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ATTORNEYS FOR COMTEL TELECOM ASSETS, LP AND COMTEL INVESTMENTS LLC

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

IN RE:	§	
	§	
VARTEC TELECOM, INC., *et al.,*	§	**CASE NO. 04-81694-HDH-11**
	§	
DEBTORS.	§	**(Chapter 11)**
	§	**(Jointly Administered)**
	§	
	§	**Status Conference Set for December 13, 2005 at 1:30 p.m.**
	§	
	§	**Hearing Set for January 3, 2006 at 10:00 a.m.**
	§	

DEBTORS' AND COMTEL'S JOINT OBJECTION AND RESPONSE TO MOTION TO COMPEL IMMEDIATE ASSUMPTION OR REJECTION OF THE DEBTORS' EXECUTORY CONTRACTS OR, IN THE ALTERNATIVE, MOTION TO GRANT RELIEF FROM THE AUTOMATIC STAY (QWEST COMMUNICATIONS CORPORATION AND QWEST CORPORATION)

TO THE HONORABLE HARLIN D. HALE, UNITED STATES BANKRUPTCY JUDGE:

The above-referenced debtors and debtors in possession (collectively, the "Debtors")[1] and Comtel Telecom Assets, LP and Comtel Investments LLC (collectively, "Comtel") file this Joint Objection and Response to Motion to Compel Immediate Assumption or Rejection of the Debtors' Executory Contracts or, in the Alternative, Motion to Grant Relief from the Automatic Stay (Qwest Communications Corporation and Qwest Corporation) (the "Objection") and in support thereof the Debtors would show as follows:

I. INTRODUCTION

1. Qwest Communications Corporation and Qwest Corporation (collectively, the "Qwest Parties") – who are being paid on better terms post-petition than pre-petition – seek to compel the Debtors to immediately assume or reject certain unspecified agreements (collectively, the "Qwest Agreements"). In the alternative, the Qwest Parties request stay relief in order to terminate providing services to the Debtors under those agreements.

2. The *Motion for Order Compelling Immediate Assumption or Rejection of the Debtors' Executory Contracts with Qwest Communications Corporation and Qwest Corporation or, in the Alternative, Granting Relief from the Automatic Stay to Allow Termination of Services* [Docket No. 2058] (the "Second Motion to Compel") is premised on a number of hollow arguments that this Court previously considered and found to be

[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.

unpersuasive, including that Comtel currently controls the operation of the Debtors' business. The Second Motion to Compel is nothing more than an attempt by the Qwest Parties to gain leverage in their ongoing negotiations with the Debtors and Comtel concerning the Qwest Agreements. During those negotiations, the Qwest Parties have consistently rejected reasonable proposals made by the Debtors and/or Comtel.

3. Contrary to the Qwest Parties' assertions, the Debtors, and not Comtel, ultimately control the Debtors' assets, pending a Final Closing.[2] Moreover, since the Sale Hearing, the Debtors and Comtel have diligently focused upon identifying executory contracts and unexpired leases to be assumed, assumed and assigned (effective as of the Final Closing Date), or rejected, and they have covered significant ground with respect to that evaluation. The Qwest Parties are simply angry that this process has yielded settlements for other carriers, whereas their intransigence has prevented resolution of their demands for payment of cure costs.

4. Because the Qwest Parties fail to demonstrate cause to compel the Debtors' immediate assumption or rejection of the Qwest Agreements, or to lift the stay to allow termination of services to the Debtors under those agreements, the Second Motion to Compel should be denied.

II. PROCEDURAL BACKGROUND

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"). Since the Petition Date, the Debtors have

[2] Capitalized terms not otherwise defined herein shall have the meaning attributed to them in the Comtel APA (as defined herein).

continued to operate and manage their businesses as debtors in possession pursuant to Bankruptcy Code §§ 1107(a) and 1108.

III. FACTUAL BACKGROUND

A. The Court Approves the Carrier Stipulation

6. In the initial days following the Petition Date, several motions for adequate assurance or adequate protection, or joinders thereto, were filed by certain large telecommunications carriers with whom the Debtors had contractual or other business relationships. In those pleadings, the carriers requested, among other things, large deposits, prepayments for services, and authority to terminate services under certain circumstances. After extensive negotiations, the Debtors and several carriers, including the Qwest Parties, executed a Stipulation and Consent Order by and among Certain Carriers and the Debtors regarding Adequate Assurance/Adequate Protection of Future Payments [Docket No. 451] (the "Carrier Stipulation"). The Court entered the Carrier Stipulation on December 3, 2005.

7. The Carrier Stipulation provides a framework for, among other things, (i) ***the Debtors to make negotiated payments on the first and third Wednesday of each month to pre-pay and promptly pay carriers for average usage***; (ii) the Debtors and the carriers promptly to engage in monthly true ups of payments made and actual amounts owed; and (iii) the Debtors to otherwise provide adequate assurance and adequate protection to the carriers.

