Daniel C. Stewart, SBT # 19206500
William L. Wallander, SBT # 20780750
Richard H. London, SBT # 24032678
VINSON & ELKINS L.L.P.
Trammell Crow Center
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201-2975
Tel: 214.661.7299
Fax: 214.220.7716
VarTec@velaw.com

ATTORNEYS FOR THE DEBTORS

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

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

OMNIBUS RESPONSE TO OBJECTIONS (OTHER THAN BY SBC TELCOS) 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)

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 Response to Objections (Other than by SBC Telcos) to Debtors' Motion for Authority to Sell Assets Free and Clear of All Liens, Claims, Rights,

[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.

Interests, and Encumbrances and for Related Relief (Substantially All of the Debtors' Remaining Assets) (the "Response") and in support show as follows:

BACKGROUND INFORMATION

Sale Motion and Sale Procedures Motion

1. 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")[2] 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").

2. In the Sale Motion, the Debtors request, among other things, approval of the sale of substantially all of their assets to Leucadia National Corporation ("Leucadia"), or another successful bidder, under that certain Asset Purchase Agreement dated June 17, 2005, or such other agreement executed by the successful bidder (the "APA").[3]

---

[2] Capitalized terms not defined herein shall have the meaning given to them in the Sale Motion.
[3] Page references to the APA shall be to the Leucadia APA which was an exhibit at the hearing on June 27 – 28, 2005.

3. Certain parties objected to the Sale Procedures Motion, and after a contested hearing on June 27 and 28, 2005, the Court entered its Order (A) Approving Sale Procedures and Bid Protections in Connection with Sale of Certain Acquired 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. 1446] (the "Sale Procedures Order"). The Sale Procedures Order contained the following provisions in which certain objections to the Sale Procedures Motion were reserved:

- "[I]ssues raised as to (i) *sub rosa* plan, (ii) assumption, assignment, and rejection of executory contracts and unexpired leases, and (iii) substantive issues as to any asset purchase agreement presented at the Sale Hearing, are reserved to the Sale Hearing." *Sale Procedures Order* at 3.
- "If the RTFC submits a bid under 11 U.S.C. Section 363(k), any challenge to the right to assert the bid, if raised, will be reserved for the Sale Hearing." *Sale Procedures Order* at 5.

4. Pursuant to the Sale Procedures Order, the Court set a number of dates and deadlines relating to the Sale Motion, including the following: (i) the deadline to submit bids – July 20, 2005 at 12:00 p.m.; (ii) the deadline to file objections to the Sale Motion – July 20, 2005 at 12:00 p.m.; (iii) the auction of the Acquired Assets – July 25, 2005 at 1:00 p.m. ; and (iv) the Sale Hearing – July 27, 2005 at 9:00 a.m.

The Auction

5. In addition to Leucadia's stalking horse bid, the Debtors received a Qualified Bid from ComTel Investment, LLC ("ComTel" or the "Buyer"). At the auction

conducted on July 25, 2005, ComTel was selected as the successful bidder with the highest and best bid of $82,100,000 which is an increase in the purchase price of $19,600,000.

Summary of the Proposed Sale Transaction[4]

6. The proposed transaction and the associated Sale Procedures create an environment in which the Debtors can maximize the value of their estates. Under the APA, ComTel, the Buyer agrees to pay VarTec $82,100,000 (subject to a working capital adjustment) in consideration for the Acquired Assets, including substantially all operating assets of the estates less Excluded Assets. *See APA* at 8, 11-14. Acquired Assets do not include, among other things, cash, insurance policies, avoidance actions and other causes of action of the estates not related to the Acquired Assets. *APA* at 14-16. The Buyer also agrees to assume certain liabilities, including ordinary course post-petition operating expenses of the estates and cure costs of any executory contracts or unexpired leases that are designated for assumption and assignment and approved by this Court for assumption and assignment. *APA* at 16-18.

7. Prior to the transfer of certain assets, various regulatory approvals of the Federal Communications Commission (the "FCC") and certain public utility or public service commissions (the "PUCs") for each State in which the Debtors conduct business must be obtained. To comply with these regulations, the Acquired Assets fall into two mutually exclusive categories: Transferred Assets and Non-Transferred Assets. *APA* at

[4] Where possible, the Debtors have corrected various objecting parties' misunderstandings or misrepresentations concerning the structure of the sale; however, the Debtors' lack of a clarification shall not be deemed an agreement to assertions of objecting parties.

19. The Non-Transferred Assets include all monies and property necessary for the business to operate (e.g. accounts receivables, equipment and facilities necessary to provide telecommunications services), and Transferred Assets include assets that may be transferred upon obtaining Hart Scott Rodino ("HSR") approval and not in violation of any FCC or PUC regulations. *See id*.

8. As a consequence of the various regulatory requirements and to maximize the value of the Acquired Assets, the APA generally provides for closing in three steps on the following dates: (i) Early Funding Date (escrow funded); (ii) Closing Date (escrow amount paid to the Debtors); and (iii) Final Closing Date (date upon which Non-Transferred Assets transferred and balance of purchase price paid to the Debtors). *APA* at 22-23.

9. As early as two Business Days after the entry of the Sale Order (the Early Funding Date), the Purchase Price shall be placed in an escrow account and the final closing documents shall be executed and placed in escrow pending the Final Closing Date. *APA* at 22-23, 42-43. On that date, the risk of loss as to all Acquired Assets (but not ownership or control) transfers to the Buyer. *APA* at 22-23.

10. As early as the second Business Day after the later of (i) the Early Funding Date and (ii) the expiration or termination of the statutory waiting period under the HSR Act (the Closing Date), 50% of the Purchase Price shall be paid to VarTec and the Transferred Assets shall be transferred to the Buyer. *APA* at 22, 43.

11. Upon receipt of requisite regulatory approvals of the FCC and PUC (the Final Closing Date), the balance of the Purchase Price shall be paid to VarTec and the

balance of the Acquired Assets (i.e. the Non-Transferred Assets) shall be transferred to the Buyer. *APA* at 22, 43-44.

