100000-OT

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

GORDON SILVER
GREGORY E. GARMAN, ESQ.
Nevada Bar No. 6654
E-mail: ggarman@gordonsilver.com
MATTHEW C. ZIRZOW, ESQ.
Nevada Bar No. 7222
E-mail: mzirzow@gordonsilver.com
ERIC J. VAN, ESQ.
Nevada Bar No. 10259
E-mail: evan@gordonsilver.com
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Telephone (702) 796-5555
Facsimile (702) 369-2666
Proposed Attorneys for Debtors

E-Filed: July 2, 2010

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

In re:	**Case No.: BK-S-10-20932-LBR; Chapter 11 Jointly Administered with:**
COMMPARTNERS HOLDING CORPORATION, a Nevada corporation	10-20933 CommPartners, LLC 10-20934 CommPartners Carrier Services Corp. 10-20935 CommPartners Network Services, LLC
☐ Affects this Debtor.	
☒ Affects all Debtors.	
☐ Affects COMMPARTNERS, LLC, a Nevada limited liability company	
☐ Affects COMMPARTNERS CARRIER SERVICES CORPORATION, a Nevada corporation	
☐ Affects COMMPARTNERS NETWORK SERVICES, LLC, a Nevada limited liability company	Date: OST PENDING Time: OST PENDING

COM ____
APA ____
ECR ____
GCL ____
RAD ____
SSC ____
ADM ____
OPC
CLK Grant

DEBTORS' MOTION PURSUANT TO 11 U.S.C. §§ 105(a) AND 366 FOR AN ORDER DETERMINING THAT CERTAIN ENTITIES ARE NOT UTILITIES, OR IN THE ALTERNATIVE, THAT ADEQUATE ASSURANCES HAVE BEEN PROVIDED

Debtors, CommPartners Holding Corporation, a Nevada corporation ("CHC"); CommPartners, LLC, a Nevada limited liability company ("CL"); CommPartners Carrier Services Corporation, a Nevada corporation ("CCSC"); and CommPartners Network Services, LLC, a Nevada limited liability company ("CNS" and, together with CHC, CL, CCSC,

DOCUMENT NUMBER-DATE
05640 JUL-9 2
FPSC-COMMISSION CLERK

hereinafter collectively, the "Debtors"), debtors and debtors-in-possession, by and through their proposed attorneys, the law firm of Gordon Silver, hereby submit their Motion (the "Motion") pursuant to Sections 105(a) and 366 of title 11 of the U.S. Code (the "Bankruptcy Code") for an order determining that adequate assurances need not be provided to any of the Debtors' creditors as they are not "utilities" within the meaning of the statute, or in the alternative, to the extent any are determined to be utilities, that adequate assurances have been provided.

The Motion is made and based on the points and authorities herein, the Omnibus Declaration of Greg Roeper in Support of Debtors' First Day Motions [Docket No. 7], the papers and pleadings on file herein, judicial notice of which is respectfully requested, and any arguments of counsel made at any hearing on this matter.

I. INTRODUCTION

1. On June 13, 2010 (the "Petition Date"), the Debtors filed their respective voluntary petitions for relief under Chapter 11 of the Bankruptcy Code thereby commencing their bankruptcy cases (the "Chapter 11 Cases").

2. The Debtors continue to operate their businesses and manage their financial affairs and properties as debtors and debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

3. No request has been made for the appointment of a trustee or examiner, and no official committee has yet been established in these cases.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

5. The statutory basis for the relief sought herein are Sections 105 and 366 of the Bankruptcy Code.

6. Venue of Debtors' Chapter 11 Cases in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

102498-002/963561_3.doc

III.
PROCEDRUAL BACKGROUND

7. On the Petition Date, the Debtors filed various "first day" motions concerning joint administration, employee wage obligations, and payment of taxes and Universal Service Fund charges (collectively, the "First Day Motions"). See Docket Nos. 4, 5 and 6. In support of the First Day Motions, the Debtors also filed the Omnibus Declaration, which provided a detailed overview of the Debtors' businesses and the reasons for its Chapter 11 Cases.

8. As of the Petition Date, the Company has $1,478,029 in cash on hand, and approximately $3,000,000 in what it considers readily collectible accounts receivable. Assuming no significant changes in operations, Debtors believe that they have enough cash to continue operating and maintaining its normal undisputed payments to its contractual counterparties on a post-petition basis for at least four to six months.

9. The Debtors did not file a "utilities" first day motion to deal with potential issues pursuant to Section 366 of the Bankruptcy Code because it did not believe, given its business line and its agreements with various creditors, that any of them could possibly claim with any legitimacy that they were "utilities" within the meaning of Section 366 of the Bankruptcy Code.

10. On June 17, 2010, the Court held hearings on the Debtors' First Day Motions, which were generally approved with only minor modifications pursuant to various written orders entered shortly thereafter. See Docket Nos. 20, 25 and 26.

11. On June 22, 2010, one alleged creditor, Paetec Communications, Inc. ("Paetec"), filed a Motion for Relief from Stay Pursuant to 11 U.S.C. Sec. 362(d)(1) to Allow Movant to Proceed With an Appeal to the United States Court of Appeals for the District of Columbia (the "Paetec Stay Relief Motion") [Docket No. 22], which is set for hearing on July 23, 2010 at 2:30 p.m. As more specifically set forth below, Paetec lost its case against CP on summary judgment before the U.S. District Court for the District of Columbia (the "Paetec Decision"), and is seeking stay relief to continue with an interlocutory appeal from that decision before the U.S. Court of Appeals for the D.C. Circuit. A copy of the Paetec Decision is attached hereto as Exhibit "1." Debtors will be opposing the Paetec Stay Relief Motion.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

12. On June 25, 2010, the Debtors filed applications (the "Retention Applications") to employ the law firm of Gordon Silver as bankruptcy counsel pursuant to Section 327(a) of the Bankruptcy Code, and to employ the Law Offices of Anita Taff-Rice from Walnut Creek, California as special counsel pursuant to Section 327(e) of the Bankruptcy Code for telecommunications law and related regulatory matters. See Docket Nos. 42 and 45. The Retention Applications are also set for hearing on July 23, 2010 at 2:30 p.m.

13. On June 28, 2010, the Debtors filed their Motion to Extend Time to File Schedules and Statements (the "Extension Motion") [Docket No. 52], which requested that they be provided an extension of time from that day until July 12, 2010 to file their completed bankruptcy schedules and statements of financial affairs. The Extension Motion is set for hearing on July 21, 2010 at 1:30 p.m.

