Joseph M. Coleman
State Bar No. 04566100
Joseph A. Friedman
State Bar No. 07468280
Michael L. Scanlon
State Bar No. 17707500
KANE, RUSSELL, COLEMAN & LOGAN, P.C.
3700 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-7207
Telephone: (214) 777-4200
Telecopy: (214) 777-0049

SPECIAL COUNSEL TO THE DEBTORS

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

In re:	§	Case No. 04-81694-SAF-11
	§	(Jointly Administered)
VARTEC TELECOM, INC., et al.,	§	
	§	
Debtors.	§	

DEBTORS' REPLY TO RESPONSE OF THE SBC TELCOS TO DEBTORS' MOTION FOR AUTHORITY TO SELL ASSETS FREE AND CLEAR OF ALL LIENS, ETC.

[RELATES TO DOCKET NO. 1560]

Debtors and debtors in possession (collectively, the "Debtors") file this Reply to Response of the SBC Telcos to Debtors' Motion for Authority to Sell Assets Free and Clear of All Liens, etc. (the "Reply"), and would show as follows:

Procedural Background

1. 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 "Motion to Sell").

2. On or about July 20, 2005, the SBC telephone companies (hereafter, the "SBC Telcos" or "SBC") and others filed the Response of the SBC Telcos, Verizon, MCI, Qwest, BellSouth, and Time Warner Telecom to Debtors' 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. 1560] (the "Response").

3. A hearing concerning the Motion to Sell is scheduled for July 27, 2005 at 9:00 a.m.

Summary of Response to Objection

4. SBC has attacked the proposed sale on numerous grounds. The Debtors' responses to these arguments may be summarized as follows:

a. The proposed sale does not constitute a *sub rosa* plan.

b. The proposed sale is not a *de facto* assumption and assignment of executory contracts that circumvents the requirements of Section 365 of the Bankruptcy Code.

c. The sale of designation rights under the Motion to Sell is a permissible framework or mechanism as part of an asset sale.

d. The proposed sale is not a *de facto* transfer of control of the Debtors.

e. The asset purchase agreement ("APA") clearly addresses risk of loss. Further, the Debtors have an opportunity for profit if the "Final Closing"[1] does not occur.

Discussion and Analysis

The Sale Motion Is Not a Sub Rosa Plan

5. In the Response, the SBC Telcos assert that the Motion to Sell is an improper plan *sub rosa* that deprives them of the Bankruptcy Code protections that must accompany plans of reorganization, and accordingly, the Motion to Sell should not be approved. SBC relies heavily on the Fifth Circuit's decision in *Pension Benefit Guaranty Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935 (5th Cir. 1983) to support this conclusion. The SBC Telcos' reliance on *Braniff* and other cases cited is misplaced. First, the SBC Telcos inaccurately characterize the current state of the law concerning Section 363(b) sales. Second, they overstate

[1] Capitalized terms that are not defined in this Reply shall have the meanings specified in the Motion to Sell.

the impact of *Braniff* on Section 363(b) sales. Third, the SBC Telcos incorrectly apply the holding in *Braniff* to the facts of this case.

6. The SBC Telcos inaccurately characterize the state of the law concerning asset sales under Section 363(b) of the Bankruptcy Code. They state that it is an open question in this circuit whether a sale of assets outside the context of a plan of reorganization "ever could be legally permissible." Response at ¶ 21. Even if this statement is true as a matter of precedent, it is certainly *not* true as a matter of fact or practice. *Collier* neatly summarizes the state of the law:

> There has been disagreement historically on the issue of whether and under what circumstances a chapter 11 debtor may sell substantial assets under section 363. *It is now generally accepted that section 363 allows such sales in chapter 11, provided, however, that the sale proponent demonstrates a good, sound business justification for conducting the sale prior to confirmation* (other than appeasement of the loudest creditor), that there has been adequate and reasonable notice of the sale, that the sale has been proposed in good faith, and that the purchase price is fair and reasonable. These factors are considered to assure that the interests of all parties in interest are protected and that the sale is not for an illegitimate purpose.