12. During this three-step closing process, two other significant events will occur: (i) the execution of the Management Services Agreement and (ii) the filing of motions to assume, assign, and reject executory contracts and unexpired leases, to be effective only upon receipt of necessary regulatory approvals. Effective on the date of the receipt of all required FCC consents, the Debtors and the Buyer shall enter into a Management Services Agreement under which the Buyer shall provide management and related services to the Debtors in connection with any Acquired Assets still owned by the Debtors provided that the Debtors ***"shall remain in ultimate control of all Acquired Assets still owned by any of the [Debtors]."*** *APA* at 32. During the term of the Management Services Agreement, it will be the Debtors' employees that tend to the day-to-day operations of the Debtors' business and the ultimate decision-making authority will be vested in the Debtors' chief executive officer, Michael G. Hoffman. Under the Management Services Agreement, the Buyer shall be an independent contractor and receive a monthly management fee of $250,000. *APA, Exhibit F*, *Management Services Agreement* at 5.

13. From time to time after the entry of the Sale Order, the Buyer shall designate executory contracts and unexpired leases for assumption and assignment. *APA* at 39. This assumption and assignment process will occur only after (i) requisite regulatory approvals are obtained from the FCC and the PUCs and (ii) this Court approves such assumption and assignment after notice and hearing. *Id*.

14. The APA provides that from the date of the entry of the Sale Order through the termination of the Management Services Agreement, the Buyer may ***request*** that the Debtors take actions to optimize the networks and business operations of certain of the Debtors and to realize reasonably achievable network and operational savings and efficiencies. *APA* at 33. This section of the APA makes clear that these actions are ***"subject to the consent and ultimate control of [VarTec]."*** *Id*. Thus, contrary to the allegations of various Objecting Parties (as defined below), the Buyer cannot instruct or require that the Debtors make network or operational modifications.

15. The net proceeds from the sale of the Acquired Assets shall be applied to the claims of the RTFC on a provisional basis. *See APA, Exhibit F, Sale Order* at 10.

16. The transaction, as structured, is particularly beneficial because, soon after the entry of the Sale Order, the Buyer accepts the risks associated with running the business, including risk of loss, risk of inability to obtain the necessary government approvals, and risks of contract assignment.

Objections to the Sale Motion

17. The following parties (collectively, the "Objecting Parties") have filed objections to the Sale Motion (collectively, the "Objections"):[5]

Docket No.	Objecting Party
1491	City of Irving, Texas ("City of Irving")

[5] To the extent that a Party asserts an objection that was reserved, the Debtors incorporate their argument in their Omnibus Response to Objections 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. 1435] (the "Sale Procedures Response"). In the event that the Sale Procedures Response conflicts with this Response, this Response shall control.

Docket No.	Objecting Party
1544	Kent Amberson ("Amberson")
1549	770 "L" Street Investment Group ("770 'L' Street")
1550	TDS Telecommunications Corporation ("TDS")
1557	DeSoto ISD, Richardson ISD, and Spring Branch ISD ("DeSoto, Richardson, and Spring Branch ISDs")
1558	Official Committee of Unsecured Creditors ("Committee")
1560	SBC Telcos, Verizon, MCI, Qwest, BellSouth, and Time Warner Telecom (collectively, the "Carriers")[6]
1566	CentruyTel, Inc. ("CenturyTel")
1572	Broadwing Communications, LLC's ("Broadwing")
1582	King County
1585	Miami-Dade County Tax Collector ("Miami-Dade County")
1586	Valor Telecommunications of Texas, LP and Kerrville Telephone LP (collectively, "Valor")
1587	Nortel Networks Inc. ("Nortel")
Not Filed / Only Served	Washoe County Treasurer ("Washoe")

18. A table summarizing the grounds for objections raised by the Objecting Parties is attached hereto as **Exhibit A** (the "Summary Table").

19. Generally, the Objections fall within five categories: (i) *Sub Rosa* Plan Objections; (ii) Carrier-Specific Objections; (iii) General Transaction Objections; (iv) Tax Authority Objections; and (v) Miscellaneous Objections. Except to the extent to which the Debtors otherwise provide herein, the objections do not have merit, and they should be overruled.

[6] This Response does not address the arguments raised by the SBC Telcos. The Debtors are represented by special counsel in matters involving the SBC Telcos.

RESPONSE

Sub Rosa Plan Objections

Fails Because the Sale Does Not Affect Claims, Priority of Distribution, or Voting Rights

20. Broadwing, the Carriers, the Committee, and TDS have objected to the Sale Motion on the ground that the Sale of the Acquired Assets is a *sub rosa* plan. Because the proposed sale does not constitute a *sub rosa* plan and because the timing and structure of the proposed transaction will maximize the value of the Debtors assets, this Court should overrule the *sub rosa* objections and approve the sale.

21. 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) militates against a finding that the proposed transaction is a *sub rosa* plan. In *Braniff*, 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." *Id.* at 938. The Bankruptcy Court approved both of those transactions (collectively, the "PSA Transaction") in a ruling that was affirmed by the District Court. *Id*. at 939. The District Court's decision was appealed to the Fifth Circuit.

22. 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 participating in PSA's propose operation. ***The PSA transaction also require significant restructuring of the rights of Braniff creditors.***

Id. (emphasis added). In particular, the Fifth Circuit found objectionable the fact that the PSA Transaction dictated (i) some of the terms of a future plan; (ii) the secured creditor's vote on a subsequent plan; and (iii) the release of claims against Braniff by all parties. *Id*. at 939-40.

