 1107 and 1108 must use reasonable judgment in ordinary business matters in its determination of whether to assume or reject executory contracts.

1. Business Judgment Assumption Standards

27. Bankruptcy Code § 365(b)(1) further states:

> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

28. Bankruptcy Code § 365 does not provide a standard for determining when a debtor in possession can assume an executory contract. Courts have held that "the act of assumption must be grounded, at least in part, in the conclusion that maintenance of the contract is more beneficial to the estate than doing without the other party's services." *See MMR Holding Corp. v. C & C Consultants, Inc. (In re MMR Holding Corp.)*, 203 B.R. 605, 612 (Bankr. M.D. La. 1996).

29. To assess whether the unexpired agreement is beneficial to the estate, the debtor in possession must "take full account" of the cost incurred to cure the existing defaults. *See Century Indemnity Co. v. NGC Settlement Trust (In re National Gypsum Co.)*, 208 F.3d 498, 506 (5th Cir. 2000) (citing *Three Sisters Partners, L.L.C. v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843, 849 (4th Cir. 1999)).

2. Business Judgment Assumption Standards are Not Met

30. In order for the Debtors to assume the Agreements, they must be able to cure any defaults. The Debtors disagree with the Carriers alleged cure amounts and these are the subject of pending litigation. However, even if the Debtors use amounts that are one-half of what the Carriers allege, the Debtors do not have the cash flow to cure. Accordingly, the Debtors would be unable to assume the Agreements at the time of the Sale Hearing.

31. Once the Court approves an APA, the Debtors can begin seeking regulatory approval to consent to the change of control that gives the Debtors the ability to thereafter assign certain Agreements to the Buyer. Under the proposed APA, the Buyer would then be responsible to pay the cure amounts. Thus, the earliest time for the Debtors to assume the Agreements would be at the time the Debtors can simultaneously assign the Agreements to the Buyer, which is after regulatory approval.

32. Moreover, the number of Agreements is too large for the Debtors, or the Buyer, to evaluate within the timeframe the Carriers propose. The magnitude of the evaluation task is not evident from the Motions because the Carriers conveniently failed to list the specific Agreements they seek to compel the Debtors to assume or reject; rather the Carriers use only general category descriptions. According to the Debtors' records, there are over three thousand Agreements with the Carriers. The bulk of these

Agreements deal with the use of circuits. The Debtors and the Buyer will need to analyze the Debtors' network model to determine which circuits are necessary to service the Debtors' end-user customers and which can be rejected and the traffic routed to a more efficient channel. This process is labor intensive and will take time to effectuate, and simply cannot be done on the timetable suggested by the Carriers.

3. Business Judgment Rejection Standards

33. Bankruptcy Code § 365 does not provide a standard for determining when a debtor's rejection of an executory contract or unexpired lease is appropriate. *In re Monarch Tool & Manufacturing Co.*, 114 B.R. 134 (Bankr. S.D. Ohio 1990). However, most courts acknowledge that the business judgment standard should be applied to determine "whether to authorize the rejection of executory contracts and unexpired leases." *In re Federated Department Stores, Inc.*, 131 B.R. 808, 811 (Bankr. S.D. Ohio 1991) (citing, *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) and *Group of Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U.S. 523 (1943)). As one court stated, "[A] bankruptcy court . . . need determine only . . . whether disaffirmance would be advantageous to the debtor. The burden or hardship which rejection would impose on other parties to such a contract is not a factor to be weighed by the bankruptcy court in ruling upon the debtor's application." *Borman's, Inc. v. Allied Supermarkets, Inc.*, 706 F.2d 187, 189 (6th Cir.) (dicta), *cert. denied,* 464 U.S. 908 (1983). Therefore, the Debtors may reject any executory contract or unexpired lease provided that they determine, in their business judgment, that rejection would be advantageous to them.

4. The Business Judgment Rejection Standards Cannot Be Met Currently

34. If the Debtors attempted to reject the Agreements at the times urged by the Carriers, it would not be a proper exercise of business judgment. The Agreements are currently necessary for the continued operation of the Debtors' businesses pending any sale. Any rejection decision at this time would destroy the value of the Debtors' network and customer base. The Debtors have previously shown why assumption and cure is not presently an available option.