Alan J. Resnick & Harry J. Somer, 3 *Collier on Bankruptcy* ¶ 363.02[4] at 363-20 (15th ed. rev. 2005)(emphasis added); *see In re Condere Corp.*, 228 B.R. 615, 626 (Bankr. S.D. Miss. 1998) (case quotes almost all of this same passage from *Collier* in its review and discussion of a debtor's motion to sell all assets outside the ordinary course of business). The Fifth Circuit recognized the primary importance of "business justification" in connection with the use, sale or lease of property outside the ordinary course in *Institutional Creditors of Continental Air Lines v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.*), 780 F.2d 1223 (5th Cir. 1986). *See In re Condere Corp.*, 228 B.R. at 628 (explaining that with its discussion of the business justification issue in *Continental*, the Fifth Circuit "expanded" on the holding in *Braniff*).

7. Not only do the SBC Telcos inaccurately characterize the current state of the law concerning Section 363(b) sales, they overstate the impact of ***Braniff*** on Section 363(b) sales. Recall that in the ***Braniff*** case, Braniff Airways, Inc. ("Braniff"), a debtor in possession, sought authority to sell certain assets to Pacific Southwest Airlines, Inc. ("PSA") and to compromise and settle "all claims, counterclaims, and potential litigations by and among Braniff, certain unsecured creditors, and certain secured creditors." *In re Braniff Airways, Inc.*, 700 F.2d at 938. The bankruptcy court approved both transactions in a ruling that was affirmed by the district court. *Id.* at 939.

8. In reversing the district court, the Fifth Circuit held:

> Reduced to its barest bones, the PSA transaction would provide for Braniff's transfer of cash, airplanes and equipment, terminal leases and landing slots to PSA in return for travel scrip, unsecured notes, and a profit participation in PSA's proposed operation. The PSA transaction would also require significant restructuring of the rights of Braniff creditors.

Id. In particular, three elements illustrated that the transaction went beyond a use, sale or lease of property authorized under Section 363(b) of the Bankruptcy Code. Specifically, the proposed transaction dictated (a) some of the terms of a future plan; (b) the secured creditor's vote on a subsequent plan; and (c) the release of claims against Braniff by all parties. *Id.* at 939-40.

9. ***Braniff*** does not deprive a debtor of the ability to sell substantially all of its assets under Section 363(b). To the contrary, its holding is quite narrow. The ***Braniff*** court clearly stated:

> Since *certain portions* of the transactions are clearly outside the scope of § 363, the district court was without power under that section to approve it.

Id. at 939 (emphasis added). As noted above, however, the troublesome aspects related to dictating terms of a future plan, affecting plan voting, and granting releases.

10. *Braniff* provides a demarcation line that shows what a sale of assets *cannot* include. In turn, the cases are clear that dispositions of property that do not include the objectionable attributes identified in *Braniff* are allowed. *See, e.g., Official Committee of Unsecured Creditors v. Cajun Electric Power Coop., Inc. (In re Cajun Electric Power Coop., Inc.)*, 119 F.3d 349, 355 (5th Cir. 1997)(the three *Braniff* characteristics were analyzed, and court found that the "instant settlement is not a *sub rosa* reorganization of the type disapproved in *Braniff*"); *In re Victoria Alloys, Inc.*, 261 B.R. 918, 921 (based on the absence of the three elements identified in *Braniff*, the court "found "no similarity between the *sub rosa* plan in *Braniff* and the proposed compromise at issue here"); *In re Condere Corp.*, 228 B.R. at 627 (proposed sale of all assets lacked *Braniff* attributes, and was approved).