8. The Debtors are current on their post-petition obligations to the Qwest Parties, and the payment terms of the Carrier Stipulation are more favorable to the Qwest Parties than the payment terms under the Qwest Agreements.

B. The Court Approves the Sale of the Acquired Assets

9. In July 2005, after identifying, and negotiating with, several stalking horse candidates, the Debtors finalized an asset purchase agreement with Leucadia National Corporation ("Leucadia") under which Leucadia agreed to, among other things, (i) pay $61,500,000 for the Debtors' remaining operating assets (the "Acquired Assets") (subject to a working capital adjustment) and (ii) assume certain liabilities. Prior to the expiration of the bid deadline, Comtel Investments LLC submitted a qualified bid for the Acquired Assets, and on July 25, 2005, the Debtors held an auction of the Acquired Assets, at which Comtel Investments LLC was identified as the successful bidder with a bid of $82,100,000 (subject to a working capital adjustment).

10. Certain parties, including the Qwest Parties, objected to the sale of the Acquired Assets, and after a contested hearing on July 27, 2005, the Court entered an Order [Docket No. 1663] ("Comtel Sale Approval Order") approving (i) the Asset Purchase Agreement dated July 25, 2005 (the "Comtel APA") by and among the Debtors, on the one hand, and Comtel Investments LLC, on the other hand, and (ii) the sale of the Acquired Assets to Comtel Telecom Assets, LP, as successor in interest to Comtel Investments LLC under the Comtel APA.

11. Under the Comtel APA, the Acquired Assets generally consist of substantially all of the Debtors' assets but specifically exclude, among other things, cash, insurance policies, avoidance actions and other causes of action of the estates not related to the Acquired Assets. As more specifically delineated in the Comtel APA, Comtel agreed 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 (i) designated for assumption and assignment and (ii) approved by this Court for assumption and assignment.

12. Prior to the transfer of certain assets, including the Qwest Agreements, the Debtors and/or Comtel must obtain regulatory approvals of the Federal Communications Commission (the "FCC") and public utility or public service commissions (collectively, the "PUCs") for each State in which the Debtors conduct business. To comply with these regulations, the Acquired Assets fall into two mutually exclusive categories: Transferred Assets and Non-Transferred Assets. The Non-Transferred Assets include effectively all monies and property necessary for the business to operate (*e.g.*, accounts receivables, equipment, facilities, executory contracts, and unexpired leases necessary to provide telecommunications services), and Transferred Assets include assets that may be transferred upon obtaining Hart Scott Rodino ("HSR") approval without violating any FCC or PUC regulations. ***Thus, pursuant to government regulations and the Comtel APA, executory contracts necessary to provide telecommunications services, such as the Qwest Agreements, cannot be assumed and assigned to Comtel until the Debtors and/or Comtel obtain necessary regulatory approvals.***

13. As a consequence of the various regulatory requirements, the Comtel APA generally provides for closing the assets sale in three steps on the following dates: (i) Early Funding Date; (ii) Closing Date; and (iii) Final Closing Date. On August 1, 2005 (the Early Funding Date), one-half of the purchase price for the Acquired Assets was placed in an escrow account and the final closing documents were executed and placed in escrow pending the Final Closing Date. At that time, the risk of loss (but not

ownership or control) as to all Acquired Assets transferred to Comtel. On August 19, 2005 (after the expiration of the statutory waiting period under the HSR Act), $40,050,000 was paid to VarTec Telecom, Inc. and the Transferred Assets were transferred to Comtel. The Debtors await the requisite regulatory approval of the PUCs (the FCC provided approval on September 19, 2005) and upon the date of the receipt of those approvals (the Final Closing Date), the balance of the purchase price for the Acquired Assets will be paid to VarTec Telecom, Inc. and the balance of the Acquired Assets (*i.e.,* the Non-Transferred Assets) will be transferred to Comtel.

14. As contemplated in the Comtel APA, the Debtors and Comtel have executed a Management Services Agreement (the "Comtel MSA") effective as of September 19, 2005, under which Comtel provides 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]."*** *Comtel APA* at 32. Similarly, the Comtel MSA provides,

> ***Subject to [VarTec Telecom, Inc.'s] ultimate control over the Business,*** Section 8 herein and all applicable Laws and Regulations, [VarTec Telecom, Inc.], on behalf of the VarTec Entities, hereby appoints Manager as the sole and exclusive provider of all services necessary or appropriate for the supervision and management of the Business, as described more fully in Section 3."

Comtel MSA at 2 (emphasis added). Section 3 of the Comtel MSA further provides,

> Commencing as of the date hereof and continuing until termination of this Agreement as provided herein, Manager shall establish and implement operational policies and provide general management and direction of the day-to-day operations of the Business and shall exercise general supervision and direction of the Business and the affairs of the Business, ***subject to Parent's ultimate control of the Business.***

Comtel MSA at 3 (emphasis added). During the term of the Comtel MSA, the Debtors' employees continue to attend to the day-to-day operations of the Debtors' business and the ultimate decision-making authority is vested in the Debtors' chief executive officer, Michael G. Hoffman.