23. None of the objectionable factors identified by the Fifth Circuit in *Braniff* are present in the sale proposed by the Debtors. The Debtors do not seek to make an "end run" around chapter 11 of the Bankruptcy Code. Rather, the Debtors seek to maximize the value of their assets by selling the assets now, when to wait would result in a significantly reduced return for the estates and their creditors because of the declining value of the assets. Although it is true that the net proceeds from the sale will be used to pay down the secured claim of the RTFC ***on a provisional basis*** (as has been the case in the four previous auctions), the sale will not modify the distributions available to or priority of the various creditor parties. As was the case with respect to the previous asset sales, the proposed Order approving the sale of Acquired Assets provides,

> [T]he Proceeds from the Sale of the Non-Transferred Assets shall be paid to the Sellers on the Final Closing Date, and the Net Proceeds (as defined in the First Amended and Restated Credit Agreement dated as of October 7, 2004, as amended ("DIPFA")) shall then be transferred by the Sellers to the RTFC and ***provisionally*** applied by the RTFC, all in accordance with the terms and provisions of DIPFA, as approved in the Final Order Authorizing Post-Petition Financing, Granting Senior Liens and Priority Administrative Expense Status, Authorizing Use of Cash Collateral and Modifying the Automatic Stay, which was entered on January 12, 2005 (the "DIP Financing Order"), ***provided that all rights and remedies of all interested parties, if any, to object to, seek avoidance of or subordination of, and assert defenses, offsets, recoupment rights, and counterclaims to any lien, claim, right, interest, and/or encumbrance asserted against the Proceeds are hereby expressly preserved such that the RTFC shall be obligated to pay such***

Proceeds to the Debtors, as determined by this Court, in the event of a final determination that RTFC is not entitled to receive same.

See Agreement, Exhibit B, Sale Order at 10 (emphasis added). The quoted language originally was the product of a request by the Committee, and the Committee has requested its inclusion in each sale approved by the Court.

24. Thus, contrary to the allegations of certain Objecting Parties, the proposed sale would not finally determine claims asserted by the RTFC. If the Committee is successful in its litigation with the RTFC and the Court determines that the RTFC's liens are avoidable, the proceeds from the sale of the Acquired Assets will be returned to the Debtors' estates for the benefit of their creditors.

25. Moreover, that the Debtors are seeking approval of the disposition of significant assets under Bankruptcy Code § 363 does not make the transaction a *sub rosa* plan. The Carriers admit that the Fifth Circuit has never held that a debtor cannot sell substantially all of its assets outside the context of a plan of reorganization. *Carriers Objection* at 12 (citing *Richmond Leasing Co. v. Capital Bank, N.A. v. Capital Bank, N.A.*, 762 F.2d 1303, 1312 (5th Cir. 1985) ("[t]he question whether a sale of all assets may be approved under § 363(b) of course remains open in this Circuit.")) This language from the Fifth Circuit's opinion in *Richmond Leasing* (quoted by the Carriers) shows that the Fifth Circuit did not see its own earlier opinion in *Braniff* as prohibiting sales of substantially all of a debtor's assets outside the context of a plan of reorganization. In fact, a year later, in *Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.)*, the Fifth Circuit recognized the necessity in some cases of having Bankruptcy Code § 363 sales outside of the context of a plan of reorganization: "[W]e fully appreciate that post-petition, pre-

confirmation transactions outside the ordinary course of business may be required and that each hearing on a § 363(b) transaction cannot become a mini-hearing on plan confirmation." 780 F.2d 1223, 1228 (5th Cir. 1986)

26. Furthermore, in the Northern District of Texas, the bankruptcy court clearly does not see *Braniff* as prohibiting sales of substantially all of a debtor's assets under Bankruptcy Code § 363 as evidenced by its standing procedures regarding "11 U.S.C. § 363 sales to dispose of substantially all assets of a Chapter 11 debtor shortly after the filing of the petition." *See* United States Bankruptcy Court, Northern District of Texas, "Guidelines for Early Disposition of Assets in Chapter 11 Cases The Sale of Substantially All Assets Under Section 363 and Overbid and Topping Fees."[7]

27. Because the *Braniff* factors are not present, the proposed sale by the Debtors is permissible under Bankruptcy Code § 363. Aside from claims that would be Assumed Liabilities under the Agreement, the proposed sale of the Acquired Assets would not dispose of any claims against the Debtors. Further, the sale of the Acquired Assets will not affect any creditor's voting rights (except to the extent that its claim is satisfied through a cure payment) or the right to receive a disclosure statement in connection with any plan that the Debtors may propose. The sale will not affect the priorities of creditors under the Bankruptcy Code and does not predetermine the ultimate distribution to any creditor, including the RTFC.

28. The Carriers argue that the failure of the Debtors to assume or reject their contracts at the time of the sale makes the proposed sale a *sub rosa* plan. Their

[7] Although those guidelines apply to "early" sales, the Debtors comply with substantially all of the requirements of those guidelines.

argument is as follows: because the sale is a *sub rosa* plan, the Debtors must assume or reject executory contracts on or before the sale (which the Carriers equate to confirmation), and because the APA does not provide for the assumption or rejection of their contracts on or before the sale (read, "confirmation"), the sale is a *sub rosa* plan. The argument is circular and should be summarily rejected. Furthermore, as set forth below, giving the Buyer designation rights in connection with the proposed sale is not only permissible, but is necessary to achieve maximum value for the Debtors' assets.

29. Because the value of the Debtors' assets are declining as a result of an eroding customer base, the Debtors and the Court are faced with the proverbial "melting ice cream cone," making the proposed sale under Bankruptcy Code § 363 at this juncture in the case not only permissible, but essential. None of the factors that concerned the Fifth Circuit in *Braniff* are present here; and, therefore, this Court should approve the sale.

Carrier Specific Objections

A. The Proposed Transaction Does Not Create a De Facto Transfer of Control or a De Facto Assignment of Assets, including Executory Contracts, Unexpired Leases, and Rights under Tariffs.

30. In their Objections, the Carriers, TDS, and Valor assert that the Management Services Agreement effectuates a *de facto* transfer of control and/or a *de facto* assignment of executory contracts, unexpired leases, and rights under tariffs. Those assertions are not true.

31. The Management Services Agreement makes clear that the Buyer shall act as an independent contractor to provide "all services necessary or appropriate for the supervision and management of the Business." *APA, Exhibit F, Management*

Services Agreement at 2, 5. On a monthly basis, the Buyer will be compensated for rendering those services. *APA, Exhibit F, Management Services Agreement* at 5. The APA clarifies with whom ultimate control rests:

> 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 therefore, subject to ***the ultimate direction of Sellers*** and consistent with all applicable Laws and Regulations.

APA at 32 (emphasis added).