5. The Public's Interest also Supports Denying the Motions

35. The Debtors must conduct the administration of their estates in compliance with state and governmental regulations. *See* 28 U.S.C. § 959(b); *In re St. Mary Hospital*, 86 B.R. at 398 ("We believe that it is inescapable to avoid the conclusion that 28 U.S.C § 959(b) requires a debtor to conform with applicable federal, state, and local law in conducting its business."); *In re Mirant Corp.*, 378 F.3d 511, 523 (5th Cir. 2004) ("The Bankruptcy Code clearly anticipates ongoing governmental regulatory jurisdiction while a bankruptcy proceeding is pending.")(citations omitted); *In re Cajun Electric Power Coop., Inc.*, 185 F.3d 446, 453-54 (5th Cir. 1999) (noting that laws dealing with public safety and welfare will not be preempted by bankruptcy law).

36. The only feasible way for the Debtors to assume the Agreements is to do so when the Debtors can simultaneously assign the Agreements to the Buyer who can, and will, pay any necessary cure costs. The Debtors are not permitted to change control and assign the regulated Agreements to a third party absent consent by the appropriate state and federal governmental agencies, and the Debtors cannot reject the Agreements at the time of the sale because the Debtors' end-user customers would be

left without service in violation of notice requirements under federal laws. Either assumption or rejection as sought in the Motions would cause the Debtors to violate federal non-bankruptcy law. Such a result is not in sync with the public's interest nor in compliance with federal and/or state regulatory law.

E. <u>The Carriers Offer No Relevant Support for their Position</u>

1. *Travelot* Does Not Apply Nor Support the Carriers' Position

37. Certain Carriers incorrectly cite *Travelot* to support the general proposition that when a Debtor has information sufficient to determine whether to assume or reject an executory contract, then compelling assumption or rejection is appropriate. *In re Travelot Company*, 286 B.R. 462, 464 (Bankr. S.D. Ga. 2001). (Verizon Motion, p. 8; BellSouth Motion, pp. 5-6). *Travelot* involved a debtor whose "sole meaningful asset" was a **single** executory contract under which the debtor had failed to make *any* postpetition or prepetition payments to the counterparty. 286 B.R. at 464. The *Travelot* court even distinguished the debtor's situation from other chapter 11 debtors who were called upon to make decisions between multiple leases or executory contracts to assume or reject as part of a larger comprehensive plan. *See id.* at 468. In *Travelot*, the debtor had not paid the counterparty $250,000 owed postpetition and $750,000 owed prepetition. *Id.* at 464. Further, the debtor's estate had "minimal funds" in its bank account estimated at less than $100 and had taken no visible steps to raise capital of $1 million to pay the cure under the executory contract. *Id.* at 469.

38. The facts under the *Travelot* case are nothing like those at bar. The Debtors have **thousands** of Agreements with the Carriers and continue to make postpetition payments for services rendered under the Agreements. Further, the Debtors have the pending sale which would require the Buyer to pay the allowed cure

costs under any assumed and assigned Agreements if regulatory approval is accomplished. These are large, complex estates. The Debtors have a plan in place to deal with the rejection or assumption of the thousands of Agreements at a later date; now is not the time.

39. Even if the caselaw somehow supported the absurd standard set forth by Verizon, its application here would bring an inappropriate conclusion. The Carriers' bold assumption that the Debtors currently know which Agreements they need to assume or reject is a fallacy because there are thousands of Agreements with the Carriers, no such determination has been made to date, and for the Debtors to make such a determination now would ignore the realities of the pending sale. (Verizon 3; BellSouth 6). The Debtors cannot make critical decisions regarding the structure of their network prior to a Buyer doing a detailed evaluation of the network and its own business strategy once regulatory approval is accomplished.