15. Under the Comtel APA, from time to time after the entry of the Comtel Sale Approval Order, Comtel is entitled to designate executory contracts and unexpired leases for assumption and assignment. As required by applicable law and regulations, the actual assumption and assignment will occur only after (i) requisite regulatory approvals are obtained from the PUCs; and (ii) the Court approves such assumption and assignment after notice and hearing.

C. The Court Denies the Qwest Parties' First Motion to Compel Assumption or Rejection of Executory Contracts

16. On July 1, 2005, the Qwest Parties filed their Motion for Order Compelling Immediate Assumption or Rejection of Executory Contracts [Docket No. 1459] (the "First Motion to Compel"), in which they sought to compel the Debtors to assume or reject certain executory contracts.[3] The hearing on the First Motion to Compel (and similar motions filed by other carriers) was held concurrent with the hearing on the sale of the Acquired Assets.

17. At the conclusion of that hearing, the Court found that the Qwest Parties had not demonstrated cause to compel the Debtors to assume or reject the executory contracts, and it denied the First Motion to Compel and the similar motions filed by other

[3] Several other carriers filed similar motions to compel assumption or rejection of executory contracts and unexpired leases, as well.

carriers without prejudice to their refilling after November 1, 2005. Specifically, the Court found:

> The carriers have not met their burden of proof . . . under Section 365. The Code provides that this Court "may" require a debtor to assume or reject a contract. On this record, especially given that the sale motion and the adequate protection stipulation are in place, the creditors have not established cause for me to compel assumption or rejection tonight.

Transcript of Proceeding on July 27, 2005 (Court's Ruling), page 5, lines 2-9.

D. The Qwest Parties File the Second Motion to Compel Assumption or Rejection of Executory Contracts

18. On November 16, 2005, the Qwest Parties filed the Second Motion to Compel in which they again seek (i) to compel the Debtors' immediate assumption or rejection of the Qwest Agreements, or (ii) in the alternative, relief from the automatic stay to allow the termination of services under those agreements.

19. In support, the Qwest Parties argue that (i) Comtel currently controls the Debtors' operations; (ii) the Debtors and Comtel have had sufficient time to decide whether the Qwest Agreements should be assumed or rejected; and (iii) the Debtors' directors are not exercising their fiduciary duties to the Qwest Parties. The Qwest Parties' arguments are not supported by the facts and the Second Motion to Compel should be denied.[4]

[4] As an initial matter, in the Second Motion to Compel, the Qwest Parties state, "This balancing [of the interests of various parties in interest] is accomplished ***by requiring the debtor to abide by the contract provisions during pendency of the bankruptcy case*** . . . ." *Second Motion to Compel* at 13-14 (emphasis added). The Qwest Parties' assertion is not true; the terms of an executory contract cannot be enforced against a debtor prior to a debtor's assumption of such contract. *See In re El Paso Refinery, L.P.*, 220 B.R. 37, 43 (Bankr. W.D. Tex. 1998) (holding that "from the moment of filing to the moment of assumption or rejection, the non-debtor party is held to be barred from enforcing the contract and its terms," but the debtor may enforce the contract against the non-debtor party); *In re BCE West, L.P.*, 257 B.R. 304, 307 (Bankr. D. Ariz. 2000) (noting that executory contracts may, generally, be enforced by, but not against, a debtor prior to assumption). Because a non-debtor party cannot enforce an executory contract prior to its assumption, the non-debtor party cannot terminate the contract due to the debtor's default under that contract. *Golding v. Putnam Lovell, Inc. (In re Monarch Capital Corp.)*, 163 B.R. 899, 907 (Bankr. D. Mass. 1994).

IV. OBJECTION

A. The Qwest Parties Have Not Identified the Qwest Agreements

20. In the Second Motion to Compel, the Qwest Parties fail to identify the specific agreements that they seek to compel the Debtors to assume or reject; therefore, there is no relief that this Court can fashion under that motion. Further, because the Qwest Parties have not identified with particularity the Qwest Agreements, they cannot demonstrate any specific harm that they allegedly are suffering under each of the Qwest Agreements as a result of the decision regarding the assumption or rejection of the Qwest Agreements being made pursuant to the timeline set forth in Bankruptcy Code § 365(d)(2).