11. In this case, none of the problematic elements identified in *Braniff* are present in the Motion to Sell. The Motion to Sell will not have the effect of dictating or pre-determining terms of a proposed plan. It will not determine in advance how creditors must vote on a plan. Finally, the Motion to Sell does not provide for the release of creditor claims. *See In re Braniff Airways, Inc.*, 700 F.2d at 939-40; *see also In re Cajun Electric Power Coop., Inc.*, 119 F.3d at 354-55.

12. Even though the Motion to Sell does not include any of the elements that were disapproved of in *Braniff*, the SBC Telcos incorrectly apply the holding in *Braniff* to the facts of this case. In paragraph 29 of the Response, they identify "features" of the proposed transaction that allegedly fall outside a permissible motion to sell. None of these features violate the principles of *Braniff*, and some of these features have nothing to do with *Braniff*-type issues. For example, while the SBC Telcos complain about a delay concerning the assumption or rejection of executory contracts and a closing date, the Bankruptcy Code allows the assumption/rejection

decision to wait at least until the time of plan confirmation. Further, the timing of Final Closing is not a *Braniff* issue, and such a provision is permissible given the wide discretion which debtors in possession have in structuring asset sales.

13. The SBC Telcos complain about the disposition of litigation and avoidance actions; however, it is entirely appropriate for a sale of substantially all assets to address the disposition of such assets. These features raise no *Braniff* issues. Nor does the management of the Debtors under the Management Services Agreement ("MSA"). Finally, the conditional disposition of sale proceeds to the RTFC is made subject to lien-avoidance claims. This is completely consistent with the requirements of the Bankruptcy Code. In short, notwithstanding the SBC Telcos' protests to the contrary, the Motion to Sell does not raise *Braniff* issues, and it does not constitute a *sub rosa* plan.

The Proposed Sale Is Not a De Facto Assumption and Assignment of Executory Contracts That Circumvents the Requirements of Section 365 of the Bankruptcy Code

14. The SBC Telcos, for a multitude of ill-founded reasons, object to the sale without the assumption (and assignment to the purchaser) or rejection of the executory contracts between themselves and the Debtors. The foundation of these arguments is that the sale will confer to the purchaser the benefits of executory contracts without meeting the Bankruptcy Code requirements of assumption including the payment of cure amounts. The objections to the sale, in this regard, should be overruled because: (i) the SBC Telcos have already stipulated that their interests are adequately protected under the terms of the Stipulation and Consent Order By and Among Certain Carriers and the Debtors Regarding Adequate Assurance/Adequate Protection of Future Payments (the "Carrier Stipulation") entered by this Court on or about December 2, 2004 [Docket No. 451]; (ii) the Debtors will continue to operate their business, perform under the executory contracts, and pay for postpetition services provided by the SBC Telcos to the Debtors

under various contracts with the SBC Telcos until regulatory approvals are secured to assume, assign, or reject such contracts; and (iii) it is impossible to assume and assign the contracts to the purchaser of the Debtors' assets until necessary regulatory approvals (to assume and assign the contracts in question) are obtained. As such, the Debtors' need to delay the decision to assume or reject in order to complete the regulatory process is neither prejudicial nor inequitable, but legally mandated.

15. The Bankruptcy Code provides that, with the exception of non-residential real property leases, a debtor in possession shall have until confirmation of the plan to assume or reject executory contracts or unexpired leases. 11 U.S.C. § 365(d)(2). "Permitting the debtor to make 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 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 clear policy of the Bankruptcy Code is to provide a debtor with breathing space following the filing of a bankruptcy petition, continuing until confirmation of the plan within which to assume or reject executory contracts. *In re Enron Corp.*, 279 B.R. 695, 702 (Bankr. S.D.N.Y. 2002).

16. The Debtors are not *effectively* assigning the contracts to the purchaser. Likewise, the Debtors are not assigning tariffs in contravention of their terms or the Filed-Rate Doctrine. These statements are true for the simple reason that the Debtors are not assigning any contracts at this time.