2. The Carriers Cannot Show Economic Harm

40. The Carriers claim they will be economically harmed if the Agreements are not assumed or rejected at or near the Sale Hearing. However, not a single Carrier states how they will be harmed. Rather, the Carriers argue that a third party would benefit from the Agreements without them being assumed and assigned; this is not the standard. There is no harm because the Carriers are receiving payments postpetition under the Carrier Stipulation on better terms than their Agreements. Pending regulatory approval and Final Closing, the Debtors continue to enjoy the benefits of the Agreements and to pay for same.

3. The Bankruptcy Code Does Not Support an "Election" Requirement

41. Verizon asks the Court to invent some sort of "election" requirement for the Debtors or the Buyer, to be exercised at the time of the sale, as to which Agreements they will assume and assign in the future. (Verizon Motion, pp. 3, 8, 11). Verizon cites no authority in the Bankruptcy Code for such a proposition. Verizon knows the Agreements cannot be assumed and assigned to a third party absent regulatory approval, yet in an effort to force any potential Buyer into agreeing to cure costs as a condition of the sale, Verizon asserts that it has a right to compel the Debtors or Buyer to elect to assume or reject the Agreements prior to the regulatory approval.

42. Even if the Court decided to consider this "election" approach, Verizon does not show what this would achieve, other than to apply unnecessary pressure on the sale process. Regardless, the Debtors currently do not have the knowledge to decide or "elect" which Agreements to assume or reject and no creditor constituency other than the Carriers stands to benefit from such an approach.

4. The Debtors Meet the Standards for Denying a Motion to Compel Set Forth by Qwest

43. Ironically, the standards set forth in the Qwest Motion to determine whether to compel assumption or rejection support denying the requested relief. (Qwest Motion, pp. 4-5 (citing *In re Adelphia Communications Corp.*, 291 B.R. 283, 292-93 (Bankr. S.D.N.Y. 2003)). Factors such as the importance of the contract to the debtor's business and debtor's ability to satisfy postpetition obligations both weigh in favor of denying the Motions. In the Motions, certain Carriers acknowledge the current importance of the Agreements to the Debtors' business operations. (Qwest Motion, p. 6; Verizon Motion, p. 2; BellSouth Motion, p. 2). Further, the postpetition obligations

under the Agreements have been and continue to be satisfied under the Carrier Stipulation.

44. The last factor that Qwest sets forth states, "'above all,' the purpose of Chapter 11, to permit successful rehabilitation of the debtors." (Qwest Motion, p. 5 (citing and quoting *Adelphia*, 291 B.R. at 292-93)). This factor goes to the heart of the reason the Motions should be denied. If the Debtors are forced to assume or reject the Agreements at the time of the sale, then the sale likely will be compromised as will the value the Debtors have worked so hard to get out of their remaining assets. Further, the Debtors may be saddled with large administrative claims if they have to assume Agreements to survive (if assumption is even a viable option given the alleged cure claims). Otherwise, rejection will result in a great loss of value to the Debtors and any hopes of a confirmable plan of reorganization.

F. <u>Assumption, Assignment and Cure Cost Issues are Preserved as Are the Rights of the Carriers</u>

45. The assumption and assignment decision for executory contracts and unexpired leases as well as the associated cure costs are being properly preserved for the Court's later determination under Bankruptcy Code § 365. As part of the sale, the Debtors seek to grant the Buyer the right to designate which executory contracts and unexpired leases the Buyer wishes to have assigned to it. (APA § 5.11(c)). Under the APA, the Buyer will notify the Debtors of the contracts it wants, then the Debtors will file a motion pursuant to Bankruptcy Code § 365 for approval of such assumption and assignment. (APA § 5.11(c)). When the Debtors assign an Agreement to the Buyer, the Buyer has the responsibility of paying the cure costs. (APA § 5.11(c)). Those Agreements not assumed by the Buyer pursuant to Bankruptcy Code § 365 will be

rejected by the Debtors, if such rejection is a proper exercise of the Debtors' business judgment.

G. **The Debtors Can Sell Designation Rights**

46. Other courts have recognized a debtor's ability to grant and sell designation rights. *See e.g., In re Ames Department Stores, Inc.*, 287 B.R. 112, 115 (Bankr. S.D.N.Y. 2002); *Weingarten Nostat, Inc. v. Service Merchandise Co., Inc. (In re Service Merchandise Co., Inc.)*, 396 F.3d 737, 742-43 (6th Cir. 2005) (dealing with the issue of mootness under § 363(m) as applied to a designation agreement); *In re G Survivor Corp.,* 171 B.R. 755 (Bankr. S.D.N.Y. 1994).