B. The Qwest Parties Have Not Satisfied Their Burden to Compel the Immediate Assumption or Rejection of the Qwest Agreements

1. Legal Standard

21. Bankruptcy Code § 365(d)(2) provides:

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

11 U.S.C. § 365(d)(2) (emphasis added).

22. When ruling on a motion to compel assumption or rejection of an executory contract or unexpired lease, a court should provide a debtor a "reasonable time" to make the assumption/rejection determination. *See In re Republic Tech. Int'l, LLC*, 267 B.R. 548, 554 (Bankr. N.D. Ohio 2001) (quoting *Data-Link Sys., Inc. v. Whitcomb & Keller Mtg. Co., Inc. (In re Whitcomb & Keller Mtg. Co., Inc.)*, 715 F.2d 375, 379 (7th Cir. 1983)); *In re Dunes Casino Hotel*, 63 B.R. 939, 949 (D.N.J. 1986). The

court has discretion to determine what constitutes a "reasonable time" and its determination should turn on the circumstances of each case. *See In re G-I Holdings, Inc.*, 308 B.R. 196, 213 (Bankr. D.J. 2004); *Dunes*, 63 B.R. at 949. In a complex case such as this one, the movant has a "very high burden of proof." *Id.*[5]

23. Courts have proposed a number of factors to consider when determining whether to reduce the time period within which a debtor must assume or reject an executory contract and the extent to which that time period should be reduced. Among the factors that have been considered are the following:

a. the nature of the interests at stake;

b. the balance of the hurt to the litigants;

c. the good to be achieved;

d. the safeguards afforded those litigants; and

e. whether the action to be taken is so in derogation of Congress' scheme that the court may be said to be arbitrary;

G-I Holdings, 308 B.R. at 213; *In re Beker Indus. Corp.*, 64 B.R. 890, 896 (Bankr. S.D.N.Y. 1986); *Dunes*, 63 B.R. at 949. The court's consideration of these factors should be consistent with the purpose of chapter 11 of the Bankruptcy Code – permitting a debtor to successfully rehabilitate. *G-I Holdings*, 308 B.R. at 213; *Dunes*, 63 B.R. at 949. In considering these factors, the court should "balance the interests of the contracting party against the interests of the debtor and its estate." *In re Physician Health Corp.*, 262 B.R. 290, 292 (Bankr. D. Del. 2001); *see also Republic Tech.*, 267 B.R. at 554.

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

24. The Bankruptcy Court for the Northern District of Illinois noted the importance of the policy of permitting a debtor to "carefully evaluate" the benefits and burdens of an executory contract which underlies Bankruptcy Code § 365(d)(2). *In re Kmart Corp.*, 290 B.R. 614, 619 (Bankr. N.D. Ill. 2003); *see also In re Wheeling-Pittsburgh Steel Corp.*, 54 B.R. 385, 388 (Bankr. W.D. Pa. 1985). The Seventh Circuit provided another policy underlying Bankruptcy Code § 365(d)(2):

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

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

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

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

> assumption or rejection appear to us much greater than the interests of HHS in forcing a prompt resolution.").

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

2. Application of the Legal Standard

26. After applying the legal standard to the facts at hand, the "interests of creditors collectively and the bankruptcy estate as a whole" support the denial of the Second Motion to Compel. *See In re Pub. Serv.*, 884 F.2d at 14-15.

27. The Qwest Parties cannot demonstrate that the nature of their interests justifies compelling the immediate assumption or rejection of the Qwest Agreements. As is true for thousands of other parties, the Qwest Parties are counterparties to executory contracts with certain of the Debtors. The Qwest Parties' interests in those agreements are comparable to the interests of the other contract counterparties, and the Qwest Parties are not entitled to "leapfrog" those other parties to force the Debtors to consider the Qwest Agreements first. The Debtors and Comtel methodically and diligently are evaluating their executory contracts and unexpired leases, and the Qwest Parties should not dictate that process and compel a piecemeal "me first" analysis.

28. The deferral of the Debtors' decision regarding the assumption or rejection of the Qwest Agreements will not cause the Qwest Parties injury. To the contrary, under the Carrier Stipulation, the Qwest Parties' post-petition payment terms are ***superior*** to their payment terms under the Qwest Agreements. Since the entry of the Carrier Stipulation, the Qwest Parties have received payments on the first and third Wednesday of each week as adequate protection and adequate assurance of payment.

A portion of that payment represents a pre-pay for services and a portion of that payment represents a prompt pay for services. The Debtors are current on all undisputed obligations owed to the Qwest Parties under the Carrier Stipulation. As such, no harm to the Qwest Parties – economic or otherwise – exists.

29. In the Second Motion to Compel, the Qwest Parties assert that (i) a deferred decision prejudices their alleged rights to receive prompt cure payments; and (ii) a third party, Comtel, is wrongfully "benefiting" from the Qwest Agreements without paying a cure in compliance with section 365 of the Bankruptcy Code. *See Second Motion to Compel* at 12.