17. The APA bifurcates the purchase transaction between the transfer of assets for which regulatory approvals are required and the transfer of assets for which it is not.[2] The

[2] The term "Non-Transferred Assets" is defined as those assets which require regulatory approval to be transferred to the buyer. *See* APA at § 2.4.

Debtors believe that the assignment of their rights under executory contracts requires regulatory approvals as well as approval under Section 365. As such, the Debtors ask the Court pursuant to 11 U.S.C. § 363 to approve the sale of Non-Transferred Assets conditioned upon the Debtors obtaining regulatory approvals. The Debtors are deferring the assumption and assignment of executory contracts under Section 365. Thus, in the first instance, none of the SBC Telcos' rights under Section 365 are implicated or affected by the sale, but instead, these issues are reserved for a later date.

18. The SBC Telcos' reliance on *In re Antwerp Diamond, Inc.,* 138 B.R. 865 (Bankr. N.D. Ohio 1992) is both questionable[3] and misplaced. In the first instance, the reliance is questionable because the Debtors are unable to find that any other court has published an opinion citing, much less following, *Antwerp Diamond* since its publication over thirteen years ago. To the contrary, so many courts, including numerous courts in this district, have approved the type of transaction questioned by *Antwerp Diamond* that the phrase "GOB/Store Closing Sale" is part of the lexicon of modern bankruptcy practice.

19. Second, the reliance is misplaced because the Debtors' cases are factually distinguishable. In *Antwerp Diamond*, the debtor had closed its operations and removed the inventory from the store locations in question. Before the court was the debtors' motion to sell the assets and to permit the purchaser to re-open at the locations in question to sell the acquired inventory. The court noted

> It is of particular significance to note that since the Debtors' voluntarily ceased operations shortly after the petition filings, there was no recommencement of business operations by the Debtors.

In re Antwerp Diamond, Inc., 138 B.R. at 866.

[3] Likewise, the unpublished order of the United States Bankruptcy Court for the Eastern District of Missouri in *In re Omniplex Communications Group, LLC,* is, at best, questionable precedent. Accordingly, the SBC Telcos' reliance on the order is misplaced.

20. The court also noted that there was no intent to ever assume the real property leases in question. *Id.* Finally, the court's reasoning showed special concern over the particular protections Congress added to the Bankruptcy Code with the 1984 amendments regarding shopping center leases, such as 11 U. S.C. §365(b)(3)(C). *Id.* at 867.

21. This is not the case before the Court. First, the Debtors have continued to operate their business and intend to continue to operate their regulated business until the necessary regulatory approvals for a transfer of the Non-Transferred Assets can be secured. Second, other than conjecture by the SBC Telcos, there is no evidence that the Debtors intend to reject all of the executory contracts in question. The fact that the Debtors have not yet made that decision is evidence of nothing more than that fact alone. Finally, the executory contracts in question are not non-residential real property leases. Accordingly, to the extent that the *Antwerp Diamond* court's special concern about the Bankruptcy Code's treatment of that type of contract was valid, it is of no consequence in this case.

22. The SBC Telcos now contend that because all of the SBC Telcos' executory contracts are allegedly essential to the Debtors' business, no further analysis or time is necessary for the Debtors to decide whether to assume or reject the executory contracts. Ignoring the fact that the SBC Telcos have stipulated that on December 2, 2004 the Debtors' performance under the Carrier Stipulation adequately protects their interest, the SBC Telcos now assert the Debtors cannot obtain court approval of a sale under Section 363 without assuming, assuming and assigning, or rejecting executory contracts under Section 365. The Seventh Circuit rejected this "essential contract" argument twenty-two (22) years ago. *Data-Link Systems, Inc. v. Whitcomb & Keller Mortgage Co., Inc.*, 715 F.2d 375, 379 (7th Cir. 1983). The simple fact that services provided under executory contracts are essential to a debtor is not sufficient cause to accelerate a

debtor's decision process. *Id*. at 379. Instead, a debtor must be provided a reasonable time to determine whether assumption or assignment would be beneficial to the reorganization process. *Id*.

