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ATTORNEYS FOR THE OFFICIAL COMMITTEE
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	**Case No. 04-81694-SAF**
VARTEC TELECOM, INC., *ET AL*.,	§	**(Chapter 11)**
	§	
*DEBTOR*S.	§	**(Jointly Administered)**
		Hearing set for July 27, 2005 9:00 a.m. CST (Judge Hale)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS' FIRST AMENDED OBJECTION 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)
[Re: Docket #1399; Amending and Restating Docket #1558]

TO THE HONORABLE H. DWAYNE HALE, UNITED STATES BANKRUPTCY JUDGE:

The Official Committee of Unsecured Creditors (the "Committee") of the above-referenced debtors and debtors in possession (collectively, the "Debtors") files this First Amended Objection (the "Objection") 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) (the "Sale Motion"), and states as follows:

I. ADOPTION OF PRIOR OBJECTIONS

1. The Committee adopts by reference and asserts those unresolved objections previously set forth in its Partial Objection to Debtors' 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), filed on or about June 17, 2005.[1]

2. Additionally, the Committee asserts numerous other and further objections herein.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. The Sale Motion and this Objection constitute core proceedings pursuant to 28 U.S.C. § 157(b).

4. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

III. PROCEDURAL HISTORY

5. On November 1, 2004 (the "Petition Date"), the Debtors each filed a voluntary petition for relief (collectively, the "Cases") under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

6. On November 8, 2004, the Office of the United States Trustee appointed the Committee to represent the interests of unsecured creditors.

[1] For clarity sake, it appears that the Debtors re-executed an amended Asset Purchase Agreement with Leucadia (or its surrogate entity), the stalking horse bidder, on or about June 28, 2005. The Committee presumes that the Debtors' will also prepare and execute an amended agreement with the successful bidder from the July 25, 2005 auction. The Committee has made its best effort to conform references to and quotes from the "APA" to the June 28 version. The Committee is not or has not been in possession of the post-auction version of the agreement long enough to quote from it.

7. On December 8, 2004, the Office of the United States Trustee appointed the Official Committee of Excel Independent Representatives (the "IR Committee") with a sunset provision under which the IR Committee automatically dissolves.

8. RTFC filed proofs of claim against the estates (Claim Nos. 2877-2804, 2963, 2884-2998, and 3106, collectively the "RTFC Claim") on or about March 11, 2005 asserting substantial claims, together with liens extending to substantially all of the Debtors' assets.

9. On or about June 10, 2005, the Committee filed an Adversary Proceeding styled, "*Official Committee of Unsecured Creditors of VarTec Telecom, Inc., et al., on behalf of the Bankruptcy Estates of the Debtors v. Rural Telephone Finance Cooperative,*" bearing Adversary No. 05-03514-SAF (the "Adversary Proceeding"), *inter alia* contesting and objecting to a significant portion of the RTFC Claim and some or all of its liens, seeking avoidance and recovery of material pre-petition transfers, disgorgement of material post-petition transfers, equitable subordination of claims and liens, and recovery of damages.

10. On or about June 27 and 28, 2005, the Hon. Steven A. Felsenthal conducted hearings on the Sale Procedure Motion. An order approving such motion was entered on or about June 30, 2005.

11. On or about July 25, 2005, the Debtors conducted an auction, ostensibly pursuant to the order approving the Sale Procedure Motion. During the auction, the Court gave an oral ruling on the interpretation of the order approving the Sale Procedure Motion. At the end of the auction, the Debtors declared a competing bidder to be the winning bidder, with a bid approximately $20 million higher than the initial stalking horse bid.

IV. OBJECTIONS

12. *Braniff* Related Issues. A transaction occurring outside the normal Chapter 11 confirmation scheme that significantly restructures or dictates the restructuring of the rights of the creditors is an impermissible *sub rosa* plan of reorganization. *Pension Benefit Guaranty Corporation v. Braniff Airways, Inc.*, (*In re Braniff Airways, Inc.*), 700 F.3d 935, 939 (5th Cir. 1983). *See also Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303 (5th Cir. 1985) (recognizing that the disposal of a crown jewel asset might, in some circumstances, amount to a *sub rosa* plan).