30. The existence of a pre-petition arrearage and the desire to have that arrearage addressed sooner, rather than later, are not proper bases to compel the Debtors to immediately assume or reject the Qwest Agreements. *See Physician Health*, 262 B.R. at 294 ("[E]ven if the Debtors were in default of the [executory contract] pre-petition, it is not a legally cognizable reason to compel the Debtors to decide on an expedited basis whether to assume or reject that agreement."). To order a debtor to assume or reject an executory contract based upon the existence of a pre-petition arrearage would render Bankruptcy Code § 365(d)(2) meaningless (as well as Bankruptcy Code §365(b)(1)), because a debtor could be compelled to assume or reject almost all of its executory contracts prior to the confirmation of a plan, and debtors would not receive the "breathing space" underlying Bankruptcy Code § 365(d)(2).

31. Comtel is not wrongly benefiting from the Qwest Agreements and the Qwest Agreements have not been assigned to Comtel outside of the formalities of

Bankruptcy Code § 365 as the Qwest Parties suggest. Implicit in this argument is that Comtel "controls" the Debtors' businesses. This is the same argument that was made by the Qwest Parties – and rejected by the Court – in connection with the sale of the Acquired Assets and the First Motion to Compel.

32. As previously briefed and supported by testimony, absent the receipt of requisite regulatory approvals, many of the Debtors' executory contracts, including the Qwest Agreements, cannot be assigned to Comtel. At this time, such an assignment would run astray of applicable law and would detrimentally impact the possibility of approval of the sale of the Acquired Assets. *See, e.g.,* 11 U.S.C. § 363(f); *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 Mirant Corp.*, 378 F.3d 511, 523 (5th Cir. 2004) ("The Bankruptcy Code clearly anticipates ongoing governmental regulatory jurisdiction while a bankruptcy proceeding is pending.") (citations omitted); *In re Cajun Electric Power Coop., Inc.*, 185 F.3d 446, 453-54 (5th Cir. 1999) (noting that laws dealing with public safety and welfare will not be preempted by bankruptcy law).

33. The Comtel APA and Comtel MSA make clear that Comtel shall manage the Debtors' business subject to the ***ultimate authority*** of the Debtors. The reason for the Debtors' retention of control is that the FCC and the PUCs do not permit the transfer of control, without prior approval, of businesses subject to their jurisdiction that provide telecommunications common carrier services. *See generally* 47 U.S.C. § 214;

47 C.F.R. §§ 63.04, 63.24. Although the Debtors have received the necessary FCC approval, they continue to await requisite PUC approvals.

34. Comtel presently is not reaping the benefits of the Qwest Agreements as the Qwest Parties allege. Pursuant to the Comtel APA and Comtel MSA, net profits (if any) from the Qwest Agreements are deposited in the Funding Account, which will remain the property of the Debtors absent occurrence of the Final Closing. *Comtel MSA* at 2.

35. The Qwest Parties reference Section 2.15 of the Comtel APA (which transfers the risk of loss for certain assets to Comtel on the Early Funding Date) as demonstrating a change of control. Although the risk of loss of all Acquired Assets (including the Non-Transferred Assets, the ownership and control of which are not transferred until regulatory approvals are obtained) transferred to Comtel on the Early Funding Date, ownership and control did not.

36. While, in some circumstances, the shifting of the risk of loss may be indicative of ownership or control, it is not determinative. Rather, under the Uniform Commercial Code, the parties to a sale may, by agreement, allocate the risk of loss in whatever manner they choose, which would include allocating the risk of loss to the buyer before the actual transfer of ownership and control of the object of the sale. *See, e.g.,* Tex. Bus. & Comm. Code Ann. § 2.203 ("Where this chapter ["Sales"] allocates a risk or a burden as between the parties 'unless otherwise agreed', the agreement may not only shift the allocation but may also divide the risk or burden."). Here, the Debtors and Comtel agreed in the Comtel APA that ownership and control of the Non-Transferred Assets will not occur until the requisite regulatory approvals are obtained.

However, they also agreed to allocate the risk of loss with respect to *all* assets, including Non-Transferred Assets, to Comtel as of the Early Funding Date. This provision protects the Debtors in the event that there is a diminution of value, for whatever reason, of the Acquired Assets following the Early Funding Date and the Final Closing does not occur.

37. In contrast to the Qwest Parties, who can demonstrate no harm if the Qwest Agreements are not assumed or rejected immediately, the Debtors, their creditors, and parties to other contracts with the Debtors will be injured.[6] The Debtors and Comtel have not concluded their evaluation of the Qwest Agreements, and a premature decision to assume or reject those agreements could have devastating consequences. Further, the Debtors and Comtel have implemented an orderly process to evaluate executory contracts and unexpired leases to be assumed and assigned (effective on or after the Final Closing Date) or rejected. The observance of that process will save time and resources and ensure that the right agreements are classified for assumption and assignment or rejection.