23. The Seventh Circuit's analysis in *Data-Link* is consistent with that of a number of court decisions that came later. For example, the Supreme Court has said that a court should interpret reasonable time consistent with the broad purpose of Chapter 11 in mind, which is "to permit successful rehabilitation of debtors." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed 2d 482 (1984); s*ee also In re G-I Holdings, Inc.*, 308 B.R. 196, 213 (D.N.J. 2004) (rehabilitation purpose most important factor under § 365(d)(2)) citing *In re Dunes Casino Hotel*, 63 B.R. 939, 949 (D.N.J. 1986)).

24. Similarly, in 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 Corp.*, 262 B.R. 290 (D. Del. 2001) (denying motion compelling assumption or rejection of executory contract when bankruptcy case was only five months old); *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.").

In re Kmart Corp., 290 B.R. at 620 (emphasis added).

25. The SBC Telcos have shown no harm--much less manifest injustice or economic harm--they will suffer if the Debtors have until confirmation to assume or reject the executory contracts. The right of the SBC Telcos to receive cure payments, if any, owed to them if their

contracts are assumed, does not trump the interests of the Debtors' creditors as a whole in a sale process that maximizes the value of the Debtors' estates. Assuming the cure amounts are at the levels the SBC Telcos allege, the Debtors are economically unable to satisfy the cure absent simultaneous assignment to the buyer. The SBC Telcos never assert that assignment of the executory contracts can occur prior to regulatory approvals. Accordingly, here the Debtors' and the purchaser's legal obligations to regulators and the collective interests of the Debtors' creditors should not be compromised by the convenience or advantage sought by the SBC Telcos.

The Sale of Designation Rights Under the Motion to Sell Is a Permissible

26. Likewise, the SBC Telcos' arguments concerning designation rights miss the mark. The SBC Telcos attempt to distinguish the sale of designation rights in retail cases from the instant case on the basis that when such sales are approved, they are done in such a manner that the purchaser of the designation rights is not the ultimate assignee of the executory contract in question.[4] On one hand, the SBC Telcos ask the Court to look at the substance of the transaction rather than its form. On the other hand, they ignore the fact that the text of the Bankruptcy Code itself contemplates that the sale of assets, and the assumption and assignment of executory contracts are distinct events. *Compare* 11 U.S.C. §§ 363 *and* 365.

27. The key point here is that the Debtors' ability to use designation rights as part of this sale process is permissible. Bankruptcy courts have recognized that the timing of when a debtor sells its assets under Section 363, or when it assumes, assumes and assigns, or rejects

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[4] The SBC Telcos also assert that the Supreme Court's decision in *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000) has relevance to the issue of designation rights. In *Hartford Underwriters*, the Supreme Court rejected a third party using Section 506(c) to surcharge a secured creditor for its benefit. Here, no question exists that it is the Debtors that will assume and assign or reject executory contracts. The fact that the assignee will choose which contracts it wants to have assigned to it is unsurprising, customary, and of no significance.

executory contracts under Section 365, are part and parcel 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." *In re Ames Department Stores, Inc.*, 287 B.R. 112, 126 (Bankr. S.D.N.Y. 2002). In a staged process, transparently designed to maximize the value of the Debtors' assets, the Debtors have first sought Court approval to auction their assets to the highest bidder. The Debtors will then seek approval of that bid from the Court. The Debtors and the approved purchaser will then seek regulatory approvals of the sale of Non-Transferred Assets. During the interim, and subject to the Debtors' ultimate control, the approved purchaser will assist the Debtors in managing the Debtors' business for the benefit of the estate and its creditors until regulatory approvals are obtained.[5]

28. SBC views the decision to assume or reject contracts far too simplistically. While proclaiming the contracts to be "essential," the SBC Telcos ignore that the regulatory issues drive the APA's bifurcation of the sale process and the assumption/rejection process applicable to the Debtors' industry. To ignore regulatory demands makes no sense.[6]

The Proposed Sale Is Not a De Facto Transfer of Control of the Debtors

29. 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 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

[5] Among the benefits to the estates is the reduction in rejection damages in the event a particular contract is ultimately rejected.