13. *Continental*. The substantive and procedural requirements of the Code for obtaining the confirmation of a Chapter 11 plan preclude approval of any sale that would have the effect of establishing the essential terms of a plan in the sale agreement, even where a sound business reason supports a proposed sale of assets. *See The Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.),* 780 F.2d 1223, 1227-28 (5th Cir. 1986). In *Continental*, the Circuit Court noted the appellants' argument that the proposed leases represented pieces of a creeping plan of reorganization, found the sale motion incompatible with *Braniff*, vacated the district court's order and remanded for consideration the contention that the objecting parties were denied protections they would have received if the transaction were part of a reorganization plan. *Id*.

14. *Babcock*. The provisions of §363 that permit a trustee to use, sell or lease a debtor's assets simply do not allow a debtor to eviscerate the bankruptcy estate before reorganization or to change the fundamental nature of the estate's assets in a manner which would limit a future plan of reorganization. *See In re Babcock and Wilcox Co.*, 250 F.3d 955,

960 (5th Cir. 2001) (noting that *Braniff* stands for the proposition that "the provisions of Section 363 permitting a trustee to use, sell, or lease the [debtor's] assets do not allow a debtor to gut the bankruptcy estate before reorganization or to change the fundamental nature of the estate's assets in such a way that limits a future reorganization plan").

15. Lower Court *Braniff* Decisions. Three subsequent, reported lower court decisions within the Fifth Circuit which have addressed the *Braniff* issue, are also instructive. *In re Crutcher Resources Corp.*, 72 B.R. 628, 630-31 (Bankr. N.D. Tex. 1987) involved the denial of a motion to sell the remaining profitable assets of the debtor, and noted the debtor's admission that it could not reorganize. *In re Condere Corp.*, 228 B.R. 615, 636 (Bankr. S.D. Miss. 1998), involved approval of a sale motion conditioned on the debtor's assumption and assignment to the purchaser of the executory contract of the objecting party (and noting that the term sheet provided for the filing of a plan of liquidation upon approval of the motion to sell). *In re Property Co. of America Joint Venture*, 110 B.R. 244, 247 (Bankr. N.D. Tex. 1990), involved the granting of a sale motion after findings of exceptional circumstance as a result of the rapidly deteriorating condition of the debtor's properties. Noting the problems associated with *sub rosa* arrangements which lock in and disenfranchise creditors, this third court noted that "[t]his court strictly adheres to *Braniff* and *Continental* and will approve the sale of substantially all of an estate's assets in seldom circumstances."

16. Applying *Braniff* to the Sale Motion. The transaction proposed in the Sale Motion is an impermissible *sub rosa* plan which, by design or otherwise, circumvents the Bankruptcy Code (the "Code") by stripping creditors' due process and property rights, disclosure rights, voting rights and other confirmation rights including application of the best interest of

creditors test and absolute priority rule. The Sale Motion goes well beyond the permissible bounds for a sale motion and crosses over into the purview of a "creeping" plan of reorganization without the attendant creditor protections, disenfranchising creditors in the process. Specifically, the Sale Motion:

(a) eviscerates the Debtors' estates through the sale of substantially all of the Debtors' remaining assets outside of a plan of reorganization and devoid of the protections inherent therein;

(b) pays out all of the net sales proceeds to Rural Telephone Finance Cooperative ("RTFC"), whose lien rights are subject to dispute in pending litigation (APA at Exh. B, ¶ 10);

(c) decreases the likelihood that the RTFC or any other entity will provide financing necessary for the Debtors to confirm a viable plan;

(d) decreases the likelihood that the Debtors will ever file (much less secure confirmation and implementation of) a feasible plan;

(e) materially increases the likelihood of a *de facto* substantive consolidation of the various estates, without the benefit of any discovery or court proceedings to evaluate the fairness thereof;

(f) grants the Buyer/Manager significant control over the general management and direction of the day-to-day operations of the Debtors' businesses no later than the effective date of the MSA (MSA §3(a); APA §5.1(b)(ii));

(g) requires the Debtors to conduct all restructuring activities with no revenue stream or other set aside funds to finance same;