38. The Debtors and Comtel are not dragging their feet as the Qwest Parties claim, but have made significant progress. The Court has already approved motions, agreements, and stipulations regarding a number of executory contracts and unexpired leases. The Debtors and Comtel have reached an agreement with McLeod USA Telecommunications, Inc. concerning the assumption and assignment of executory contracts effective as of the Final Closing Date, which the Court has approved. The Debtors and Comtel have focused extensively on identifying circuits to reject (each

[6] The "good to be achieved" factor is encompassed in the discussion of the harm to the Debtors, which follows.

circuit is evidenced by an agreement), and the Court has approved the rejection of over 1,200 circuit agreements.

39. With respect to, among others, the SBC Telcos and Verizon, the rejection of these circuit agreements is a time-sensitive process because under the Court-approved agreements with those parties, the rejection of such circuit agreements must occur prior to a specific date to avoid the possibility of certain claims. The Debtors also have obtained Court approval of the assumption of a non-carrier agreement with Edify Corporation, and the rejections of at least 45 agreements, including real property leases, carrier agreements, and day-to-day operations agreements.

40. The Debtors and Comtel have reached advanced stages with at least two other large carriers, and they believe that the filing of motions seeking approval of those agreements and stipulations is imminent. The Debtors and Comtel would be in the same position with the Qwest Parties (contrary to representations made in the Second Motion to Compel, the parties have had detailed discussions regarding a going forward relationship), if the Qwest Parties were willing to accept reasonable concessions like other carriers have.

41. The Carrier Stipulation affords the Qwest Parties extensive safeguards of their interests in the Qwest Agreements. Under the Carrier Stipulation, the Qwest Parties are being paid twice a month under a pre-/prompt-pay arrangement. The terms of the Carrier Stipulation are more favorable than those set forth in the Qwest Agreements, and it affords the Qwest Parties a number of remedies in the event that the Debtors do not satisfy their obligations thereunder.

42. The timeline and progress of the Debtors' assumption/rejection decision is consistent with the scheme established by Congress. The Debtors continue to use the "breathing space" afforded to them to evaluate thousands of agreements. In the interim, the Debtors have satisfied the undisputed amounts due and payable under those agreements.

43. After considering the totality of the circumstances, including the factors discussed above, the Motion to Compel should be denied.

3. Application of the *Adelphia* Legal Standard

44. The Qwest Parties cite *In re Adelphia Commun. Corp.*, 291 B.R. 283, 292-93 (Bankr. S.D.N.Y. 2003) for a list of additional factors to consider in ruling on the Second Motion to Compel. Under these factors, the Second Motion to Compel should still be denied. Application of the *Adelphia* factors in the present case reveals the following:

a. **the debtor's failure or ability to satisfy post-petition obligations** – the Debtors continue to perform under the Carrier Stipulation, no undisputed amounts are currently due and owing to the Qwest Parties, and the Debtors have adequate funds to satisfy the obligations owed to the Qwest Parties on a going forward basis;

b. **the damage that the non-debtor will suffer beyond the compensation available under the Bankruptcy Code** – the Qwest Parties cannot prove any such damage or harm as they are being paid currently or in advance;

c. **the importance of the contract to the debtor's business and reorganization** – the Debtors and Comtel continue to evaluate whether the Qwest Agreements will be important to their reorganization and they will be unable to make that determination until they ascertain the amount of cure associated with the assumption and assignment of those agreements (which amount is disputed);

d. **whether the debtor has sufficient time to appraise its financial situation and the potential value of the assets in formulating a**

plan – discussed in connection with factor (c) above; additionally, the Debtors and Comtel must first resolve the cure dispute with the Qwest Parties in order for the Debtors to prudently exercise their business judgment as to whether to assume or reject;

e. **whether there is a need for judicial determination as to whether an executory contract exists** – although the Debtors are unaware of any such need, they cannot reach a conclusion on this factor because the Qwest Parties have not specifically identified the Qwest Agreements; judicial resolution regarding the disputed cure amount is needed;

f. **whether exclusivity has been terminated** – exclusivity has not been terminated; and

g. **the purpose of Chapter 11 to permit successful rehabilitation of the debtors** – the Debtors require the "breathing space" underlying Bankruptcy Code § 365(d)(2).

Id.

C. At this Time, the Debtors Cannot Prudently Exercise their Business Judgment to Assume or Reject the Qwest Agreements

45. Courts have held that a debtor's decision to assume or reject an executory contract or unexpired lease must be supported by an exercise of the Debtors' business judgment. *See MMR Holding Corp. v. C & C Consultants, Inc. (In re MMR Holding Corp.)*, 203 B.R. 605, 612 (Bankr. M.D. La. 1996); *In re Federated Department Stores, Inc.*, 131 B.R. 808, 811 (Bankr. S.D. Ohio 1991) (citing, *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) and *Group of Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U.S. 523 (1943)). A primary consideration in the assumption/rejection decision is the cost associated with the cure of existing defaults. *See Century Indemnity Co. v. NGC Settlement Trust (In re National Gypsum Co.)*, 208 F.3d 498, 506 (5th Cir. 2000) (citing *Three Sisters Partners, L.L.C. v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843, 849 (4th Cir. 1999)).