[6] Likewise, the SBC Telcos also make no sense when they argue that the stalking horse bidder's agreement to (i) buy the Debtors' assets now, and (ii) make decisions as to what contracts to assume later, after securing regulatory approvals is evidence that the stalking horse is prepared to make the decision to assume contracts now without obtaining regulatory approvals for the purchase.

safety and welfare are not preempted by bankruptcy law); ***In re St. Mary Hosp.***, 86 B.R. at 398 (inescapable conclusion that 28 U.S.C. § 959(b) requires a debtor to conform with applicable federal, state, and local law in conducting its business).

30. The Debtors must obtain regulatory approvals prior to the assignment of the Non-Transferred Assets portion of the Acquired Assets (as those terms are defined in the APA).[7] *See 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 Hosp.***, 86 B.R. at 398; *In re Mirant Corp.*, 378 F.3d at 523; *In re Cajun Electric Power Coop., Inc.*, 185 F.3d at 453-54.

31. 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, approvals must be sought, and such approvals by the FCC and the PUCs will take time after any sale contemplated by the APA is approved by the Court.

32. The SBC Telcos do not argue that the Debtors position as to the need for regulatory approvals of Non-Transferred Assets is incorrect, nor do they argue that the ultimate purchaser can assume the contracts without regulatory approvals. The SBC Telcos' cannot make these arguments because the transactions contemplated by the APA necessarily require regulatory approvals and no one can readily determine the timing and ultimate outcome of regulatory approvals. Thus, they are left with ignoring the regulatory scheme that necessarily overlays this transaction.

[7] While not specifically enumerated herein, the public utility and/or public service commissions (the "PUCs") have similar transfer and change-in-control provisions to those of the Federal Communications Commission ("FCC"). Thus, the Debtors must seek PUC approvals for the transaction contemplated in the APA.

33. The Debtors and the purchaser have valid, unassailable reasons to bifurcate the timing of the sale process and the assumption and assignment of executory contracts. The SBC Telcos simply want to be paid sooner rather than later.

34. The SBC Telcos' claim that it is wrong to delay the assumption/rejection decision while the purchaser manages the Debtors' assets pending regulatory approvals is really nothing more than a complaint about the very process the Bankruptcy Code and regulations governing the Debtors' operations contemplate, and it is not a basis to accelerate the timing of the Debtors' decision or to deny approval of the sale.

35. The MSA as defined by the APA does not and cannot transfer any form of control to the buyer. This prohibition of control prior to FCC approval extends both to *de jure* transfers of control and *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. Thus, it is necessary to examine two types of control: *de jure* (control as a matter of law) and *de facto* (actual control of the licensee)") (internal quotation marks 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.

36. When issues of *de facto* transfer of control arise, the FCC examines the facts of each case. In doing so, it 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:

> unfettered 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.

37. The fact that the Debtors retain control of their business and assets pending regulatory approvals of a transfer of assets is clear under both the APA and MSA. Further, the MSA neither causes nor imposes a *de facto* transfer of control from Debtors to buyer.

38. The APA is clear that ultimate control of assets remains with the Debtors prior to Final Closing. For example, Section 5.1(b)(i) of the APA states:

> the Transition Plan shall not deprive Seller of ultimate control over the Non-Transferred Assets prior to the Final Closing and shall at all times comply with all applicable Laws and Regulations.