(h) dictates the timing of any such plan, if one is ever filed (by virtue of the extended time to assume or reject contracts contemplated by the Sale Motion) (APA §5.11(c), §6.6(a));

(i) fails to provide the statutory protections of cure and adequate assurance of future performance prior to the assignment and use of executory contracts and unexpired leases, delaying assumption or rejection by as much as one year (APA §5.11(c), §6.6(a));

(j) purports to delegate some avoidance rights to the Buyer while retaining other, undisclosed avoidance rights (APA §§2.2(k) and 2.3(a));

(k) sets forth provisions more appropriate to a plan of reorganization, such as how certain of the estates' pending litigation will be funded, who will be the real parties in interest and how and to whom recoveries from such litigation, if any, will be disbursed (APA §§5.16(b) and (c));

(l) allows the "taking of" the property rights and "an unlimited free look at," and the "use and receipt of benefits from," such rights by Buyer, without just compensation and for an indefinite period of time; and,

(m) substantially increases the likelihood that the case will ultimately be converted to a liquidation under Chapter 7.

17. These Cases have been pending for over eight (8) months, and the Debtors have made no progress toward formulating, much less proposing, a Chapter 11 plan. The Sale Motion lacks any discussion of the effect of the sale transaction on the ability of the Debtors to formulate a Chapter 11 plan. To the contrary, the sale could very well have the effect of precluding any plan (depending *inter alia* upon whether RTFC will at last commit to funding the costs necessary to implement a plan of reorganization). As proposed, all the proceeds from the sale go to the RTFC, which has so far declined to give its commitment to allow funds to be used for the exit costs of a Chapter 11 plan, ***e.g.***, administrative and priority claims. (Most recently, RTFC has indicated a reluctance to permit funding to allow closing of a Chapter 11 plan in connection with the proposed settlement of claims of the Excel independent representatives and has expressed concern about the payment of tax claims.) Also, the APA could effectively preclude confirmation of a Chapter 11 plan until the Final Closing Date – as much as a year or more after entry of an order approving the Sale Motion – by deferring assumption, assignment and rejection decisions until that time. Conversely, §365(d)(2) of the Bankruptcy Code requires assumption/rejection decisions by the date of confirmation. Effectively, plan confirmation timing would be held hostage to the APA.

18. It is of major and imminent concern in these Cases that RTFC may be manipulating the reorganization processes in this chapter 11 case to orchestrate a sale or, alternatively, a massive liquidation, to its own material advantage without any commitment to or provision for (a) the payment of administrative and priority claims or (b) the confirmation and implementation of a plan of reorganization. RTFC should not be permitted to benefit in a chapter 11 context from the significant upside incident to operation under the protections of chapter 11 and a sale (or liquidation) of substantially all assets, absent a meaningful commitment to the confirmation and implementation of a plan of reorganization, only to sweep the totality of such benefits into its own pockets while leaving the estates destined for conversion to administratively insolvent chapter 7 cases. Accordingly:

(a) The Sale Motion should not be approved except in the context of a confirmed plan of reorganization.

(b) Alternatively, the Sale Motion should not be approved unless and until firm and binding provisions have been made for financing the confirmation and implementation of a plan of reorganization.

(c) Alternatively, it is incumbent upon the Debtors to provide clear evidence and convincing argument as to why the transaction contemplated in the Sale Motion cannot be feasibly implemented in a confirmed plan of reorganization and why the transaction will not have an impermissible *sub rosa* effect.

(d) The Debtors and RTFC should, as of the time of any hearing on the Sale Motion, have agreed upon and committed themselves to a critical path and budget (*i.e.*, one otherwise acceptable to the Committee) for proceeding post-sale to a confirmed plan of reorganization, and such budget should necessarily include the costs of implementing a feasible plan of reorganization.

(e) Any approval of the Sale Motion should be conditioned upon the imposition of other substantial safeguards materially protecting against any residual *sub rosa* impact.

19. RTFC Should Instead be Committed to a Plan. A sale of the assets in question in the proposed auction format has principally benefited RTFC by creating a competitive environment for such sale; however, the sale of such assets by a § 363 motion (as opposed to the plan format) may at the same time substantially reduce or perhaps eliminate the estates' leverage to induce RTFC to fund the front-end costs for implementation of a plan of reorganization.[2] Accordingly, RTFC's commitment to the confirmation and implementation of a plan of reorganization should be a prerequisite to approval of the Sale Motion.