32. Pending the Final Closing, control of the Non-Transferred Assets remains with the Debtors for a logical reason – it must to comply with government regulations. *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. 393, 398 (Bankr. E.D. Pa. 1988); *In re Mirant Corp.*, 378 F.3d 511, 523 (5th Cir. 2004); *In re Cajun Electric Power Coop., Inc.*, 185 F.3d 446, 453-54 (5th Cir. 1999). The transfer of control of businesses that provide telecommunications common carrier services are subject to the jurisdiction of the FCC and the PUCs. *See generally* 47 U.S.C. § 214; 47 F.R. §§ 63.04, 63.24.

33. The prohibition of transfer of control prior to FCC approval extends to both *de jure* transfers of control as well as *de facto* transfers of control.[8] *See Fox Television*

[8] While not specifically enumerated herein, the PUCs have similar transfer and change in control provisions as the FCC and thus the Debtors must seek PUC approval for the transaction contemplated in the APA.

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.

34. 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.

35. The Debtors continue to be responsible for the payment of all financial obligations, and 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 carrier agreements) and facilities until regulatory approvals are obtained and the Final Closing 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 relating to the business, which could lead the FCC and PUCs to determine that the Buyer was granted *de facto* control. Thus, there is no violation of any provision of the Carriers' tariffs or of the filed rate doctrine – neither the APA nor the Management Services Agreement makes any modification of rights defined by various sections in the Carriers' FCC tariffs, because to do so, would implicate a transfer of control prior to the obtaining of the appropriate FCC and PUC consents.

36. Although the Carriers and TDS implicitly seek a determination from this Court as to whether the Management Services Agreement results in the Buyer's *de facto* control of the Acquired Assets, such a determination more properly would be made by the FCC, if necessary, during the normal course of its review process. 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.

37. Here, this Court need not refer the issue of *de facto* control to the FCC; under the APA, the Debtors must seek the FCC and PUCs' approval of the transaction involving the Acquired Assets; and therefore, all transfer issues already will be before the FCC and PUCs. 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 of the transaction under *Intermountain*.

38. Contrary to the positions asserted by the Carriers and/or TDS, neither *In re Antwerp Diamond, Inc.*, 138 B.R. 865, 867 (Bankr. N.D. Ohio 1992) nor the unpublished order from *In re Omniplex Communications Group, LLC*, Case No. 01-42079-399 (Bankr. E.D. Mo. 2001) support their objections. In *Antwerp*, a debtor sought approval of a sale of inventory under which the purchaser would be permitted to use real property leased by the debtor to conduct going out of business sales relating to that inventory. *Id*. at 866. The proposed going out of business sale would be a default under the lease. *Id*. The inventory to be sold by the purchaser was stored at a location other than the lease premises. *Id*. The debtors in *Antwerp* acknowledged that they did not intend to assume the subject leases. *Id*. Upon certain landlords' objection to the proposed transaction based on an asserted *de facto* assignment of their leases, the Court denied the motion to approve the asset sale. *Id*. at 866, 869.

39. The facts set forth in *Antwerp* are distinguishable from those presented in these Cases. In *Antwerp*, the debtor sought authority to permit a third party – the

inventory purchaser – to use unexpired leases of the debtor in contravention of the terms of those unexpired leases in order to conduct the inventory purchaser's business. Here, the Debtors seek to continue to use their own executory contracts and unexpired leases in accordance with their terms and in compliance with the Carriers Stipulation[9] in order to conduct their own business.

40. The unpublished order from *In re Omniplex Communications Group, LLC*, Case No. 01-42079-399 (Bankr. E.D. Mo. 2001) has no precedential or persuasive value. In *Omniplex*, the debtor executed a purchase agreement with a purchaser under which certain agreements would be assumed and assigned to that purchaser. The debtor determined that 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. Despite the determination to reject the Verizon agreement, the debtor sought to delay the actual rejection of the Verizon agreement until after the termination of a services agreement with the purchaser under which the debtor sought to transition its customers to the interconnection agreements of the purchaser. The *Omniplex* court entered an Order rejecting the Verizon agreement effective as of the date of the closing of the sale with the purchaser.

41. The *Omniplex* Order relied upon by the Carriers and TDS is of no persuasive value for a number of reasons, including the fact that it is not apparent how the services agreement or sale transaction was structured. For instance, several

[9] The term "Carrier Stipulation" shall mean the Stipulation and Consent Order by and Among Certain Carriers and the Debtors regarding Adequate Assurance/Adequate Protection of Future Payments [Docket No. 451]

important factors – such as whether the purchaser managed the business for the benefit of the debtor under the services agreement, whether the purchaser was an independent contractor of the debtor, and when the assets were transferred to the purchaser – are unknown. In any event, a significant distinction between the facts set forth in *Omniplex* and those set forth in the Sale Motion is that the Debtors have not determined that the executory contracts and unexpired leases should be rejected; to the contrary, the Debtors structured the sale transaction as they did precisely because they do not know which agreements will be assumed, assumed and assigned, or rejected.

B. The Assumed Contracts May Be Assumed and Assigned after the Approval of the Sale (i.e. the Court May Control the Timing of the Designation of Contracts to be Assumed or Rejected)

42. The Carriers argue that the setting of the timing of contract designation is inappropriate because it would be the Buyer, and not the Debtors, that would "designate" the Assumed Contracts to be assumed and assigned by the Debtors. *Carriers Objection* at 28. In asserting this position, the Carriers ignore the fact that, in any event, it will be the Debtors exercising their rights pursuant to Bankruptcy Code § 365.[10]

[10] The Carriers assert, "The Debtors argue that they will actually assume or reject as directed by Buyer after the sale is completed. That argument, however, ignores the economic, practical, and legal reality that the Buyer, rather than the Debtors, will determine what Executory Contracts, if any, will be assumed or rejected." *Carriers Objection* at 28. The Carriers' position is disingenuous. The "economic, practical, and legal reality" of any assumption and assignment of executory contracts and unexpired leases is that the assignee influences whether an agreement will be assigned to it; a debtor cannot assign an executory contract or unexpired lease to an unwilling assignee. Further, the assumption and rejection decisions of any debtor that determines that it will sell substantially all of its assets to a buyer obviously will be influenced by that buyer regardless of whether the executory contracts and unexpired leases are assumed, assigned, or rejected pursuant to the Sale Order or a subsequent Order.