14. Since the Petition Date, Debtors have received various demands for adequate assurances from creditors who are claiming that they are "utilities" within the meaning of Section 366 of the Bankruptcy Code. Debtors did not anticipate various creditors making such meritless demands especially given that the Debtors are themselves in the telecommunications business and they purchase wholesale services provided by these creditors in order to provide service to the Debtor's own customers, rather than purchasing services from the creditors for the Debtor's own internal use. Nonetheless, the Debtors are filing this Motion in order to obtain clarity and certainty to this issue given the potential consequences under Section 366 of the Bankruptcy Code.

IV.
RELIEF REQUESTED

15. The Debtors request that the Court determine that the any creditor receiving notice of this motion (the "Alleged Utilities") be determined to not be a "utility" within the meaning of Section 366 of the Bankruptcy Code, and thus are not entitled to adequate assurances pursuant to that statute.

16. In the alternative, to the extent the Court affirmatively determines that any of the Alleged Utilities are "utilities" within the meaning of Section 366 of the Bankruptcy Code (the

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

"Utility Providers"), that the Court order as follows: (a) determining that their Utility Providers have been provided with adequate assurance of payment within the meaning of Section 366 of the Bankruptcy Code; (b) prohibiting the Utility Providers from altering, refusing or discontinuing services on account of pre-petition amounts outstanding and on account of any perceived inadequacy of the Debtors' proposed adequate assurance; and (c) determining that the Debtors are not required to provide any additional adequate assurance, beyond what is proposed by this Motion.

V.
BACKGROUND

A. Overview of the Debtors' Business.

17. The Company is a facilities based network operator providing Voice over Internet Protocol ("VoIP") and time-division multiplexing ("TDM") services to communications carriers as well as enhanced hosted applications to small and medium sized businesses through a network of strategic partners and resellers. VoIP is a general term for a family of transmission technologies for delivery of voice communications over Internet Protocol ("IP") networks such as the Internet or other packet-switched networks. TDM is a type of digital multiplexing in which two or more signals or bit streams are transferred apparently simultaneously as sub-channels in one communication channel, but are physically taking turns on the channel. Traditional voice traffic is transmitted in TDM format.

18. The Company's network was built through CL, which is an authorized competitive local exchange carrier ("CLEC") in 46 states. Pursuant to its CLEC status, CL is entitled under federal law to obtain wholesale services from incumbent local exchange carriers (ILECs) either through specialized contracts known as interconnection agreements (ICAs), or in some instances through traffic exchanges that may not be governed by a written agreement, as inputs to provide service to its own customers. The ILECs are either the monopoly local providers that were part of the unified Bell system or local providers (often serving rural areas) that were not part of the Bell system. CLECs also often obtain wholesale services from other CLECs or providers as inputs to provide its own services to customers.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

19. Through CCSC, the company provides domestic and international carriers with wholesale carrier services ("Carrier Services"). In this capacity, CCSC serves as the middle man for phone calls originated on other carriers networks and terminated on yet another carriers network.

20. Through CNS, the Company provides business grade, IP based voice and other value added services such as IP based Call Centers, IP Fax and IP Call Recording (the "Hosted Services"). These services are sold to end user customers through a dealer network of over 250 resellers spread throughout the United States.

21. The Company was founded in 2003. As more specifically described herein, the Company's original business premise was to take advantage of provisions in the 1996 Telecommunications Act (the "1996 Act"), which provided exemptions from certain traditional regulated access charges for companies deemed to be enhanced service providers ("ESP"). The Company believed that VoIP technology had advanced to the point where it was commercially viable and thus invested in VoIP switching gear, began applying for CLEC certifications in all 50 states and began building a nation-wide IP-based network.

22. The Company has two business segments: Carrier Services and Hosted Services. Carrier Services uses wholesale services purchased from CL to provide wholesale origination and termination services to other carriers throughout the United States. Essentially, the Company contracts with either ESPs, who generate IP-based traffic, or other carriers who, in turn, have contracted with ESPs, who generate IP-based traffic, to have the traffic carried across the Company's network, convert the traffic to TDM and hand it off to the terminating carrier. Carrier Services operates in a highly competitive and price sensitive market segment.

23. Hosted Services uses wholesale services purchased from CL to provide small and medium-sized businesses with IP communications solutions. The Company features a full suite of business VoIP and other IP applications to help growing companies with their business communications needs.

24. In 2005, it became clear that the adoption of VoIP was not going to meet the Company's original projections, so the Company, through CCSC, acquired a company engaged

in wholesale carrier termination services thus entering the carrier services segment. For most of the next two years, the Company focused significant attention on expanding its network and growing the amount of minutes that it carried through its carrier services division.

25. Beginning in 2007, the Company concluded that the long awaited for adoption of VoIP services was close to fruition. As a result, the Company began to place less focus on carrier growth, more focus on reducing the cost of the network, increasing the profitability of the carrier business, and growth of the hosted business. As a result of the growth of the hosted business and the emphasis on profitable carrier operations, the Company was able to increase gross margins from $811,785 in 2007 to $4,099,438 in 2009.

26. Beginning in March 2010, however, Carrier Services began experiencing a sharp reduction in traffic thus significantly reducing monthly revenue. The Company's largest customer reported the loss of several large customers and the Company has subsequently learned there is an increasing industry trend for carriers to directly connect or "peer" with one another (which utilizing IP technology is now significantly less expensive), thus eliminating the need for a middle man or wholesaler such as the Company. With the loss of this traffic in the marketplace, many of the Company's competitors began reducing rates in order to try and gain back additional market-share. The Company was forced to follow suit, thus resulting in reduced average selling prices as well as volumes. The Company expects this trend to continue. Thus the positive cash flows in January and February, turned negative in March, April and May of 2010.

B. **Regulatory Background.**

27. TDM traffic is subject, according to the 1996 Act, to one of two different types of compensation regimes, depending on the nature and geographic scope of the traffic. First, for long distance traffic (calls that cross local calling boundaries or state boundaries), switched access charges apply. These charges are paid by interexchange common carriers to compensate local carriers for the use of their local network facilities to terminate long distance traffic to the recipient. These charges were created at the time that the unified Bell System was divested into separate local and long distance operations,, and they include an explicit subsidy to keep the

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

price of local service low. Second, for local calls that originate and terminate on different local carriers' networks within a local calling area, reciprocal compensation ("Recip. Comp.") applies. Recip. Comp. is a negotiated rate that two local carriers charge one another for the ingress/egress of traffic exchanged between their respective networks. Historically, Recip. Comp. rates have been significantly lower than tariffed switched access rates. Switched access charges and Recip. Comp. are mutually exclusive compensation regimes.