47. Reviewing a situation in which the debtor sought to sell designation rights with respect to real property leases, the *Ames* court recognized that designation rights are property of the debtor's estate that can be sold. 287 B.R. at 118-25. The *Ames* court held that such designation did not vest the debtor's power in a non-fiduciary because the debtor retained its power under § 365 to assume and/or assign the agreements. *Id.* at 125-26. Similar to the case at bar, the Debtors are also retaining their power under § 365.

48. The *Ames* court correctly held, "Committing an estate to an immediate sale and immediate assignment of a lease, on the one hand, or to an immediate sale and possible future assignment, on the other, are differences only in the mechanics, and are simply examples of the nearly infinite ways by which a transaction can be structured if it otherwise makes business sense and involves a proper exercise of business judgment." *Id.* at 126. This statement rings true in the case at bar. The Debtors are using their business judgment in creating a flexible sale structure with designation rights to maximize value for the creditors of their estates. Like *Ames,* the

power to assume and assign the agreements pursuant to Bankruptcy Code § 365 rests with the Debtors.

49. In opposition, Verizon cites two cases, both of which are distinguishable. (Verizon Motion, pp. 10-13). In *In re Antwerp Diamond, Inc.*, 138 B.R. 865, 867 (Bankr. N.D. Ohio 1992), the issue was the debtor's attempt to use the lease premises to facilitate going-out-of-business sales for the purchaser of inventory that was not even being stored on the lease premises. The court's concern was the ability of the debtor to permit the purchaser to use the lease in violation of its terms, with the debtor's clear stated intention to reject the lease upon the completion of the purchaser's sale of the inventory. *Id.* at 867-68. The simplified description of *Antwerp* set forth by Verizon does not accurately capture this main issue. The Debtors harbor no such intention in this case. The Debtors are current on their postpetition obligations under the Agreements and have the Carrier Stipulation in place to insure ongoing protection to the Carriers. The Debtors seek to continue to use their own executory contracts and unexpired leases in accordance with their terms in order to conduct their own business. And, the stated objective of the Buyer is and has been to reach agreement for the assumption of those executory contracts and unexpired leases in the future which are of value to the ongoing business.

50. Verizon also cites an unpublished order, *In re Omniplex Communications Group, LLC*, Case No. 01-42079-399 (Bankr. E.D. Mo. 2001). (Verizon Motion, pp. 10-11). *Omniplex* is of no precedential or persuasive value and is a much different situation than here. In *Omniplex*, the debtor executed a purchase agreement with a purchaser under which certain agreements to be assumed and assigned to the

purchaser. (Verizon Motion, Exhibit B ¶ 16). There were no designation rights granted to the purchaser. The remaining agreements, including one with Verizon, would not be assumed and assigned to the purchaser, but rather would be rejected by the debtor pursuant to a liquidating plan. (Verizon Motion, Exhibit B ¶ 20). However, the Verizon agreement in *Omniplex* would not be rejected until after the termination of a service agreement with the purchaser under which the debtor sought to transition its customers to the interconnection agreements of the purchaser. (Verizon Motion, Exhibit B ¶ 17). The purchase agreement and services agreement in *Omniplex* is much different than the APA and Management Services Agreement because the present situation requires the Debtors to retain all control prior to regulatory approval, leaves the Agreements open for assumption and assignment to the Buyer, and does **not** set forth any executory contracts or personal property leases to be rejected. Accordingly, *Omniplex* does not bear the weight that Verizon asks this Court to place on it.

H. Under Applicable Federal and State Law, Assignment of Key Executory Contracts and Leases Cannot Occur Pending Regulatory Approval

51. The Debtors must obtain regulatory approval prior to the assignment of the Non-Transferred Assets portion of the Acquired Assets (as those terms are defined in the APA).[6] *See* 11 U.S.C. § 363(f); *see also, e.g., In re Southeast Community Media, Inc.*, 27 B.R. 834, 838 (E.D. Tenn. 1983) (explaining a purchase agreement where the transfer of assets and the assignment of agreements does not occur until after the FCC approves a radio license transfer); 28 U.S.C. § 959(b); *In re St. Mary Hospital*, 86 B.R.