43. This issue has been resolved by a number of courts, each of which has approved the setting of the timing of contract designation. *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).

44. Reviewing a situation in which the debtor sought to sell such rights with respect to real property leases, the *Ames* court recognized that those 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 Bankruptcy Code § 365 to assume and/or assign the agreements. *Id*. at 125-26.

45. In *Ames* the court 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 (emphasis added). This holding is equally applicable to the Debtors' Cases. In the exercise of their business judgment, the Debtors created a flexible sale structure under which they seek to control the timing of contract designation. Like in *Ames*, the power to assume and assign the agreements pursuant to Bankruptcy Code § 365 remains with the Debtors.

46. Noticeably absent from the Objections is a citation to any case in which the court held that the sale of designation rights is inappropriate. Instead, the Carriers rely upon the United States Supreme Court's decision in *Hartford Underwriters Ins. Co. v. Unionplanters Bank, N.A.*, 530 U.S. 1 (2000), in which the Supreme Court ruled that a third party insurance carrier could not surcharge a secured lender for costs associated with insurance coverage provided to the debtor after the commencement of the debtor's chapter 11 case but prior to the conversion of that case to a case under chapter 7.

47. Because the right to actually assume or reject executory contracts remains with the Debtors and will not be exercised by the Buyer, the Supreme Court's decision in *Hartford* is inapposite to the facts at hand. Furthermore, in *Hartford*, the Supreme Court noted, "We do not address whether a bankruptcy court can allow other interested parties to act in the trustee's stead in pursuing recovery under § 506(c)." *Id*. at 13 n.5. Thus, even if the Carriers and TDS's arguments that the Debtors transferred the assumption and assignment power to the Buyer were true, that practice would not be defeated by the *Hartford* decision. Distinguishing the facts presented in *Hartford* from the situation in which an interested party acts in the trustee's stead, the Court observed "Petitioner asserted an independent right to use § 506(c), which is what we reject today." *Id*.

48. By their conduct, the Carriers and TDS acknowledge the exception noted by the Supreme Court, and they even seem to act in contradiction of their position on the *Hartford* opinion. Each of the Carriers is a party to the Carrier Stipulation. In negotiating the Carrier Stipulation, the Carriers sought to preserve their alleged right to

surcharge the RTFC (for their own benefit) for telecommunication services provided to the Debtors. *Carrier Stipulation* at 14-15. The Carrier Stipulation provides,

> 10. Potential for Surcharge. Notwithstanding anything to the contrary herein or in any other order of the Court, including any debtor in possession financing orders, ***each of the Carriers shall have and is hereby vested with standing to pursue for its sole benefit from property securing the RTFC's allowed claims, the reasonable, necessary costs or expenses of preserving, or disposing of, such property which are incurred by such Carriers, to the extent of any benefit received therefrom by the RTFC***, and provided that (a) such action shall only be taken after expiration of all opportunities to cure a Default under Paragraph 6 of this Stipulation shall have occurred, and (b) no judgment shall be entered until each such Carrier shall have exhausted all other reasonable remedies for collection from the Debtors or their estates of any unpaid postpetition obligations, including without limitation exercise of any remedies of setoff and recoupment in accordance with Paragraph 9.A. Such claims shall have priority in payment to the respective Carriers over any and all other claims including those of the RTFC, but excluding all items comprising the Carve-Out in the debtor in possession financing order. No right of surcharge is being created, enlarged or decreased by this provision, and all parties reserve all rights with respect to 11 U.S.C. § 506(c) except as specifically set forth herein, provided however in no event shall the RTFC collateral be surcharged for more than 100% of any person's reasonable, necessary costs or expenses.

Id.

49. The grant of designation rights by a debtor has been approved by a number of Courts, and it is consistent with the Bankruptcy Code. Moreover, the sale of designation rights is necessary to maximize the value of the Debtors' estates. Due to intensely litigated issues with respect to, among other things, setoff rights and the amount of prepetition claims, the determination of cure obligations is difficult. To compel the Debtors to assume immediately executory contracts and unexpired leases would result in protracted litigation over cure obligations and make the timely approval of the sale of Acquired Assets impossible.

General Transaction Objections

A. The Debtors and RTFC Need Not Be Committed to a Plan.

50. The Committee objects to the proposed sale to the extent that it is approved absent a "meaningful commitment to the confirmation and implementation of a plan of reorganization" by the Debtors and the RTFC. *Committee Objection* at 5-6. The Debtors fully commit to take all actions necessary to satisfy their duties to act in the best interests of the estates and their creditors. The Court recently extended exclusivity until September 7, 2005, and it is currently the Debtors' intention, as announced in open court, to file a plan on or before that date.

B. The RTFC's Rights to Credit Bid at the Auction or Exercise Veto Powers Are Moot.

51. Because the RTFC did not attempt to credit bid at the auction and did not exercise any rights to veto the Auction, these grounds for objection are moot.

C. Procedures and a Timetable Have Been Established for the Designation of Executory Contracts and Related Matters.

52. The Committee objects to the Sale Motion, stating as follows:

> [A]pproval 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, the identification of the anticipated sources of such cure payments, and the formal assumption, assignment and, as appropriate, rejection of pertinent contracts and leases.

Committee Objection at 10. The Debtors submit that they have established procedures and a timetable for the designation of executory contracts and related matters, and, thus, this objection should be overruled.

D. The Debtors Should Not Be Required to Allocate Proceeds Prior to the Sale Hearing.

53. The Committee argue that 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." *Committee Objection* at 10. The Debtors should not be required to make such an allocation prior to the sale hearing. Because there will be no distribution of the proceeds (other than on a provisional basis to the RTFC), the allocation of the proceeds, which would necessarily involve valuation issues, can be determined at a later date.

E. The Debtors Will Work With the Buyer to Address any "Timing Busts."

54. The Committee objects to the Sale Motion on the grounds that there are certain "timing busts" in the APA and Sale Procedures. To the extent that such "timing busts" exist, the Debtors commit to work with the Buyer to address these issues.