20. RTFC Should Not be Allowed to Sweep and Apply Proceeds. In the event the Sale Motion is approved, RTFC should not be permitted to sweep and apply the proceeds except for the retirement of any DIP financing outstanding as of the closing of such sale. After such DIP financing is retired, the balance of the sales proceeds should be escrowed pending the earlier of confirmation and implementation of a plan of reorganization or the outcome of the Adversary Proceeding by the Committee against RTFC.

21. Any Sweep of Proceeds Requires Proof of RTFC's Financial Ability to Disgorge. The Sale Motion, the companion Sale Procedure Motion[3], related agreements, and, to some extent, the order approving the sale procedures[4] purported to: (a) assure the RTFC the right to credit bid in any auction, when the alleged liens and claims of RTFC are materially contested

[2] For example, such front-end costs include the payment on a plan's effective date of those numerous priority claims and administrative claims not assumed by the Buyer.

[3] Debtors' 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" (the "Sale Procedures Motion," Docket #1401).

[4] 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 1446, the "Sales Procedure Order") entered on or about June 30, 2005.

and, in any event, are not allowed liens or claims, (b) grant RTFC an extraordinary right to "veto" any sale (see n4 herein), and (c) enable RTFC to shift to the estates a proposed $2 million "Termination Fee" incident with RTFC's exercise of its purported "veto." The Committee previously objected to these features of the Sale Procedure Motion and the Sale Motion.

22. At the hearing on the Sale Procedure Motion, the Committee's objections to the foregoing were essentially carried to the hearing on the Sale Motion.

23. The Committee reasserts the objections relating to RTFC's ability to disgorge the sale proceeds, albeit now in the context of a contemplated sweep of the third-party sale proceeds by RTFC and application of such proceeds to its claims (including, without limitation, its pre-petition claims):

(a) A demonstration of RTFC's creditworthiness is especially important in this case given the amount of recovery sought by the Committee against the RTFC in the Adversary Proceeding.

(b) In addition to its lien avoidance actions (which if successful may *inter alia* require disgorgement of many of the proceeds already applied by RTFC during the course of these Cases), the Committee seeks to recover in excess of $141 million in avoidable transfers made to RTFC within the statutory recovery periods, and also seeks the avoidance and recovery of other avoidable transfers and damages on account of other claims.

(c) Unless RTFC's parent is now prepared to guarantee RTFC's disgorgement obligations, proof of the parent's solvency or net worth is of no avail. To date, the Committee has seen no proof of RTFC's own ability to perform any Court ordered disgorgement.

24. Funding Reorganization and Ongoing Costs, Feasibility, and Due Process. In addition to the important question of how a plan of reorganization will be funded, it is also important to note that provisions for funding the estates' operations post-sale are wholly inadequate (even if limited to winding down the estates' administrative affairs, preparing and

implementing a plan of reorganization, and complying with obligations under the contemplated APA and MSA):

(a) The oddly segmented and staged manner in which the Sale Motion is structured requires that either RTFC, the Buyer, or some other lender be committed to provide continued DIP financing at a sufficient level to allow the Debtors to continue in business after the Sale Motion is approved and until "Final Closing" – which could be one year or more from now.

(b) None of the papers or motions before the Court provides for or describes any ongoing DIP financing. Accordingly, the Sale Motion lacks feasibility of performance or, alternatively, violates due process in that it requires implementation of financing that has not heretofore been disclosed and a budget that has not yet been considered or approved.

(c) The projected costs and means for the Debtors' performance of their ongoing obligations under that Asset Purchase Agreement and Sale Motion through "final closing" of the contemplated transaction should be thoroughly disclosed, considered, and approved or disapproved by the parties and by the Court prior to approval of the Sale Motion. Among other things, there should be a finding that the Debtors' ongoing operations can be conducted in a feasible manner in light of case dynamics.