28. As the 1996 Act was crafted, there was a recognition that new technologies like dial-up Internet service were coming to the market and could not bear the weight of the compensation regime as established for traditional telephony carriers. As such, the 1996 Act carves out an exemption from switched access charges for ESPs, which essentially covers communications companies that deal in data (IP) format to deliver services to the market rather than traditional telephony.

29. By 2003, VoIP was a commercially available technology and the Company was formed with the intention of providing VoIP to the small to medium-sized business market. The Company's distribution model was a wholesale version using data providers and traditional telecommunication value-added resellers looking to offer converged services to their customers.

30. The key economic assumption that underlies the Company's business is that VoIP-originated traffic falls under the definition of an "enhanced service" and therefore is subject to the ESP exemption in the 1996 Act. The economic impact of this assumption is that the Company's cost structure, absent of traditional access charges, enabled a start-up to compete on a national basis against well-established competitors.

31. The FCC opened a Notice of Proposed Rulemaking in February of 2004, which the Company anticipated would take 12 months to conclude and would result in either the FCC ruling that VoIP was "free" of access charges, or that if a compensation regime was going to be established for VoIP, it would fall under the Recip. Comp. mechanism with rate structures that facilitated the technology and service providers to grow. The notice of proposed rulemaking is still open as of this writing.

32. As the volume of VoIP traffic has grown, traditional carriers and specifically

smaller/rural telephone companies have seen a dramatic decline in their switched access revenue streams. Where the Company delivers traffic to these types of carriers, bills are rendered to the Company that include full access charges for every minute--essentially ignoring the fact the vast majority of the calls are IP originated. The Company has consistently taken the position that if a minute of traffic is non-IP, it will pay the full access rate. Where the minute of traffic is IP-based, the Company asserts that the ESP exemption applies and no compensation is due. In order to avoid litigation in the past, the Company has also offered to enter into Recip. Comp. agreements with these companies at a rate of $.0007/minute.

33. To date, the VoIP industry and the Company have either won the ESP argument and/or had cases stayed pending a final determination of the handling of VoIP traffic from the FCC. In February of 2010, the FCC released their National Broadband Plan and contained in the proposal was an outline of the FCC's intent for handling the regulation of VoIP traffic. The specifics of this regulatory plan are to be introduced in the fourth quarter of this year. While not all details are known, the information released appears to support the long-held position the Company has taken regarding the regulation of VoIP traffic.

34. Traditional carriers, seeing a potential ending of their historically subsidized switched access rate revenue streams, have initiated litigation against the Company ahead of a formal ruling by the FCC. At this writing, the Company has seven cases pending in a combination of federal and state courts plus three state Public Utility Commissions (*i.e.*, California, Pennsylvania and Georgia). In the vacuum created by the inaction of the FCC, various states, including but not necessarily limited to Pennsylvania and Maine, are beginning to become active and take positions that the states, not the federal government, are responsible for the regulation of VoIP. The lack of a firm regulatory regime has spurred litigation at an alarming rate.

35. Taken as a whole, the increased level of litigation and the associated increase in legal activities, fees and potential liabilities (not to mention resource distraction for management) place the Company in a position of needing immediate court protection despite the fact that the core Hosted Services business of the Company continues to grow.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

36. As the numerous access charge cases against the Company indicate, the status of VoIP access charge regulation remains in a great state of flux. The original FCC proposed rule-making for this topic started in the first quarter of 2004 and remains open at this writing. The delay in any formal access charge reform and the treatment of VoIP has fostered the current environment of increasing litigation. While the FCC's initial indications are positive for VoIP providers such as the Company and the initial federal court victory against PaeTec was a very positive development--the approaching potential of real reform (and thus decreased access revenue for traditional telephone companies) has unleashed a torrent of litigation against the Company until there is clarity regarding access charges and treatment of VoIP. The internal resource allocation to fight these battles, outside legal costs, and building potential liabilities should the company not prevail have put it at a perilous point. Moreover, the Company's ability to raise new funds is severely restricted by the growing litigation environment the Company finds itself in, and the potential future liabilities of access charge cases.

C. **Litigation Against The Company.**

37. Beginning in 2008, the Company was first named in a lawsuit against it by a traditional carrier challenging the Company's position that the 1996 Act exempted all VoIP-originated traffic from traditional access charges. While the Company has successfully defended its position and received a favorable ruling in federal court as hereinafter detailed, increasing concerns that the Federal Communications Commission ("FCC") plans to rule on this industry question, spawned a series of additional lawsuits filed against the Company on this same matter in the past 18 months, including three in the past 60 days.

38. CL was a complainant against Pacific Bell Telephone Company, d/b/a AT&T California ("AT&T"), as defendant, in Proceeding No. C0801007 before the California Public Utilities Commission (the "California PUC"), which involves disputed charges allegedly owing by CL to AT&T in the current alleged amount of approximately $1,350,000. These amounts were upheld by the California PUC, and CL has appealed the California PUC's decision to the U.S. District Court for the Northern District of California, Case No. C-10-02164-CRB. AT&T is also a named defendant in this case. The Company has filed an extrinsic fraud claim against

1 AT&T for concealing certain materials during discovery and thereby improperly obtaining a
2 favorable order from the California PUC case. The Company seeks to have the disputed charges
3 eliminated and also seeks recovery of approximately $400,000 in charges it believes were
4 unnecessarily paid to AT&T and other providers for connections needed to install and test
5 AT&T's facilities. This appeal remains pending. Notably, this litigation differs from the other
6 litigations referenced hereinafter in that this litigation involves disputed network facility charges,
7 not access charges.

8 39. As a result of these disputed charges, AT&T had threatened to suspend all
9 current orders and customer service activities in California on June 14, 2010 unless the
10 Company made payment in full of this alleged outstanding balance. suspended. Suspension of
11 orders was the first in a series of punitive steps that AT&T could take pursuant to its
12 interconnection agreement ("ICA") with CL and that would have resulted in the disconnection of
13 the Company's entire network in California on or about June 29, 2010. Such shutdown would
14 leave approximately 25% of the Company's Hosted Services base of business, which is in
15 California, in jeopardy. Moreover, AT&T's alleged ability to continue billing for such disputed
16 charges in California going forward adds $26,000 in fixed costs to the Company's network per
17 month.

