

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

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

**RESPONSE OF BROADWING COMMUNICATIONS, LLC
TO AMENDED SECOND MOTION TO AUTHORIZE AND
RATIFY REJECTIONS OF VARIOUS CIRCUIT AGREEMENTS**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, Broadwing Communications, LLC (“Broadwing”), a creditor and party-in-interest in the above-referenced matter, and files this response to the Debtors’ Amended Second Motion to Authorize and Ratify Rejections of Various Circuit Agreements (“Response”) and avers as follows:

**I.
INTRODUCTION**

1. Broadwing is a telecommunications carrier which, among other things, provides telecommunication services including voice, data, and long-haul transmission, collocation facilities, and private line services.

2. Broadwing provides telecommunications services to the Debtors pursuant to master services, and products and services agreements (“Service Agreements”). Broadwing continues to provide services to the Debtors on a post-petition basis pursuant to the Service Agreements, and the Stipulation and Consent Order by and Among Certain Carriers and the Debtors Regarding Adequate Assurance/Adequate Protection of Future Payments, and the Debtors’ First Notice of Additional Carriers dated December 17, 2004.

3. Or about June 16, 2005, the Debtors filed their first Motion to Authorize Rejections of Circuit Agreements (“First Motion to Reject”). In their First Motion to Reject, the Debtors proposed to “reject” certain designated circuits, including eight (8) circuits attributed to Broadwing. Each of the Broadwing circuits identified in the First Motion to Reject had already been “disconnected through the procedure provided for under the applicable Agreements.”

4. Because the Broadwing circuits identified by the Debtors in the First Motion to Reject had already been disconnected, Broadwing filed its Joinder in Objections to the Debtors’ Motion to Authorize Rejections of Circuit Agreements (“Broadwing Objection”). In the Broadwing Objection, Broadwing noted that because the Broadwing circuits had already been disconnected, according to the *Debtors*, in accordance with the Service Agreements, the circuits were not executory, and thus could not be rejected under § 365 of the Bankruptcy Code.¹

5. As compromise of the Broadwing Objection to the First Motion to Reject, on November 7, 2005, the Court entered the Debtors’ Second Order Authorizing Rejection of Circuit Agreements (“Second Order”). In the Second Order, the Broadwing circuits identified in the First Motion to Reject were “deemed disconnected” without prejudice to the parties positions with regard to other circuits.

6. On or about October 28, 2005, the Debtors filed an Amended Second Motion to Authorize and Ratify Rejections of Various Circuit Agreements (“Second Motion to Reject”). In their Second Motion to Reject, the Debtors seek authority to reject certain additional circuits identified as “Designated Circuits.” Among the Designated Circuits are three (3) circuits attributed to Broadwing (“Broadwing Circuits”).

¹ Broadwing joined in the objections filed by MCI Network Services, Inc. and Bellsouth Telecommunications, Inc.

7. As stated in the Second Motion to Reject, as was the case in the First Motion to Reject, the Broadwing Circuits have already been disconnected.

8. Accordingly, the issue of whether the Designated Circuits or the Broadwing Circuits are “severable contracts” under the relevant agreements, and the Service Agreements, is not properly before the Court.

9. A debtor may not assume or reject an agreement which, by its own terms, is not executory because it has already expired or been terminated. *See In re Office Products of America, Inc.*, 136 B.R. 675, 685 (Bankr.W.D.Tex.1992)(“There being no executory contract, the trustee could not have assumed it, even if he had wished to.”); *see also In re Nat’l Steel Corp.*, 316 B.R. 287, 304 (Bankr. N.D. Ill. 2004)(an executory contract expired by its terms leaves nothing for the debtor to assume or reject).

10. Moreover, and in the alternative, Broadwing disputes that the Designated Circuits are severable, individual contracts capable of rejection apart from the Service Agreements. Executory contracts must be assumed or rejected in their entirety. *See, e.g., Stewart Title Guaranty Co. v. Old Republic Nat. Title Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996). In the event that the Debtors attempt to assume the Service Agreements, Broadwing reserves all rights to demand cure of all amounts arising under the Service Agreements, whether or not individual circuits have otherwise terminated or been disconnected, in accordance with § 365 of the Bankruptcy Code.

WHEREFORE, Broadwing respectfully requests that this Court enter an order denying the Debtors’ Second Motion to Reject, and that the Court grant Broadwing such other and further relief to which it may show itself to be justly entitled.

Dated November 17, 2005.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: /s/Marvin E. Sprouse III

Marvin E. Sprouse III

State Bar No. 24008067

msprouse@jw.com

C. Wade Cooper

State Bar No. 04772700

wcooper@jw.com

100 Congress, Suite 1100

Austin, TX 78701

(512) 236-2000 Telephone

(512) 236-2002 Fax

ATTORNEYS FOR BROADWING
COMMUNICATIONS, LLC

CERTIFICATE OF SERVICE

This is to certify that on this 17th day of November, 2005, a true and correct copy of the foregoing document was served electronically or via United States mail, postage prepaid upon the following parties:

Elizabeth Weller
LINEBARGER, GOGGAN BLAIR & SAMPSON
2323 Bryan Street, Suite 1600
Dallas, Texas 75201

Rex D. Rainach
3622 Government Street
Baton Rouge, LA 70806-5720

US TRUSTEE
1100 Commerce Street, Room 976
Dallas, Texas 75242-1496

Lisa A. Epps
SPENCER FANE BRITT AND BROWNE, LLP
1000 Walnut Street, Suite 1400
Kansas City, MO 64106-2140

Darryl S. Laddin
ARNALL GOLDEN GREGORY LLP
171 17th Street, Suite 2100
Atlanta, GA 30363

Marvin R. Mohny
900 Jackson Street, Suite 120
Dallas, Texas 75202

Vincent A. D-Agostino, Esq.
LOWENSTEIN SANDLER, P.C.
65 Livingston Avenue
Roseland, NJ 07068

Paul M. Rosenblatt
KILPATRICK STOCKTON
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309

David L. Woods
MCGUIR, CRADDOCK & STROTHER
500 N. Akard Street, Suite 3550
Dallas, Texas 75201

Daniel C. Stewart
William Louis Wallander
Holly J. Warrington
VINSON & ELKINS
3700 Trammel Crow Center
2001 Ross Avenue
Dallas, Texas 75201-2975

/s/Marvin E. Sprouse III

Marvin E. Sprouse III