(d) The Sale Motion fails to explain how any subsequent plan can or will be funded if the Court approves the Sale Motion in the absence of the commitments sought herein by the Committee. In the context of a plan of reorganization, a debtor must show that confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization. *See* 11 U.S.C. § 1129(a)(11). Here, the overt sidestepping of fundamental confirmation standards shows the appropriateness, applicability and endurance of the ***Braniff*** standard.

(e) The MSA provides that Buyer will be managing the business and paid $250,000 per month out of receivables for doing so. The Debtors is to remain in ultimate control but cannot direct the Buyer since it is given independent contractor status. Accordingly, the Debtors should show (i) the extent of control it will actually retain versus the control ceded, directly and/or indirectly, to the Buyer, (ii) how this arrangement will affect the total costs of operating the business, (iii) whether receipts up to the final closing will be adequate to cover those costs, (iv) whether it will be necessary to draw upon any DIP financing, and (v) whether proceeds of any final closing will be applied to pay any outstanding DIP financing and

other administrative or priority claims or merely be swept to pay RTFC's pre-petition claims.

(f) The foregoing concerns are aggravated if and to the extent that RTFC is permitted to sweep the proceeds of any such sale under the DIP order and apply such proceeds to its pre-petition obligations (or even it post-petition advances) prior to implementation of a plan of reorganization.

Accordingly, the Sale Motion is not feasible as presented or, alternatively, any approval of the Sales Motion should be premised upon a clarification of the costs and sources of funding for these endeavors, corresponding commitments for the availability of such funding, and an overall finding of feasibility.

25. The Debtors Should Also be Committed to a Plan. Likewise, approval of the Sales Procedures Motion should be premised upon a clarification of the Debtors' intent with respect to the formulation and filing of a plan of reorganization and the timing thereof, ***e.g.***, whether confirmation of a plan of reorganization is contemplated prior to the final sales date of the proposed staged transaction, etc.

26. Clarification of Allocation of Risks versus Rewards. The APA does not adequately disclose and is ambiguous on the opportunity for profit in the event a Final Closing does not occur. While the APA provides that the risk of loss is borne by the Debtors prior to the Closing, APA §2.11(a), it is silent as to the opportunity for profit between the two Closings (which could span one year or more), or the effect upon any profit in the event of a termination of the agreement. APA §7.2. If it is the intent of Buyer to harvest the assets of the businesses, Buyer could make a profit prior to the date for Final Closing, but never proceed to Final Closing. In this case, if Final Closing never occurs, the Debtors will likely never receive the second half of the purchase price. Alternatively, the Buyer may be presented with the opportunity to recoup

the entire payment due at Final Closing, should such event actually occur, from the profits derived from operations of the Debtors' businesses during the period between the first Closing and the Final Closing. The Debtors should be required to clarify whether the Debtors or Buyer holds the opportunity for profit during this period. Further, the fact that Buyer may be able to recoup the purchase price by the Final Closing calls into question whether a fair price is being paid for the Debtors' businesses and assets.

27. No Suspension of the Fed. R. Bank. P. 6004(g) Ten Day Stay of Implementation. The automatic ten (10) day stay of implementation of any order approving the Sale Motion provided for in Fed. R. Bankr. P 6004(g) should not be suspended.[5] In light of the numerous, serious objections, it is likely that, in the event of entry of an order approving the Sale Motion, the Committee and/or other objecting parties will likely seek an appeal from and a stay pending appeal. Assuming any approval of the Sale Motion and in light of the possible arguments of mootness (*i.e.*, mootness under 11 U.S.C. §363(m) if the Sale Motion is approved and arguably implemented), the ten (10) day stay of implementation provided in the Bankruptcy Rules will be essentially to allow fair treatment of any efforts to obtain a stay pending appeal.[6]

28. Other Deal Related Issues. Without limitation, approval of the Sale Motion should be conditioned upon the establishment of procedures and a timetable for the designation of those executory contracts and unexpired leases to be assumed and assigned to the Buyer (including any successful competing bidder), the assertion and resolution of proposed cure costs,

[5] Most cases permitting a waiver of the ten day stay of implementation are easily distinguishable. Typical is *In re Decora Industries, Inc.*, 2002 WL 32332749 at *9 (D.Del. May 20, 2002) (waiving stay where Debtors were unaware of any party needing the benefit of the stay and an immediate closing was required to remedy Debtors' precarious financial and business position).