46. Presently, the Debtors cannot exercise their business judgment to assume the Qwest Agreements. The Debtors cannot assign the Qwest Agreements until various regulatory approvals are obtained, and absent assignment to Comtel, the Debtors do not have sufficient resources to cure any pre-petition arrearages. In addition, Comtel's obligation to cure does not become effective absent the Final Closing.

47. As the testimony at the Sale Hearing showed, the Debtors are parties to thousands of agreements, and they require until confirmation of a plan to evaluate the need for those agreements. The assumption/rejection process, which includes evaluating the Debtors' network, is labor and time intensive. The Qwest Parties are not entitled to priority treatment in advance of other third parties to executory contracts with the Debtors.

48. Similarly, the Debtors cannot exercise their business judgment to determine that the Qwest Agreements should be rejected at this time. The services provided under the Qwest Agreements are important to the continued operation of the Debtors' businesses (as such businesses currently are configured), and by rejecting the Qwest Agreements, the Debtors would diminish the value of their network and customer base without a timely and complete analysis of its benefits and burdens.

49. Applicable law prevents the Debtors from immediately rejecting the Qwest Agreements. The Debtors must conduct the administration of their estates in compliance with state and governmental regulations. *See* 28 U.S.C. § 959(b); *In re St. Mary Hospital*, 86 B.R. 393, 398 (Bankr. E.D. Pa. 1988) ("We believe that it is inescapable to avoid the conclusion that 28 U.S.C § 959(b) requires a debtor to conform

with applicable federal, state, and local law in conducting its business."); *In re Mirant Corp.*, 378 F.3d 511, 523 (5th Cir. 2004) ("The Bankruptcy Code clearly anticipates ongoing governmental regulatory jurisdiction while a bankruptcy proceeding is pending.") (citations omitted); *In re Cajun Electric Power Coop., Inc.*, 185 F.3d 446, 453-54 (5th Cir. 1999) (noting that laws dealing with public safety and welfare will not be preempted by bankruptcy law). If the Debtors immediately reject the Qwest Agreements, their end-user customers would be left without service, in violation of notice requirements under federal laws.

D. The Qwest Parties' Request for Relief from the Automatic Stay Is Defective

50. The Qwest Parties failed to satisfy a number of the Local Rules of Bankruptcy Procedures with respect to their request for relief from the automatic stay. Among other things, the Qwest Parties failed to take the following necessary steps:

a. file a certificate of conference to certify that "good faith settlement discussions have been held or why they were not held." *See* L.B.R. 9014.1(c)(1) (incorporated by L.B.R. 4001.1(a));

b. provide a notice of the requirement of the filing of a response to the motion as set forth in Local Bankruptcy Rule 4001.1(b);

c. pay the $75.00 associated with the filing of a motion for relief from the automatic stay;

d. set the motion for relief from stay for a preliminary hearing on a Wednesday at 1:30 p.m as required pursuant to Local Bankruptcy Rule 4001.1(e) and the Attorney Desk Reference for the Bankruptcy Courts of the Northern District of Texas.

Therefore, the Qwest Parties' request for relief from the automatic stay is procedurally defective, and it should not be considered by the Court.

E. The Qwest Parties Cannot Demonstrate Cause to Lift the Automatic Stay to Terminate the Providing of Services under the Qwest Parties Agreement

51. Bankruptcy Code § 362(d) enumerates situations in which relief from the automatic stay may be granted. 11 U.S.C. § 362(d). It provides, in part,

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
> >
> > . . .

11 U.S.C. § 362(d)(1).

52. A creditor should be granted relief from the automatic stay pursuant to Bankruptcy Code § 362(d)(1) only if it satisfies the "balance of the hardships" test. *Anderson v. Hoechst Celanese Corp. (In re U.S. Brass Corp.)*, 173 B.R. 1000, 1006 (Bankr. E.D. Tex. 1994). The Bankruptcy Court for the Southern District of Ohio has provided a useful analysis of this test: "In determining whether or not cause exists, the bankruptcy court must balance the inherent hardships ***on all parties*** and base its decision on the degree of hardship and the overall goals of the Bankruptcy Code. In considering whether 'cause' exists to modify the stay, the court must look at the totality of the circumstances." *In re Cardinal Industries, Inc.*, 116 B.R. 964, 983 (Bankr. S.D. Ohio 1990) (citing *In re Opelika Mfg. Corp.*, 66 B.R. 444, 449 (Bankr. N.D. Ill. 1986)).

53. The hardship on the Qwest Parties if the automatic stay remains in place is significantly outweighed by the hardship on the Debtors and the other parties in interest if the automatic stay is lifted. The Qwest Parties will experience no hardship if they are not granted stay relief because under the Carrier Stipulation, the Qwest Parties

are paid on better terms than under the Qwest Agreements, and the Debtors are current on such payments. In contrast, if stay relief is granted, the Debtors will lose a currently valuable asset which generates significant revenue and which will diminish the Debtors' customer base. The Debtors would also have great difficulty timely advising their end user customers of the cessation of services that would result. Given the totality of the circumstances, the Qwest Parties' request for relief from the automatic stay should be denied.