[6] While not specifically enumerated herein, the public utility or service commissions of various states (the "PUCs") have similar transfer and change in control provisions as the Federal Communication Commission ("FCC") and thus the Debtors must seek PUC approval for the transaction contemplated in the APA.

at 398; *In re Mirant Corp.*, 378 F.3d at 523; *In re Cajun Electric Power Coop., Inc.*, 185 F.3d at 453-54. The Carriers know this well.

52. The FCC and the PUCs do not permit the transfer of control, without prior approval, of businesses subject to their jurisdiction that provide telecommunications common carrier services. *See generally* 47 U.S.C. § 214; 47 C.F.R. §§ 63.04, 63.24. Accordingly, approval must be sought and such approval by the FCC and the PUCs will take time after any sale contemplated by the APA is approved by the Court.

53. The Carriers allege the Debtors are transferring control to the Buyer because of a provision in the APA which transfers the risk of loss to the Buyer on the Early Funding Date (as defined in the APA) for certain assets. (Verizon Motion, p. 9; Qwest Motion, p. 3; BellSouth Motion, p. 2; Valor Motion, p. 2). The provision which the Carriers take issue with is Section 2.15 of the APA which currently provides:

> **Early Funding Date.** No later than the second Business Day after the conditions set forth in Section 6.1, Section 6.2 and Section 6.3 have been satisfied or waived, or at such other later date and time upon which Buyer and Parent may mutually agree in writing (the "Early Funding Date") (i) Buyer shall deliver in immediately payable funds an amount equal to the Purchase Price (or, in the event the Working Capital Adjustment has not been finally determined under Section 2.16, the Estimated Purchase Price) minus the Deposit Escrow Amount to an escrow account (the "Purchase Price Escrow Amount") pursuant to the Escrow Agreement, (ii) Sellers and Buyer shall execute and deliver the Closing Documents and the executed Closing Documents shall be delivered to the Escrow Agent, (iii) all risk of loss, damage, impairment, confiscation or condemnation of the Acquired Assets shall transfer to Buyer.

While the Carriers are absolutely correct that the risk of loss of all "Acquired Assets" (including the "Non-Transferred Assets," the ownership and control of which are not transferred until regulatory approvals are obtained) transfers to the Buyer on the "Early Funding Date," their conclusion that the legal significance of this fact is that the

ownership and control of the Acquired Assets are necessarily transferred as well is simply wrong. While the shifting of the risk of loss may be an indicia of ownership or control, it is not determinative. Rather, under the Uniform Commercial Code, the parties to a sale may, by agreement, allocate the risk of loss in whatever manner they so choose, which would include allocating the risk of loss to the buyer before the actual transfer of ownership and control of the object of the sale. *See, e.g.,* Tex. Bus. & Comm. Code Ann. § 2.203 ("Where this chapter ["Sales"] allocates a risk or a burden as between the parties 'unless otherwise agreed', the agreement may not only shift the allocation but may also divide the risk or burden."). Here, the Debtors and the Buyer agreed in the APA that ownership and control of the "Non-Transferred Assets" – those assets the transfer of which requires regulatory approval – will not occur until the requisite regulatory approvals are obtained. They also agreed, however, to allocate the risk of loss with respect to *all* assets, including "Non-Transferred Assets," on the Buyer as of the Early Funding Date. This provision protects the Debtors in the event that there is a diminution of value, for whatever reason, of the "Acquired Assets" between the Early Funding Date and the Final Closing Date. If the "risk of loss" provision is removed from the APA, the Debtors will lose a valuable right that was negotiated for the benefit of the estate and its creditors.