[6] Cases where the mootness provisions of §§363 or 364 were invoked or where closings were rushed to thwart legitimate appellate rights may very well have led to the implementation of Bankr. R. 6004(g). *See, In re First South Savings Assoc.*, 820 F.2d 700 (5th Cir. 1987) (although arising in the DIP finance context).

the identification of the anticipated sources of such cure payments, and the formal assumption, assignment and, as appropriate, rejection of pertinent contracts and leases. Without prejudice to motions by specific contract or lease parties to compel assumption or rejection by an earlier date or by other more customized procedures, the Committee suggests that general deadlines and procedures (*i.e.*, applicable to those contract and lease parties who have not pursued specific relief) also be established that will at the same time best preserve the rights and interests of such contract and lease parties, enable any Buyer and the estates to implement any Court approved sale, preserve the interests of general unsecured creditors, and ensure the confirmation and implementation of a plan of reorganization.

29. Allocation of Proceeds and Right to be Heard. The Debtors should be required to determine the proposed allocation of sales proceeds on an asset-by asset, entity-by-entity, and estate-by-estate basis prior to the hearing on the Sales Motion in order to enable the Committee and other parties in interest to properly assess the Sales Motion and any competing bids. At present, it appears that the Debtors and RTFC do not intend to undertake a proper allocation of the sale proceeds among the various estates, and any such non-allocation may (in addition to other harm) work a substantial injustice on creditors of the various estates one against the other.

30. Timing Bust No. 1 -- Payment of Purchase Price and Management. In an apparent effort to better coordinate the various closing stages under the APA with certain required Hart Scott Rodino ("HSR"), FCC, and various state PUC approval processes, the last known version of the Sale Motion and related papers provided for a deferral of the execution and implementation of the Management Services Agreement until after receipt of FCC consent and the "first closing" under the APA until receipt of actual or de facto HSR approval. While these

changes may be prudent for some purposes, the Debtors may have inadvertently created one or more timing mismatches.

(a) Under the revised form of the Sale Motion, APA and related agreements, it is possible at least in theory that FCC consents and some significant PUC approvals may be obtained prior to the first closing (*i.e.*, prior to actual or de facto HSR approval). However, at the first closing, the Buyer is only paying half (roughly $40 million, in view of the July 25, 2005 bidding, subject to adjustments) of the total purchase price. This first-half of the purchase price was essentially for those assets which could be transferred without any regulatory approval. Payment of the second-half of the purchase price was to occur upon final closing. Final closing might occur (if ever) as late as one-year less one- day after the "Early Funding Date," or roughly in August or September 2006. One of Buyer's conditions to there being a final closing prior to such date is that all regulatory approvals or consents (*i.e.*, "Non-Transferred Assets" or assets requiring such approvals or consents in order to be transferred) have been received from the FCC and any applicable state PUC. However, if less than all regulatory approvals and consents are received, the Debtors can compel a "final closing" on the "one-year less one-day" date if 90% of such approvals and consents (*i.e.*, PUC approvals from states accounting for 90% of the total revenues of the Debtors for the year ending 2004 and all FCC consents) have by then been received. FCC consent to the transfer of some or all of the Non-Transferred Assets could occur at or before the first closing. Additionally, state PUC approvals of a significant portion (but less than all or even the referenced 90%) of the Non-Transferred Assets might also occur at or before the first closing. However, in the fortuitous event of early regulatory approvals or consents, and by nuances of the definitions, the APA does not appear to give the Debtors latitude to either defer the transfer of the erstwhile Non-Transferred Assets[7] to the final closing or, alternatively, to require an acceleration of a ratable portion of the second-half of the purchase price. Therefore, assets to be transferred at the first closing could be disproportionate to the amount of the purchase price paid. This concern could be alleviated by a clarification (of the definitions or by inclusion of an express provision) to the effect that none of those assets requiring FCC and state PUC consents may be transferred until the final closing regardless of whether such consents are obtained, absent one or more subsequent agreements for ratable payments.

[7] This refers to those assets that would have been "Non-Transferred Assets" but for the receipt of early regulatory approvals.