18 40. CL is a defendant in an action commenced by 3 Rivers Telephone Cooperative,
19 *et al.* (collectively, "3 Rivers") as plaintiffs, currently pending in the U.S. District Court for the
20 District of Montana (the "Montana Court"), Case No. CV-08-68-M-DWM. In this action, 3
21 Rivers seeks to recover access charges allegedly owing by CL for use of 3 Rivers' local network
22 facilities to complete long distance calls, among other claims for relief. On March 26, 2010, the
23 Montana Court entered a default judgment against CL, with damages to be determined at a later
24 hearing. The Montana Court had scheduled June 16, 2010 as the date on which the damages
25 hearing would have been held. The plaintiffs in this litigation are seeking approximately
26 $1,200,000 in damages. CL disputes these charges for the reasons as more specifically set forth
27 in the Regulatory Background section herein.

28 41. CL is a defendant in an action commenced by Paetec currently pending in the

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

1 U.S. District Court for the District of Columbia as Case No. 08-0397. In this action, Paetec
2 sought to recover access charges from CL for its use of Paetec's local network facilities to
3 complete long distance calls, among other claims for relief. On February 18, 2010, the Court
4 entered an order holding that IP originated traffic, like VoIP, was exempt from traditional
5 telephony access charges, and thus that CL did not owe such monies to Paetec. On May 3, 2010,
6 the Court entered an order granting Paetec's motion to certify the court's decision for an
7 immediate appeal. CL disputes these charges for the reasons as more specifically set forth in the
8 Regulatory Background section herein.

9 42. CL is a defendant in actions brought by Buffalo Valley Telephone Company,
10 Laurel Highland Telephone Company, and Yukon-Waltz Telephone Company before the
11 Pennsylvania Public Utility Commission (the "Pennsylvania PUC"), being Docket Nos. C-2009-
12 2105918 and C-201002167305. In these actions, the plaintiffs, who are local carriers, seek to
13 recover access charges from CL for its use of the carriers' local network facilities to complete
14 VoIP as well as TDM long distance calls, among other claims for relief. CL disputes these
15 charges for the reasons as more specifically set forth in the Regulatory Background section
16 herein.

17 43. CL is a defendant in a matter brought by North County Communication
18 Corporation ("NCCC") against various defendants, being Case No. 37-2008-0075605-CU-BC-
19 CTL, currently pending in the Superior Court, County of San Diego, California. In this action,
20 NCCC seeks to recover access charges from CL and other defendants for its use of the NCCC
21 local network facilities to complete VoIP as well as TDM long distance calls, among other
22 claims for relief. CL disputes these charges for the reasons as more specifically set forth in the
23 Regulatory Background section herein.

24 44. CL is a defendant in a proceeding commenced by Calaveras Telephone
25 Company, *et al.* ("CTC") before the California PUC, being Proceeding No. C1001016. In this
26 action, CTC seeks to recover access charges from CL for its use of the CTC local network
27 facilities to complete VoIP as well as TDM long distance calls, among other claims for relief.
28 CL disputes these charges for the reasons as more specifically set forth in the Regulatory

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

Background section herein.

45. On June 8, 2010, CL was named a defendant in a proceeding commenced by Blue Ridge Telephone Company ("BRT") before the Public Service Commission of the State of Georgia (the "GPSC"). In this action, BRT seeks to recover access charges from CL for its use of the BRT local network facilities to complete VoIP as well as TDM long distance calls, among other claims for relief. CL disputes these charges for the reasons as more specifically set forth in the Regulatory Background section herein.

VI.
LEGAL AUTHORITY

A. The Alleged Utility Providers are not "Utilities" Within the Meaning of Section 366 of the Bankruptcy Code, and thus are not Entitled to Adequate Assurance.

46. Section 366(c)(2) of the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, provides that a utility company may alter, refuse, or discontinue service, if within thirty (30) days after a chapter 11 filing, such utility has not received adequate "assurance of payment" that is satisfactory to the utility. See 11 U.S.C. § 366(c)(2).

47. The threshold inquiry under Section 366 of the Bankruptcy Code is whether a specific creditor necessarily falls within the meaning of a "utility" under Section 366 of the Bankruptcy Code in the first place, because if a creditor does not so qualify, then it is not entitled to demand adequate assurances or other relief pursuant to that statute. Even if a creditor is considered to be a utility for some purposes, it still may not be entitled to an assurance of payment if its services are not provided to the Debtor on a wholesale basis as inputs to the services that the Debtor provides to its own customers rather than for its own internal use.

48. The Bankruptcy Code does not define the term "utility." Section 366 of the Bankruptcy Code was originally enacted in 1978, at a time when telephone service was provided solely by the integrated Bell system, or independent ILECs, to recognize the monopoly power that incumbent utilities had in the marketplace (*i.e.*, there is no alternate supplier from whom the Debtor could obtain service). Thus, unlike typical creditors, which usually have the absolute

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

right to refrain from doing business with the debtor post-petition (absent a contract to the contrary), Congress prohibited true utilities from refusing service. With the passage of the 1996 Act, however, competition was introduced to the telecommunications industry, and the formerly monopoly providers no longer have a bottleneck monopoly over local facilities and therefore no longer fit the category of "utility" for which special protections are set forth in Section 366 of the Bankruptcy Code.

49. Although there is little decisional law on the topic, at least two bankruptcy courts have held that Section 366 of the Bankruptcy Code only applies to services provided to a debtor as an end-user and not, for instance, those provided under an interconnection agreement. For example, In re Lucre, Inc., 333 B.R. 151 (Bankr. W.D. Mich. 2005), involved a situation where the debtor was in the business of providing telecommunications services to various customers, somewhat similar to the Debtors in the case at hand. In Lucre, the Court drew a distinction between companies like the debtor's electric utility company and long distance provider, where the debtor was an end user, as compared with the telecommunications services the debtor received from SBC, Verizon and U.S. Signal pursuant to interconnection agreements. The Court held that while the former were services properly within the meaning of Section 366 of the Bankruptcy Code, the latter were not. With respect to the latter, because the debtor in Lucre did not use such services as an end-user, but rather, in turn used the telecommunications services provided by those companies to provide its own utility services to its customers—much like the Debtors in the case at hand—they were not entitled to adequate assurance pursuant to Section 366 of the Bankruptcy Code. In so doing, the Lucre Court premised its ruling on statutory interpretation, and reasoned that "Congress therefore purposely excluded services provided between utilities . . . from the more stringent requirements of [Section 366(c) of the Bankruptcy Code]. In other words, "utility service" in subsection (c) means only traditional services that the debtor in possession itself consumes in contrast to other services and rights provided by the utility, such as interconnection agreement services." Id. at 155.