54. As "cause" for relief from the automatic stay, the Qwest Parties cite the alleged assignment of the Qwest Agreements to Comtel outside of the parameters of Bankruptcy Code § 365. The Qwest Parties assert that, based on that alleged assignment, the Debtors or their directors have breached fiduciary obligations owing to the Qwest Parties.

55. As discussed above, no such assignment has been made. Government regulations prevent any such assignment, and the Debtors – and not Comtel – have ultimate control of the Debtors' assets, including the Qwest Agreements. The Debtors and their directors take their fiduciary obligations seriously. The decisions of the Debtors and their directors are guided by the interests of all of the parties involved in these Cases, including their employees, unsecured creditors, and secured creditors, not just the selfish interests of the Qwest Parties. In addition, the Debtors and their directors are mindful of their obligations under the Comtel APA and Comtel MSA, both of which were approved by this Court. The Debtors and their directors have observed and will continue to observe their fiduciary obligations.

56. *Bellevue Place Assocs. v. Caisse Centrale des Banques Populaires*, 1994 U.S. Dist. LEXIS 17409, *17 (D. Ill. 1994), which was cited by the Qwest Parties' in their Second Motion to Compel, is easily distinguishable from the facts at hand. In *Bellevue*, the District Court ruled that cause existed to appoint a trustee ***pursuant to Bankruptcy Code § 1104(a)(1)*** based on, among other things, the "absolute control" over the debtor exercised by ***a creditor*** of the debtor. 1994 U.S. Dist. LEXIS 17409, *17. Although the Debtors dispute that non-creditor Comtel controls the Debtors, the *Bellevue* decision has no application to a determination of whether cause exists to modify the automatic stay. *See Sumitomo Trust & Banking Co., Ltd. v. Grand Rapids Hotel L.P. (In re Holly's Inc.)*, 140 B.R. 643, 686 (Bankr. W.D. Mich. 1992). The *Sumitomo* court dispelled the argument that the "cause" standard under Bankruptcy Code § 362(d)(1) was the same standard as that used with respect to Bankruptcy Code § 1104(a). *Id*. It held as follows:

> [W]hen a secured creditor requests relief from the stay, **it often does so with nondisparagingly selfish motives**. Any benefit to the estate is rarely a factor in determining whether modification of the stay should be sought or granted. Conversely, when a creditor seeks an appointment of a trustee, the benefit to and needs of the entire estate, including all other creditors, is the *raison d'etre*. Therefore, 'cause' under § 362(d)(1) focuses on the interests of an individual creditor, where 'cause' under § 1104(a) focuses on the interests of the entire body of creditors. ***Because the intent of the two sections is different, the definition of 'cause' in § 1104(a) will not be deemed coextensive to the definition of 'cause' in § 362(d)(1).***

Id. (emphasis added)

V. CONCLUSION

57. For the same reasons set forth in the Court's ruling denying the First Motion to Compel, the Qwest Parties cannot justify compelling the immediate

assumption or rejection of the Qwest Agreements. The Second Motion to Compel does not even identify the specific Qwest Agreements that the Qwest Parties seek to compel the Debtors to assume or reject. As a result, the Qwest Parties have not identified with particularity any specific harm they allegedly are suffering simply because each such agreement has yet to be assumed or rejected. In fact, they are suffering none, thanks to the payments under the Carrier Stipulation.

58. Given the totality of the circumstances, and after considering the factors enunciated by various courts, the Second Motion to Compel must be denied. The Qwest Parties are being paid on better terms than are provided under the Qwest Agreements and the Comtel APA and Comtel MSA make clear that the ultimate control of the Debtors' assets remains with the Debtors unless and until the Final Closing Date. As a result, all benefits of the Qwest Agreements inure to the Debtors in the interim and Comtel is not reaping the benefits thereof without an assumption and assignment as the Qwest Parties allege. Perhaps most importantly, it would be harmful to the Debtors' estates, their creditors, and other parties in interest if the Debtors were made to prematurely assume or reject the Qwest Agreements before knowing if regulatory approval of the assets sale will be granted, such that Comtel, and not the Debtors, would be responsible for the associated cure costs.

59. Further, the Qwest Parties cannot demonstrate cause for relief from the automatic stay. The Debtors and their directors are satisfying their fiduciary obligations and the Qwest Agreements have not been assigned to Comtel outside of the context of Bankruptcy Code § 365.

60. Therefore, the Second Motion to Compel should be denied in all respects.

VI. PRAYER

For the foregoing reasons, the Debtors respectfully request that the Court enter an Order denying the Second Motion to Compel.

Dated: December 9, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on December 9, 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

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