F. D&O Litigation is an "Excluded Asset" under the APA.

55. The Committee objects to the Sale Motion, seeking the inclusion in the Sale Order of language expressly excluding D&O litigation from the definition of "Excluded Assets." The Debtors submit that the D&O litigation is already included in the definition of "Excluded Assets" under the APA. Section 2.2(k) includes in the definition of "Excluded Assets,"

> any and all claims, causes of action, avoidance actions, counterclaims, demands, controversies, costs, debts, sums of money, accounts, reckonings, bonds, bills, damages, obligations, liabilities, objections, legal proceedings, equitable proceedings, executions of any nature, type, or description, choses in action, rights of recovery, and rights of recoupment or set-off against any Person, including any Avoidance Actions that do not arise under the Acquired Assets; . . .

APA at 15.

56. This provision of the APA clearly includes D&O litigation in the definition of "Excluded Assets."

G. Additional "Disclosures" Are Not Necessary.

57. The Committee seeks to have the Debtors "disclose" whether tariffs are to be treated as "executory contracts or something else" and "the costs, financial impact, litigation costs, etc., that may result [from such treatment]"; funding of PARs litigation, and, funding of ongoing costs. *Committee Objection* at 13). The Committee also suggests that the Debtors should provide a "liquidation analysis and class-by-class recovery analysis that might otherwise be found in a disclosure statement" and disclosure of "the management personnel to be designated by the successful Buyer." *Committee Objection* at 14. While this might be the kind of disclosure that could be required of a debtor in the context of a disclosure statement for a plan, as set forth above, this sale in not a *sub rosa* plan. To address each request for disclosure, the Debtors submit the following:

- **Tariffs** Because the hearing on the Sale Motion does not involve a determination of the assumption or rejection of executory contracts, such issues are not before the Court at this time.
- **Funding of PARS Litigation**. Section 5.16 of the APA includes a detailed discussion of the effect that the sale of Acquired Assets will have on PARs. *APA* at 41. That section discusses how Acquired PARs and Retained PARs will be funded, who may direct PARs litigation, and how the proceeds from that litigation will be applied.

- **Funding of Ongoing Costs** The Debtors are negotiating a post-sale DIP financing arrangement and will provide the Committee updates from such negotiation as they become available.
- **Liquidation and Class-by-Class Recovery Analysis** The Debtors are not required to provide a liquidation analysis in connection with a sale of assets under Bankruptcy Code § 363. As discussed above, the proposed sale does not constitute a *sub rosa* plan. If the Debtors were to provide a class-by-class recovery analysis, the Committee would be arguing that such an analysis predetermines creditors' rights, which would make the proposed sale a *sub rosa* plan. The Debtors carefully negotiated the terms of the APA so as to avoid any predetermination of rights of creditors in relation to priorities or distribution of the proceeds. Such determinations and disclosures will be made at the appropriate time in connection with any plan to be submitted by the Debtors.
- **Key Management Personnel** The Debtors will provide information relating to the Buyer's management at or prior to the Sale Hearing, if available.

H. Under the APA, the Buyer Takes the Risk of Loss and the Debtors Have the Opportunity for Profit in the Event a Final Closing Does Not Occur.

58. The Carriers assert that it is unclear who bears the risk of loss and opportunity for profit between the Closing and the Final Closing. Section 2.15 of the APA clearly provides that on the Closing Date, "all risk of loss, damage, impairment,

confiscation or condemnation of the Acquired Assets shall transfer to Buyer." *APA* at 22-23.

59. Under the Management Services Agreement, all collected accounts receivable shall be disbursed into the Funding Account. *APA, Exhibit F, Management Services Agreement* at 2. The Funding Account is a Non-Transferred Asset which, along with the other Non-Transferred Assets, would be transferred to the Buyer on the Final Closing Date. *APA* at 12. If the APA would terminate prior to the Final Closing, the Non-Transferred Assets, including the Funding Account into which all of the Debtors' wealth would be captured, would remain in the Debtors' possession. Therefore, the Debtors retain the opportunity for profit if the Final Closing does not occur.

I. The Debtors Should Not Be Compelled to Assume or Reject Immediately Their Agreements with TDS and Valor.

60. In their Objections, TDS and Valor assert that the Debtors should be compelled to immediately assume or reject their agreements with those parties. The relief requested by TDS and Valor is inappropriate in the sale context. TDS and Valor are entitled to seek such relief only after notice and a hearing. As TDS and Valor filed their Objections on July 20, 2005, the twenty-day notice period (plus three days for mailing or ECF service) would not expire until after the Sale Hearing; and therefore, the requested relief should not be considered at the Sale Hearing. If the Court considers the relief requested by TDS and Valor despite this defect, the Debtors incorporate the argument set forth in their Omnibus Objection to Carriers' Motions (Other Than By SBC Telcos) to Compel Assumption or Rejection of Executory Contracts [Docket No. 1606], and they request that the relief requested by TDS and Valor be denied.

J. Valor Is Not Entitled to a Ruling on the Nature of Future Claims.

61. In its Objection, Valor asserts that it is entitled to an allowed administrative expense claim for post-petition services rendered to the Debtors. The requested relief is defective and moot. Valor Telecommunications of Texas, LP is a party to the Carrier Stipulation, which provides, "All post-petition amounts owing by the Debtors to the Carriers shall constitute administrative expenses (the "Administrative Expense Claims") of the Debtors' estates pursuant to 11 U.S.C. § 503(b)." *Carrier Stipulation* at 6.[11] Thus, the Carrier Stipulation, which would remain effective after the approval of the sale of the Acquired Assets, addresses Valor Telecommunications of Texas, LP's request for relief and moots its request.

62. To the extent not mooted, the request for relief of Valor (to include Valor Telecommunications of Texas, LP and Kerrville Telephone LP) is defective. Valor would be entitled to seek such relief only after notice and a hearing. As Valor filed its Objection on July 20, 2005, the twenty-day notice period (plus three days for mailing or ECF service) would not expire until after the Sale Hearing; and therefore, the requested relief should not be considered at the Sale Hearing.