(b) Similarly, under the prior version of the APA, the Management Services Agreement was to be executed and implemented upon or soon after entry of the order approving the Sale Motion (*i.e.*, upon the "Early Funding Date"). Now (at least via the June 28 version of the APA), the effectiveness of that agreement is deferred until after FCC consent. In other words, the Debtors may retain ownership, possession and, presumably, management and operation of significant assets sold if the first closing occurs before the Management Services Agreement becomes effective. However, if this occurs, there will be no arrangement in place governing how the Debtor will be compensated for such management and operations. If the Debtors are to retain ownership, possession, or management of assets otherwise conveyed to the Buyer, some arrangement should be made by which the Debtors are compensated for such management, operational costs, and risk, so that the estates will at least break even as compared to the effect of an earlier closing.

31. Timing Bust No. 2 -- Confirmation vs. Assumption. The Sale Procedures Motion and Sale Motion seem to contemplate an extended period of time in which the Buyer may decide which executory contracts and unexpired leases it will accept by way of assignment and, hence, for which it will fund cure costs. This may either commit the Cases to an extension of the time to assume or reject that goes well beyond a projected confirmation date (which the Debtors have denied in their Omnibus Response to Objections to Debtors' Expedited Motion for Order (A) Approving 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. 1435)), require an extension of the timetable for confirming a plan, or unreasonably endanger confirmation of a plan or the final closing of the transaction.

32. D&O Litigation Should be an Excluded Asset. Without limitation, any order approving the Sale Motion should expressly provide that all causes of actions for officers &

directors liability, related claims against upstream owners of the Debtors (TEC and CGI), and corresponding claims against D&O insurance policies covering same are "Excluded Assets," *i.e.*, remaining as non-transferred assets of the estates. The Debtor asserts that this is already the case, but its definition is too vague to give adequate comfort on this score. Despite claims by the Debtors that the D&O litigation is somehow included in the definition of excluded "Avoidance Actions," this does not appear to be the case.

33. Treatment of Tariffs. The Sale Procedures Motion and Sale Motion do not illuminate whether tariffs are to be treated as executory contracts or as something else. If tariffs are to be treated as something other than as executory contracts, the Debtors should specify how they will be treated. The Debtors should disclose the costs, financial impact, litigation costs, etc., that may result under both scenarios, and the Court should consider and determine whether such costs may be feasibly borne under the circumstances.

34. Cost and Management of PARs Litigation. To the extent that the Sales Motion and Asset Purchase Agreement purport to require the Debtors to undertake and continue litigation over the PARs ("purchase of accounts receivable"), the Debtors should disclose and the Court should consider and approve or disapprove how funding for this continued litigation will be obtained, how much such continued litigation is projected to cost, and what degree of control, if any, the estates will retain with respect to the continuation, settlement or other disposition of such continued litigation.

35. Liquidation/Class Recovery Analysis. Since the contemplated transaction involves substantially all of the Debtors' remaining assets, the Debtors should offer into evidence

at the hearing on the Sale Motion the same sort of liquidation analysis and class-by-class recovery analysis that might otherwise be found in a disclosure statement.

36. Disclosure of Key Management Personnel. Since the Buyer will manage a significant portion of the Debtors' assets during various phases of the contemplated multi-staged transaction, the Court is entitled to consider and approve the management personnel to be designated by the successful Buyer, the extent to which Buyer will hire Debtors' personnel, and whether and how Debtors will retain sufficient personnel to performs their continuing obligations prior to and after final closing.

WHEREFORE, the Committee respectfully requests that the Court (a) deny approval of the Sale Motion, (b) condition any approval of the Sale Motion upon implementation of the relief sought above, and, (c) in any event, grant such other and further relief as is just.

Dated: July 26, 2005.

Respectfully submitted,

/s/ Stephen A. Goodwin

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Attorneys for the Official Committee of Unsecured Creditors

CERTIFICATE OF SERVICE

The undersigned does hereby certify that, on July 26, 2005, a true and correct copy of the foregoing has been served, via ECF electronic mail and/or by regular United States Mail, postage-prepaid, on the parties listed on the Master Service List (*as of May 11, 2005*).

/s/ *J. Michael Sutherland*
J. Michael Sutherland