APA at § 5.1(b)(i). The APA further states:

> Pursuant to and as set forth in the Management Services Agreement, Sellers shall remain in ultimate control of all Acquired Assets still owned by any of the Sellers and Buyer shall provide management and related services to Sellers therefor, subject to the ultimate direction of Sellers and consistent with all applicable Laws and Regulations.

APA at § 5.1(b)(ii).

39. The MSA is equally clear that Leucadia National Corporation's appointment as manager thereunder is "[s]ubject to [VarTec Telecom, Inc.'s] ultimate control over the Business." MSA at § 1; *see also* MSA at §§ 3(a), 9(a). Moreover, the MSA specifically states that

> nothing in this Agreement is intended to give Manager any right which would be deemed to constitute a transfer by [VarTec Telecom, Inc.] of "<u>control</u>" (as defined

> in the Telecommunications Laws) by any of the VarTec Entities of its operations....

MSA at § 3(c)(emphasis in original).

40. Not only does the MSA clearly show an intent by the parties not to transfer *de facto* control of Debtors' business pending regulatory approvals, the MSA also clear defines both continuing responsibilities of the Debtors and limitations on the authority of the manager. *Compare* MSA at § 4 (specifies responsibilities of Debtors) *with* MSA at § 9(a) (lists actions that the manager shall not take without the prior written consent of VarTec Telecom, Inc.). Further, among the "normal minimum incidents" of control identified in the *Intermountain Microwave* case that the Debtors retain are:

> Use of Facilities: *See* MSA at § 4(b) (Debtors to "perform acts reasonably necessary to conduct the operations of the Business, excluding those acts that are to be performed by Manager").
>
> Day-to-Day Operation and Control: *See* MSA at § 4(b) (Debtors to "perform acts reasonably necessary to conduct the operations of the Business, excluding those acts that are to be performed by Manager"); MSA at § 4(c) (Debtors to "continue to communicate with third parties, including responding to their inquiries, requests, and correspondence); MSA at § 4(e) (in consultation with manager, Debtors required to "timely exercise whatever rights they have under any contracts of the Business").
>
> Payment of Financial Obligations: *See* MSA at § 4(f) (Debtors to "continue to bill and collect amounts owed by...customers and pay Business Expenses").
>
> Preparation of Regulatory Applications: *See* MSA at § 4(g) (Debtors to "direct and be responsible for preparation and filing of all applications).
>
> Personnel Decisions: *See* MSA at § 9(a)(v)-(a)(vi) (Manager may not hire, demote or terminate employees without the prior written consent of VarTec Telecom, Inc.).

Issues Concerning Risk of Loss and the Opportunity for Profit

41. Under the APA, risk of loss concerning the Acquired Assets transfers to the buyer regardless of whether the Final Closing occurs. *See* APA at 22-23. Further, if the APA

terminated prior to the Final Closing, the Non-Transferred Assets, including the Funding Account into which all of the Debtors' wealth was captured, would remain in the Debtors' possession. Accordingly, the Debtors retain the opportunity for profit if the Final Closing does not occur.

Conclusion

42. SBC's objection to the Motion to Sell should be overruled, and the Motion to Sell should be approved.

Dated: July 26, 2005.

Respectfully submitted,
KANE, RUSSELL, COLEMAN & LOGAN, P.C.

BY: /s/ Joseph M. Coleman

Joseph M. Coleman
State Bar No. 04566100
Joseph A. Friedman
State Bar No. 07468280
Michael L. Scanlon
State Bar No. 17707500

3700 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201
Tel.: (214) 777-4200
Fax: (214) 777-4299
Email: ecf@krcl.com

SPECIAL COUNSEL TO THE DEBTORS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served via e-mail to those parties receiving e-mail service through the Court's Electronic Case Filing ("ECF") System on July 26, 2005. A separate certificate of service will be filed concerning service of this document upon parties that do receive service via the Court's ECF System.

/s/ Michael L. Scanlon
Michael L. Scanlon