50. In a footnote, the Lucre Court further noted that even if it were wrong about its statutory interpretation under Section 366 of the Bankruptcy Code, "then it is appropriate to

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

1 consider whether Section 366 generally excludes from its scope services that are used by other
2 than a trustee or debtor as a consumer." Id. at n.5. In other words, the Lucre Court also agreed
3 that even if its specific reasoning were wrong, it was still appropriate to consider whether the
4 services provided by the creditor were still generally what was contemplated to be included
5 within the meaning of Section 366 of the Bankruptcy Code.

6 51. In another case with facts directly similar to the facts in this case, a Texas
7 bankruptcy court held that assurance of payment pursuant to Section 366 of the Bankruptcy Code
8 is limited only to "essential service" provided by an ILEC to a debtor CLEC for its own internal
9 use, not when utility services are used by the debtor as "a commodity on a wholesale basis
10 [when] a debtor . . . is also a utility that resells that commodity." In re Comm South Cos. Inc.,
11 Case No. 03-39496-HDH (Bankr. N.D. Tex. Nov. 10, 2003) [Docket No. 215]. A copy of the
12 Comm South memorandum opinion is attached hereto as Exhibit "2." This opinion was
13 subsequently withdrawn due to the Court's approval of a settlement agreement between the
14 parties that required, as a part of the settlement, that the decision be withdrawn, see id. at Docket
15 No. 363, but the reasoning is sound.

16 52. As applied in the case at hand, all creditors with interconnection, or other
17 wholesale agreements, or otherwise exchange or terminate traffic with Debtors are clearly not
18 utilities or providing services within the contemplation of Section 366 of the Bankruptcy Code,
19 and thus are not entitled to any adequate assurance pursuant to that statute.

20 **B. In the Alternative, Even if an Alleged Utility is Determined to be a "Utility" Within**
21 **the Meaning of Section 366 of the Bankruptcy Code, no Further Assurances Should be Required.**

22 53. Section 366(c)(1)(A) of the Bankruptcy Code provides that the term "assurance
23 of payment" means: "(i) a cash deposit; (ii) a letter of credit; (iii) a certificate of deposit; (iv) a
24 surety bond; (v) a prepayment of utility consumption; or (vi) another form of security that is
25 mutually agreed on between the utility and the debtor or trustee." 11 U.S.C. § 366(c)(1)(A). The
26 amount of assurance that must be provided is squarely within the court's discretion. See id. at §
27 366(c)(3)(A) ("A court may, after request of a party in interest and after notice and hearing,
28

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

modify the amount of adequate assurance payment required."); In re Haven Eldercare, LLC, 2008 WL 139543, at *2 (Bankr. D. Conn. Jan. 10, 2008) (court modified the amount of adequate assurance to equal a cash deposit in an amount equal to that debtor's average monthly invoice over the last 12 months); In re Viking Offshore (USA) Inc., 2008 WL 782449, at *3 (Bankr. S.D. Tex. Mar. 28, 2008) ("The structure of Section 366 is such that, if [d]ebtors are unable to provide an offer of adequate assurance satisfactory to the utility, the utility may insist on a different amount, subject to a determination by the court.").

54. Courts construing Section 366(b) of the Bankruptcy Code have long recognized that adequate assurance does not constitute an absolute guaranty of the debtor's ability to pay. See In re Steinebach, 303 B.R. 634, 641 (Bankr. D. Ariz. 2004) ("Adequate assurance of payment is not, however, absolute assurance. . . . a Bankruptcy Court is not required to give a [Utility Provider] the equivalent of a guarantee of payment, but must only determine that the utility is not subject to any unreasonable risk of non-payment for postpetition services.") (citing In re Adelphia Bus. Solutions, Inc., 280 B.R. 63, 80 (S.D.N.Y. 2002); Virginia Elec. & Power Co. v. Caldor, Inc.-N.Y. (In re Caldor, Inc.-N.Y.), 199 B.R. 1, 3 (S.D.N.Y. 1996), aff'd, 117 F.3d 646 (2d Cir. 1997) ("Section 366(b) requires a Bankruptcy Court to determine whether the circumstances are sufficient to provide a utility with 'adequate assurance' of payment. The statute does not require an 'absolute guaranty of payment.'") .

55. Courts have recognized that, in analyzing the requisite level of adequate assurance, they should "focus upon the need of the utility for assurance, and to require that the debtor supply no more than that, since the debtor almost perforce has a conflicting need to conserve scarce financial resources." Caldor, Inc.-N.Y., 117 F.3d at 650 (citing In re Penn Jersey Corp., 72 B.R. 981 (Bankr. E.D. Pa. 1987)).

56. It is also well established that Section 366(b) of the Bankruptcy Code permits a court to find that no adequate assurance payment at all is necessary to provide a utility with adequate assurance of payment. See id. at 650 ("Even assuming that 'other security' should be interpreted narrowly, . . . a bankruptcy court's authority to 'modify' the level of the 'deposit or other security' provided for under § 366(b), includes the power to require 'no deposit or other

1 security' where none is necessary to provide a utility supplier with 'adequate assurance of
2 payment.'"). Accordingly, even after BAPCPA's revisions to Section 366 of the Bankruptcy
3 Code, courts continue to have discretion to determine the amount of adequate assurance
4 payments and, where appropriate, to determine that no such payment is necessary.

5 57. The Debtors have sufficient resources to pay, and intend to pay all valid post-
6 petition obligations for all contractual and utility services in a timely manner. As evidenced by
7 the Paetec Decision, the disputed access charges sought by most of the litigants are inappropriate
8 in any event.

9 58. Similarly, in In re Transcom Enhanced Services, LLC, Case No. 05-31929-HDH
10 (Bankr. N.D. Tex. 2005), Docket No. 215, the Bankruptcy Court held, over AT&T's objection,
11 that the debtor in that case was an ESP and thus was exempt from the payment of certain access
12 charges. A copy of the Transcom case is attached hereto as Exhibit "3." The Transcom decision
13 was later vacated on appeal because the debtor failed to cure a related assumed contract, and not
14 for any reason related to the merits of the Bankruptcy Court's underlying ruling. See AT&T
15 Corp. v. Transcom Enhanced Services, LLC, Case No. 3:05-cv-1209-B (N.D. Tex. Jan. 20,
16 2006), Docket No. 38. Regardless, the Bankruptcy Court's reasoning in Transcom remains
17 sound.