63. Further, except as set forth in the Carrier Stipulation, Valor cannot demonstrate that it is entitled to an administrative expense claim for future, speculative, and contingent claims. The postpetition expenses that Valor claims should be administrative expenses have not occurred and no postpetition amounts are alleged outstanding. At this point in time, there is no way for Valor to prove a future expense is

[11] Kerrville Telephone LP is part of the defined term "Valor," but it is not a party to the Carrier Stipulation.

"actual" let alone "necessary" and made to preserve the Debtors' estates as required to prove entitlement to an allowed administrative expense claim. 11 U.S.C. § 503(b)(1)(A). Accordingly, Valor's alleged future administrative expense claim is not ripe for adjudication.

K. Pending the Assumption, Assumption and Assignment, or Rejection of the Agreements with CenturyTel, the Debtors Will Perform under the Carrier Stipulation and Observe the Requirements of Bankruptcy Code § 365.

64. In addition to adopting the arguments made by various Objecting Parties, CenturyTel requests that, if the Court grants the Sale Motion, the Sale Order should contain a number of reservations of rights and clarifications. Such reservation of rights and clarifications are unnecessary. Pending the assumption, assumption and assignment, or rejection of the agreements with CenturyTel, the Debtors shall perform under the Carrier Stipulation, which addresses a number of the concerns raised by CenturyTel, and shall comply with Bankruptcy Code § 365. Further, the Sale Motion and APA clearly sets forth that the Debtors do not seek to assume, assume and assign, or reject any agreements at the Sale Hearing; rather, the Debtors shall file subsequent motions to accomplish those tasks, and all issues relating to such assumption, assignment, or rejection should be taken up at that time.

L. The Right of a Counterparty to an Executory Contract or Unexpired Lease to Object to the Assumption and/or Assignment of Such Contract or Lease under Bankruptcy Code § 365 Is Preserved.

65. 770 "L" Street objects to the sale of the Acquired Assets "to preserve, to the extent necessary, all of its rights to object to the assumption and/or assignment of the lease for the Premises under section 365 of the Bankruptcy Code." *770 "L" Street Objection* at 2. As previously stated, issues relating to assumption and assignment of

executory contracts and unexpired leases will be taken up at the time of the filing of a motion to approve the same. Therefore, the protections requested by 770 "L" Street are preserved.

M. The Objecting Parties Do Not Provide Enough Information to Determine How the Sale Would Affect Their Setoff Rights..

66. Certain of the Objecting Parties object to the sale of the Acquired Assets to the extent that such sale would affect their setoff rights. However, those Objecting Parties do not expound upon how those setoff rights would be affected. Without more, the Debtors are unable to respond to their objection on this ground.

Tax Authority Objections

A. Tax Liens Will Attach to the Proceeds from the Sale of the Acquired Assets.

67. Several taxing authorities object to the sale of the Acquired Assets on various grounds, including that the Acquired Assets cannot be sold free and clear of tax liens, their liens should be paid from the proceeds from that sale, their liens should continue in the Buyer's personal property after the transfer, and/or they must be provided adequate protection of their interests in the Acquired Assets. The concerns raised by the taxing authorities are addressed in the proposed Sale Order, which is attached as Exhibit B to the APA. The Sale Order provides,

> Pursuant to Bankruptcy Code §§ 105(a), 363(b) and 363(f), the transfers of the Acquired Assets to the Buyer pursuant to the Agreement shall vest the Buyer with all rights, title, and interest in and to the Acquired Assets effective as of the time of the transfers under the Agreement and shall be free and clear of all Liens (other than Permitted Liens), claims, rights, interest, and encumbrances, which have, or could have, been asserted by the Debtors or their creditors in connection with the Debtors' Bankruptcy Cases, if any, with any claims, liens, encumbrances, and interests against the Acquired Assets attaching to the proceeds of the Sale (the "Proceeds") with the same force, validity, priority and effect, if any, as the claims, liens, encumbrances, and interests formerly had against the Acquired Assets, if

> any, subject to the Debtors' ability to challenge the extent, validity, priority and effect of the claims, Liens, encumbrances, and interests and subject to and as otherwise provided in any other order of this Court in these Cases.

APA, Exhibit B, Sale Order at 10. The net proceeds from the sale of the Acquired Assets then provisionally will be paid to the RTFC subject to the claims, liens, encumbrances, and interests that attach to those proceeds. *Id*. Thus, the taxing authorities' interests are protected pending the subsequent payment of their claims to the extent they are allowed.

B. The APA's Disclosure of Taxes that Will Be Prorated under the APA Is Adequate.

68. King County objects to the Sale Motion because it asserts that the APA is unclear concerning what taxes will be prorated. At issue is Section 2.12 of the APA which provides, in relevant part,

> The Working Capital Adjustment shall reflect that all ad valorem Taxes, real property Taxes, personal property Taxes, and similar obligations ("Property Taxes") attributable to the Acquired Assets with respect to the tax period which includes the Closing Date shall be apportioned as of the Closing Date between Sellers and Buyer determined by prorating such Property Taxes on a daily basis over the entire tax period.

APA at 21. As this section of the APA is clear, no clarification is necessary.

Miscellaneous Objections

A. It Would Be Improper to Pay Amberson's General Unsecured Claim from the Proceeds from the Sale.

69. Amberson objects to the sale of the Acquired Assets to the extent that the proceeds thereof would not be used to satisfy his general unsecured claim. The use of the proceeds from the sale as requested by Amberson would be contrary to the

provisions of the Bankruptcy Code; and therefore, the Amberson Objection should be denied.

B. The Nortel Objection Is Not Ripe for Determination.

70. Nortel objects to the sale of the Acquired Assets on several grounds including the following: (i) the Debtors cannot (A) sell Nortel manufactured equipment, which uses imbedded licensed software, to the Buyer and (B) assign Nortel licensed software to the Buyer without satisfying a number of requirements set forth by Nortel; (ii) the Buyer cannot perform under the Management Services Agreement without "taking possession" of Nortel licensed software and that "taking possession" cannot be effected unless the Buyer pays a license fee; and (iii) the Debtors should be required to poll their network to determine if they are engaging in the unauthorized use of Nortel software.