I. The Management Services Agreement Does Not and Cannot Give the Buyer *De Facto* Control

54. While the issue of control is irrelevant to a motion to compel, out of abundance of caution, this subject will be addressed. The Management Services Agreement as defined by the APA does not and cannot transfer any form of control to the Buyer. This prohibition of the transfer of control prior to FCC approval extends to

both *de jure* transfers of control as well as *de facto* transfers of control. *See Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8513 (1995) ("As used in the Communications Act, control means every form of control, actual or legal, direct or indirect, negative or affirmative. We thus examine two types of control: *de jure* (control as a matter of law) and *de facto* (actual control of the licensee).") (internal quotes and citations omitted) (citing *Metromedia, Inc.*, 98 FCC 2d 300, 306 (1984); *WWIZ, Inc.*, 36 FCC 561, 579 (1954)). Thus, even where a *de jure* transfer has not taken place, it is still possible that, by ceding certain types of authority to a potential buyer over the operations of its business, a seller/licensee could be deemed by a regulatory agency to have engaged in an unauthorized *de facto* transfer of control.

55. When issues of *de facto* transfers of control arise, **the FCC examines the facts of each case**. In doing so, **the FCC** applies the criteria set forth in the case of *Intermountain Microwave*, 12 FCC 2d 559 (1963). In that case, **the FCC** held that its licensees must "at all times retain exclusive responsibility for the operation and control of the facilities" used to provide common carrier services. *Id.* at 560. **According to the FCC**, the "normal minimum incidents" of such control include the following:

> [U]nfettered use of all facilities and equipment used in connection therewith; day to day operation and control; determination of and the carrying out of policy decisions, including the preparation and filing of applications with this Commission; employment, supervision, and dismissal of personnel; payment of financial obligations including expenses arising out of operation; and the receipt of moneys and profits derived from the operation of the . . . facilities.

Id.

Therefore, under **the FCC's** *Intermountain* criteria, it is *essential* that the Debtors continue to be responsible for the payment of all financial obligations and that they receive all monies and profits from the operation of their business until the necessary

regulatory approvals for the sale are received. The *Intermountain* precedent is an important reason why the Debtors will not transfer their necessary working capital, operating assets (including the Carriers' Agreements) and facilities until regulatory approvals are obtained and the Final Closing (as defined by the APA) is consummated. The assignment of the Agreements to the Buyer would implicate a number of the *Intermountain* criteria, including authority over the payment and collection of monies related to the business.

56. Additionally, the sale obligates the Buyer to provide the Debtors with certain services under the Management Services Agreement (subject to the Debtors maintaining ultimate control over the business) prior to the receipt of regulatory approvals and the Final Closing Date (as defined by the APA). The only benefit the Buyer gets from the Management Service Agreement is a management fee. In this capacity, the Buyer is an independent contractor providing professional services akin to the role played by Alvarez & Marsal.

57. The Agreements will not be assigned to the Buyer during this interim period when the Management Services Agreement is in place. The assignment of the Agreements to the Buyer would result in the transfer of responsibility for the payment and collection of monies to the assignee. Thus, if the Debtors were to assign any agreements that are essential to the operation of its business to the Buyer prior to obtaining regulatory approvals, they would cede to the Buyer the Debtors' authority over the payment and collection of monies relating to the business – an important indicia of *de facto* control under *Intermountain*. Such an assignment would be a clear violation of *Intermountain* and thus cannot be accomplished prior to the receipt of regulatory

approvals, despite certain Carriers requesting that the Court compel such a result now. (Qwest Motion, p. 3; Valor Motion, pp. 3-4).

J. Regulatory Effects of the Management Services Agreement are Properly Preserved for the FCC

58. The Carriers seek to thrust the issue of whether or not the Management Services Agreement creates *de facto* control by the Buyer onto this Court. This is better assessed by the FCC, if it ever becomes an issue during the FCC's normal course of its review. As discussed above, there is no change in control under the Management Services Agreement, and this Court should not be asked to nor should it, render a decision regarding regulatory considerations of the Management Services Agreement. *See In re StarNet, Inc.*, 355 F.3d 634, 639 (7th Cir. 2004). The *StarNet* court explained, "'The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the "conventional experience of judges" or "falling within the realm of administrative discretion" to an administrative agency with more specialized experience, expertise, and insight.'" *Id.* (quoting *National Communications Association, Inc. v. AT&T Co.*, 46 F.3d 220, 222-23 (2d Cir. 1995)). The *StarNet* court held the bankruptcy court should have referred the issue regarding the meaning of a term under the federal Telecommunications Act of 1996 to the FCC. 355 F.3d at 639.