18 59. The Debtors also request that to the extent the Court makes any determinations
19 regarding the propriety of disputed charges in the context of this Motion, that such
20 determinations be confined to the purposes of this Motion and Section 366 of the Bankruptcy
21 Code only, and not have any claim or issue preclusive effect on the ultimate allowance or
22 disallowance of such claims in the Debtors' Chapter 11 Cases pursuant to Section 502 of the
23 Bankruptcy Code. Debtors suggest this limitation to nullify any argument that they are
24 attempting an improper "end run" around any of the pending litigations. Simply stated, the
25 Debtors are seeking to maintain the status quo, and prevent advantageous creditors from
26 improperly using Section 366 of the Bankruptcy Code as a device to shut down the Debtors'
27 business.

28 60. These factors, which the Court may (and should) consider when determining the

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

amount of any adequate assurance payments, justify a finding that no further adequate assurance is required in these Chapter 11 cases. The Debtors further request that all Utility Providers be prohibited from altering, refusing or discontinuing utility services to the Debtors absent further order of the Court.

VII. RESERVATION OF RIGHTS

61. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim, or an approval or assumption of any agreement, contract, or lease under Section 365 of the Bankruptcy Code. The Debtors expressly reserve their rights to contest any invoice of an Alleged Utility or Utility Provider under applicable non-bankruptcy law. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

VIII. NOTICE

62. Prior to filing this Motion, the Debtor contacted all parties who had made formal written adequate assurance demands pursuant to Section 366 of the Bankruptcy Code to advise that they would be bringing this Motion, and also mailed this Motion to their entire creditor lists out of an abundance of caution. As such, the Debtors have used their best efforts under the circumstances to provide Alleged Utilities notice of this Motion and the proposed Procedures going forward. In light of the nature of the relief requested, the Debtors respectfully submit that no further notice is necessary.

IX. CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter an order as follows:

1. Holding that the Alleged Utilities are not "utilities" pursuant to Section 366 of the Bankruptcy Code, and thus are not entitled to any adequate assurance of future performance under that statute.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

1 2. In the alternative, to the extent the Court determines that any of the Alleged
2 Utilities are determined to be "utilities" within the meaning of Section 366 of the Bankruptcy
3 Code, ordering as follows: (a) determining that their Utility Providers have been provided with
4 adequate assurance of payment within the meaning of Section 366 of the Bankruptcy Code; (b)
5 prohibiting the Utility Providers from altering, refusing or discontinuing services on account of
6 pre-petition amounts outstanding and on account of any perceived inadequacy of the Debtors'
7 proposed adequate assurance; and (c) determining that the Debtors are not required to provide
8 any additional adequate assurance, beyond what is proposed by this Motion.
9 3. Granting the Debtors such other and further relief as is just and proper.
10 DATED this 2nd day of July, 2010.
11 GORDON SILVER
12
13 By: ______________________
GREGORY E. GARMAN, ESQ.
14 MATTHEW C. ZIRZOW, ESQ.
ERIC J. VAN, ESQ.
15 3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
16 Proposed Attorneys for Debtors
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT "1"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAETEC COMMUNICATIONS, INC., Plaintiff,	:	
v.	:	Civil Action No. 08-0397 (JR)
COMMPARTNERS, LLC, Defendant.	:	

MEMORANDUM ORDER

PAETEC Communications, Inc., seeks compensation for telephone calls made to individuals on its network that originated on the network of CommPartners, LLC. Now before the court are the parties' cross-motions for partial summary judgment (as to liability). For the reasons set forth below, PAETEC's motion [#36] is **granted** as to its statutory claim regarding the TDM-originated calls. CommPartners' "counter-motion" [#38] is **granted** as to the statutory claim regarding the VoIP-originated calls and as to the quasi-contractual claims.

Background

PAETEC and CommPartners are telecommunications companies. A long-distance call by a CommPartners customer to a PAETEC customer is completed, or "terminated," using PAETEC facilities. Decl. of John T. Ambrosi ¶ 7, attached to Pl. Mot. as Ex. B. In this action, PAETEC seeks compensation for calls it has terminated on behalf of CommPartners. PAETEC's claim is made pursuant to the "access charge" regime of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 et seq. PAETEC

alternatively asserts unjust enrichment and quantum meruit claims.

Crucial to this action is the distinction between two formats for transmitting calls: Time-Division Multiplexing ("TDM") and Voice over Internet Protocol ("VoIP"). VoIP is newer than TDM, and VoIP calls can be transmitted over either the public Internet or over closed networks. See Decl. of David S. Clark ¶¶ 10-11, attached to Pl. Mot. at Ex. A. Calls initiated in one format can be converted to the other during transmission, and a call may be converted once or multiple times. See Pl. Mot. at 6.

There are two types of calls at issue, to which different compensation regimes may apply: (1) calls that began on CommPartners' network in VoIP before being converted by CommPartners to TDM for transfer to PAETEC (the "VoIP-originated calls"); and (2) calls that both began and were transferred in TDM (the "TDM-originated calls"). PAETEC contends that both types of calls are subject to access charges. CommPartners concedes that access charges apply to the TDM-originated calls, but argues that they do not apply to VoIP-originated calls.

The access charge regime was established in the 1980s to govern compensation for long-distance telephony. See Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm., 461 F. Supp. 2d 1055, 1074 (E.D. Mo. 2006). "Access charges historically have included

significant implicit subsidies and by definition have been well above cost." Id. at 1075 (internal quotation marks omitted).

VoIP-Originated Calls

The central dispute here concerns PAETEC's assertion that its tariffs lawfully require application of access charges to VoIP-originated calls.

A. Tariff

Each carrier must file with the FCC a schedule of its charges for interstate wire communication using its network. See 47 U.S.C. § 203(a). This schedule is known as the carrier's tariff. Tariffs, once approved, "are the law, and not mere contracts." Bryan v. Bellsouth Comm'ns, Inc., 377 F.3d 424, 429 (4th Cir. 2004). The applicable portion of PAETEC's federal tariff provides that access services, to which access charges apply, include:

> all services and facilities provided by [PAETEC] for the origination or termination of any interstate or foreign telecommunications using [PAETEC's] network or origination or termination of other services utilizing the same [PAETEC] network services or functionality **regardless of the technology used in transmission.** This includes, but is not limited to, Internet Protocol or similar services.