71. In large part, Nortel's objection is based on a failure to understand the structure of the proposed sale transaction. As discussed above, upon the receipt of the required FCC approval, the Debtors will enter into a Management Services Agreement with the Buyer under which the Buyer will provide management services to the Debtors. However, ultimate control of the Non-Transferred Assets (which include the Nortel manufactured equipment and software licenses) remains with the Debtors and the Debtors' employees will be responsible for operating, using, and maintaining possession of that equipment and software licenses. Therefore, in contrast to Nortel's assertion, the Management Services Agreement will not effect the Buyer's taking possession of the Nortel manufactured equipment and software licenses, and the Buyer's payment of an additional license fee would be unnecessary.

72. As provided in the Sale Motion and APA, the Debtors do not seek approval of the assumption and assignment of any executory contracts or unexpired leases at the Sale Hearing. Rather, from time to time, the Debtors will file motions seeking to assume and assign executory contracts and unexpired leases after notice and a hearing. To the extent that Nortel is a party to executory contracts with the Debtors, whether those contracts would relate to imbedded or unimbedded software licenses, the Debtors will seek approval of such contracts, if at all, in a motion. As a result, Nortel's objections to that assumption and assignment would be preserved.

73. The Debtors dispute Nortel's assertion that the Debtors have wrongfully acquired Nortel software licenses; however, to accommodate the request of Nortel, the Debtors agree to cooperate with Nortel to identify the Nortel products and services currently utilized by the Debtors.

74. For these reasons, the Nortel Objection should be denied.

PRAYER

The Debtors respectfully request that this Court enter an Order overruling the Objections and granting the relief requested in the Sale Motion. The Debtors also request such other and further relief to which they may be justly entitled.

Dated: July 26, 2005.

Respectfully submitted,

VINSON & ELKINS L.L.P.
Trammell Crow Center
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201
Tel: 214.661.7299
Fax: 214.220.7716

By: */s/ Richard H. London*
Daniel C. Stewart, SBT #19206500
William L. Wallander, SBT #20780750
Richard H. London, SBT #24032678

ATTORNEYS FOR THE DEBTORS

989329_6.DOC

CERTIFICATE OF SERVICE

This is to certify that on July 26, 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/ Richard H. London
One of Counsel

EXHIBIT A

Ground for Objection (as Asserted by Objecting Party)	Objecting Party[12]
Sub Rosa Plan Objections	
The sale of Acquired Assets should not be structured outside of a plan and the proposed sale is a *sub rosa* plan.	Broadwing, ¶ 6-10 Carriers, ¶ 20-34 Committee, ¶ 12 TDS, p. 6
Carrier Objections	
The Proposed Transaction Would Create a *De Facto* Transfer of Control or a *De Facto* Assignment of Assets, including Executory Contracts, Unexpired Leases, and Rights under Tariffs.	Carriers, ¶ 40-54 CenturyTel, ¶ 19 TDS, pp. 5, 8
The Debtors may not sell designation rights.	Carriers, ¶ 55-73 CenturtyTel, ¶ 19 TDS, p. 6
General Transaction Objections	
The Debtors and RTFC should be committed to a plan.	Committee, ¶ 13-15
The RTFC does not have a statutory right to credit bid and certain protections should be put in place before the RTFC may credit bid.	Committee, ¶ 17-18
The RTFC should not be entitled to exercise veto rights.	Committee, ¶ 19
Procedures and a timetable for designation of those executory contracts and unexpired leases to be assumed and assigned to the Buyer should be established.	Committee, ¶ 21
The Debtors should provide proposed allocation of sale proceeds prior to sale hearing.	Committee, ¶ 22
The Debtors should correct certain timing busts.	Committee, ¶ 23-24
D&O litigation should be included in the definition of "Excluded Assets" under the APA.	Committee, ¶ 25
Debtors should be required to disclose information relating to tariffs, PARs litigation, funding of ongoing costs, liquidation analysis, class recovery analysis, and key management personnel of Buyer.	Committee, ¶ 26-31
It is unclear who bears the risk of loss in the event a final closing does not occur.	Carriers, ¶ 74-76 CenturyTel, ¶ 19

[12] If an Objection does not use paragraph numbers, the page number will be referenced.

Ground for Objection (as Asserted by Objecting Party)	Objecting Party[12]
The Debtors should be compelled to immediately assume or reject the telecommunication service providers' executory contracts.	TDS, p. 10 Valor, ¶ 7-10
Valor is entitled to payment of an administrative expense claim for the value of services rendered and which continue to accrue post-petition.	Valor, ¶ 11-13
CenturyTel's rights under Bankruptcy Code §§ 365 and 503 and under the Carrier Stipulation should be preserved.	CenturyTel, ¶ 20
Parties to executory contracts and unexpired leases should have an opportunity to object to the assumption and/or assignment of their contracts and leases.	770 L Street, ¶ 3
The proposed sale could impair setoff rights.	Carriers, ¶ 77-78 CenturyTel, ¶ 19 TDS, p. 7
Tax Authority Objections	
The Acquired Assets cannot be sold free and clear of tax liens, tax claims should be paid from the sale proceeds, and/or taxing authorities must be provided adequate protection.	City of Irving, ¶ 6 Desoto, Richardson, and King County, pp. 2-3 Miami – Dade County, ¶ 4 Spring Branch ISDs, ¶ 5 Washoe, p. 2
The taxes that will be prorated under the APA should be identified specifically.	King County, p. 3
Miscellaneous Objections	
The proceeds from the sale should be used to satisfy the general unsecured claim of Kent Amberson.	Amberson, p. 1
The Debtors cannot sell Nortel manufactured equipment to the Buyer and assign Nortel licensed software to the Buyer without satisfying a number of requirements set forth by Nortel.	Nortel, ¶ 8-22
The Buyer cannot perform under the Management Services Agreement without "taking possession" of Nortel licensed software and that "taking possession" cannot be effected unless the Buyer pays a license fee.	Nortel, ¶ 8-22
The Debtors should cooperate with Nortel to poll their network for Nortel hardware, and the Debtors should pay an additional monthly software license fee for unlicensed software.	Nortel, ¶ 23