59. Here, this Court need not refer the issue of *de facto* control to the FCC pursuant to the doctrine of primary jurisdiction because the answer to this issue will have **no impact** on the Motions before this Court. Under the APA, the Debtors must seek FCC and PUCs' approval of the transaction and, therefore, all transfer issues will already be before the FCC and the PUCs. The FCC will review the transaction to authorize a change in control from the Debtors to the Buyer, including the impact of the

Management Services Agreement. Moreover, it would be duplicative for this Court to make a finding on whether *de facto* control exists because the issue is preserved for the FCC to determine in conducting its analysis under *Intermountain*, 12 FCC 2d at 560, when reviewing the transaction. Simply, this Court is not the proper place to litigate the regulatory impact of the Management Services Agreement because the issues of *de facto* control, if raised, will be determined by the FCC.

K. Valor is Not Entitled to a Ruling on the Nature of a Future Claim

60. There is no basis under the Bankruptcy Code to seek a ruling on the priority of a future, speculative and contingent claim. Notably, Valor sets forth amounts the Debtors allegedly owe as of the Petition Date, but fail to mention any amount the Debtors have outstanding postpetition. (Valor Motion, p. 4). The postpetition expense that Valor claims should be an administrative expense has not occurred and no postpetition amounts are alleged outstanding. (Valor Motion, pp. 4-5). At this point in time, there is no way for Valor to prove a future expense is "actual" let alone "necessary" and made to preserve the Debtors' estates as required elements under the Bankruptcy Code to establish an administrative expense claim. 11 U.S.C. § 503(b)(1)(A). Accordingly, Valor's alleged future administrative expense claim is not ripe for adjudication.

61. The caselaw set forth by Valor regarding administrative expense claims deals with a situation where a postpetition service was rendered and an amount was allegedly outstanding to the counterparty. (Valor Motion, pp. 4-5). In *In re Continental Airlines, Inc.*, 146 B.R. 520, 525-26 (Bankr. D. Del. 1992), an aircraft lessor whose unexpired lease was rejected filed a claim for unpaid rent for the debtor's use of the aircraft through the date of rejection including alleged damages to the leased aircraft.

Unlike the situation at bar, the use of the aircraft had already occurred at the time the motion was filed. *Id.* In the next case *NLRB v. Bildisco and Bildisco*, 465 U.S. 513 (1984), the issue of determining an administrative expense was not before the Supreme Court, but rather dicta. However, the Supreme Court did note that "expenses and liabilities **incurred** may be treated as administrative expenses". *Id.* at 532 (emphasis added). None of these cases address allowing administrative priority for a future expense.

V. Conclusion

62. The Carriers fail to satisfy the criteria to compel the Debtors to assume or reject their respective Agreements. First, the Motions do not list each Carriers' Agreements for which the Carriers seek to compel assumption or rejection. As there are over three thousand Agreements between the Carriers and certain Debtors, the determination of which Agreements are to be assumed or rejected is no small task.

63. Since the Carriers have not identified the specific Agreements for which they seek immediate assumption or rejection, they have also not identified with particularity any specific harm they allegedly are suffering under each Agreement. In fact, the Carriers have greater protections postpetition than they do under the terms of their own Agreements, as under the Carrier Stipulation, the Carriers are generally paid in advance, semi-monthly on a postpetition basis. Accordingly, the Carriers have not met their burden to move this Court to compel assumption or rejection of the Agreements and the Motions should be denied.

VI. PRAYER

For the foregoing reasons, the Debtors respectfully request that the Court enter an Order denying the Carriers' Motions.

Dated: July 25, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on July 25, 2005, a copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Texas. A separate certificate of service shall be filed with respect to those parties on the Clerk's list who do not receive electronic e-mail service.

/s/ *Holly J. Warrington*
One of Counsel

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