PAETEC FCC Tariff No. 3, § 1.2, attached to Def. Cross-Mot. as Ex. 6 (emphasis added).[1]

[1] PAETEC's intrastate tariffs contain similar language.

Relying on the language of its tariff, PAETEC asserts that its termination of VoIP-originated calls is an access service. CommPartners begs to differ, arguing that the words "regardless of the technology used in transmission" refer only to the technology used by PAETEC, the terminating party. CommPartners loses this argument: the tariff contains no express or implied limitation on who is doing the transmitting. The terms of the tariff are unambiguous: access charges apply regardless of the technology used <u>at any point</u> in transmission.

CommPartners' next argument is more substantial. It is that, if PAETEC's tariff does cover VoIP-originated calls, it conflicts with general intercarrier compensation law, as established by the Communications Act and regulations promulgated thereunder. Here, PAETEC relies on the so-called "filed-rate doctrine," arguing that its tariff must prevail over any other consideration. The dispositive question, then, is whether the statutory provisions to which CommPartners avers are trumped by PAETEC's tariff.

B. Communications Act

CommPartners asserts two independent reasons why PAETEC's tariff may not be applied to VoIP-originated calls: (1) that its termination of VoIP-originated calls is an "information service" exempt from access charges; and (2) that

access charges cannot apply to VoIP-originated calls because "reciprocal compensation" applies instead.

1. Information Service Exception[2]

Information services are not subject to the access charge regime. See In re AT&T Access Charge Petition, 19 F.C.C.R. 7457, 7459-61, ¶¶ 4-7 (2004). Information services are defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). They include "protocol conversion (i.e., ability to communicate between networks that employ different data-transmission formats)." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 977 (2005) (citing Second Computer Inquiry, 77 F.C.C. 2d 384, 417-23 (1980)). Information services are not telecommunications services, which merely transmit without alteration. See 47 U.S.C. §§ 153(43), 153(46); Brand X, 545 U.S. at 975-76. The two categories are mutually exclusive. See Sw. Bell, 461 F. Supp. 2d at 1078; Stevens Report, 13 F.C.C.R. 11830,

---

[2] Under law prior to the 1996 Telecommunications Act, this exception was called the enhanced services exception or ESP exception. See Non-Accounting Safeguards Order, 11 F.C.C.R. 21905, 21955-58, ¶¶ 102-07 (1998). The Act essentially codified the pre-existing exception. See Nat'l Cable & Telecomm'ns Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975-77 (2005) (noting similarity of the Act's terminology to that of pre-Act FCC decisions).

11507, ¶ 13 (1998). But services that combine both telecommunications and information components are treated as information services. See Brand X, 545 U.S. at 989-90; Sw. Bell, 461 F. Supp. 2d at 1078 (citing CALEA Order, 20 F.C.C.R. 14989 (2005)). CommPartners thus contends that VoIP-to-TDM conversion results in an information service.

The telecommunications industry has been "raging for years" with debate about these arguments, Pl. Reply at 7. The FCC, which has had the controversy on its docket for a decade, has been unable to decide it.[3] Two federal district courts have considered the issue. Both have decided that transmissions which include net format conversion from VoIP to TDM are information services exempt from access charges. See Sw. Bell, 461 F. Supp. 2d at 1081-83; Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003). Their reasoning is persuasive. As the Sw. Bell court observed, "[n]et-protocol conversion is a determinative indicator of whether a service is an enhanced or information service." 461 F. Supp. 2d at 1081-82

[3] The FCC has determined that non-net protocol conversions do not constitute information services. See In re AT&T, 19 F.C.C.R. at 7465-66, ¶¶ 12-13. That is, if a company converts a TDM signal to VoIP and then back to TDM before handing it off, no information service is provided. See id. at 7466, ¶ 13 ("This order . . . addresses only AT&T's specific service, and that service does not involve a net protocol conversion. . . . If the service evolves . . . , the Commission could revisit its decision in this order."). It could - but it hasn't.

(citing In re Non-Accounting Safeguards, 11 F.C.C.R. 21905, 21956, ¶ 104 (1996)).

I find that CommPartners' transmission and net conversion of the calls is properly labeled an information service.[4]

2. Reciprocal Compensation

Reciprocal compensation and access charges are mutually exclusive methods of intercarrier compensation.[5] See 47 U.S.C. § 251(b)(5); WorldCom, Inc. v. FCC, 288 F.3d 429, 433-34 (D.C. Cir. 2002). The reciprocal compensation regime was created by the Telecommunications Act of 1996 (the "1996 Act"), which also retained the pre-existing access charge regime, but in a limited fashion. See 47 U.S.C. § 251(g) (retention provision). Under the 1996 Act, reciprocal compensation is the norm; access charges apply only where there was a "pre-Act obligation relating to inter-carrier compensation." WorldCom, 288 F.3d at 433.

There cannot be a pre-Act obligation relating to inter-carrier compensation for VoIP, because VoIP was not developed

---

[4] The parties disagree about whether the information service exception applies only to interstate calls, or whether it can reach intrastate traffic as well. See Pl. Reply at 11; Def. Reply at 11-13. I need not decide the issue, as the information service exception is but one of two independent grounds supporting CommPartners.

[5] Unlike access charges, reciprocal compensation can apply to information services. See Sw. Bell, 461 F. Supp. 2d at 1081 n.19.

until the 1996 Act was passed. Accord Sw. Bell, 461 F. Supp. 2d at 1080 ("[B]ecause [VoIP-to-TDM] is a new service developed after the [1996] Act, there is no pre-Act compensation regime which could have governed it, and therefore § 251(g) is inapplicable."). PAETEC's submission that the analysis should turn not on whether companies actually paid access charges for VoIP prior to the Act, but instead whether pre-Act law would have supported such charges -- is not so much an argument as an invitation to speculate. The invitation is declined.

C. Filed-Rate Doctrine

Under the Communications Act, tariffs "are the law, and not contracts"; and PAETEC's tariff imposes access charges on VoIP-originated calls. The FCC accepted PAETEC's tariff for filing, even though the compensation-governing provisions of the Communications Act and interpretive regulatory decisions thereunder point away from the access charges PAETEC purports to impose on VoIP-originated calls.

Under the filed-rate doctrine, customers are "charged with notice of the terms and rates set out in the filed tariff and may not bring an action against a carrier that would invalidate, alter, or add to the terms of the filed tariff." Evanns v. AT&T Corp., 229 F.3d 837, 840 (9th Cir. 2000). "The filed-rate doctrine precludes courts from deciding whether a tariff is reasonable, reserving the evaluation of tariffs to the

FCC." Brown v. MCI Worldcom Network Servs., Inc., 277 F.3d 1166, 1171 (9th Cir. 2002).

In this case, nevertheless, PAETEC's tariff must give way. "A tariff filed with a federal agency is the equivalent of a federal regulation." Cahnmann v. Spring Corp., 133 F.3d 484, 488 (7th Cir. 1998). As such, a tariff cannot be inconsistent with the statutory framework pursuant to which it is promulgated. At least one circuit has reached a similar conclusion. In that case, Iowa Network Services ("INS") filed state and federal tariffs that purported to apply access charges to transmission of certain wireless traffic. See INS v. Qwest Corp, 466 F.3d 1091, 1093-95 (8th Cir. 2006). However, the statutory framework for the wireless traffic, combined with state and federal regulatory processes pursuant to that framework, established that access charges could not apply. See id. at 1095-97. After considering the conflict, the court held that the tariffs must yield. See id. at 1097. The court found that its decision did not improperly invalidate the tariffs, in violation of the filed-rate doctrine, because they could still be applied to traffic which the statutory and framework allowed them to reach. See id. Similarly, the decision did not alter the terms of the tariff; the disputed terms were simply ultra vires and lacked legal force.

The Eighth Circuit decision in Qwest may appear to be an inventive piece of legal legerdemain, but it applies the tools that are available to courts (the FCC has much better ones, but will not use them), and it is supported by sound policy considerations. The FCC sometimes has as few as fifteen days to consider whether to object to a tariff that contains a rate increase before it goes into effect. See 47 U.S.C. § 204(a)(3). To treat tariffs as inviolable would create incentives to bury within tariffs provisions that expand their rates beyond statutory allowance in the hope that the FCC will not notice. See INS v. Qwest Corp., 385 F. Supp. 2d 850, 899 (S.D. Iowa 2005) (characterizing the tariffs in that case as an attempt to "sidestep" the applicable legal framework and "a strategic attempt to thwart the impact of the 1996 Act"). The purposes of the filed-rate doctrine -- to prevent discrimination among consumers and preserve the rate-making authority of federal agencies, see Bryan v. Bellsouth Comm'ns, Inc. 377 F.3d 424, 429 (4th Cir. 2004); Hill v. BellSouth Telcomms., Inc., 364 F.3d 1308, 1316 (11th Cir. 2004) -- are not undercut by the Eighth Circuit's decision, or by mine.

There are differences between Qwest and this case, to be sure, but they do not justify a different outcome here. First, in the background of the Qwest case were rulings of the Iowa Utilities Board that access charges were inapplicable to the

traffic at issue. See Qwest, 385 F. Supp. 2d at 863. Those regulatory decisions were not dispositive, however; indeed, earlier in the case the Eighth Circuit reversed the district court for treating them as preclusive and ordered it instead to "decide for itself whether the traffic at issue is subject to access charges pursuant to INS's tariffs." INS v. Qwest Corp., 363 F.3d 683, 695 (8th Cir. 2004). Second, the court's refusal to apply the filed-rate doctrine in Qwest was supported both by the compensation-governing provisions of 47 U.S.C. § 251 and by the provision governing the scope of tariffs located at 47 U.S.C. § 203(a). See Qwest, 466 F.3d at 1095-97. My decision turns only on § 251, yet the Qwest decision could stand alone on its persuasive holding that tariffs cannot be applied inconsistently with the Communications Act, which is where § 251 resides.

Because the access charge regime is inapplicable to VoIP-originated tariff, and because a filed tariff cannot be inconsistent with the statutory framework pursuant to which it is promulgated, the filed-rate doctrine must yield in this case.

TDM-Originated Calls

CommPartners concedes its duty to pay access charges for TDM-originated calls. See Def. Cross-Mot. at 1 n.1. PAETEC suggests that this concession should entitle it to an award of attorneys fees and costs based on the terms of its tariff. See PAETEC Tariff F.C.C. No. 3 at § 2.4.6 (requiring such fees if

PAETEC "substantially prevails" in litigation). CommPartners disputes PAETEC's assertion. The parties urge an immediate determination of that question, but at this point I am ruling only on liability. The question of what it means to "substantially prevail" must await the damages phase, when the factual record will be more complete.

Quasi-Contractual Claims

Injecting common law claims into intercarrier compensation would undermine the complex scheme Congress and the FCC have established. Because the Communications Act establishes the exclusive methods of intercarrier compensation for the calls at issue, PAETEC's unjust enrichment and quantum meruit claims are statutorily barred. See Qwest, 466 F.3d at 1098; MCI WorldCom Network Servs., Inc. v. PAETEC Comm'ns, Inc., 2005 WL 2145499, at *5 (E.D. Va. Aug. 31, 2005).

JAMES ROBERTSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAETEC COMMUNICATIONS, INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No. 08-0397 (JR)
COMMPARTNERS, LLC,	:	
Defendant.	:	

ORDER

The motion of PAETEC Communications, Inc., for certification of an interlocutory appeal [Dkt. #52] is **granted.** The memorandum order issued on February 18, 2010 [Dkt. #48], as amended on March 5, 2010 [Dkt #49], involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal from that order may materially advance the ultimate termination of this litigation. See 28 U.S.C. § 1292(b). **SO ORDERED.**

JAMES ROBERTSON
United States District Judge

Exhibit "2"

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE	§	
	§	**BANKRUPTCY CASE**
COMM SOUTH COMPANIES, INC.	§	**NO. 03-39496 HDH-11**
	§	
DEBTOR	§	

MEMORANDUM OPINION ON EMERGENCY MOTION FOR ORDER DEEMING CERTAIN ENTITIES AS NON-UTILITIES OR, ALTERNATIVELY DEEMING UTILITIES ADEQUATELY ASSURED OF FUTURE PERFORMANCE AND ESTABLISHING PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF FUTURE UTILITY PAYMENTS

The Parties

The Debtor, Comm South, Inc., known as a competitive local exchange carrier ("CLEC"), provides local and long distance telephone service to pre-paid phone service customers. The Debtor obtains telecommunications services on a wholesale basis from Verizon and other entities known as incumbent local exchange carriers ("ILECs"), which it then sells on a retail basis to its own customers. The operating subsidiaries of Verizon Communications, Inc. ("Verizon") provide the telecommunications services to the Debtor for resale pursuant to a contract negotiated by the parties and entered into on or about September 16, 2002.

Procedure

On September 19, 2003, the Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor seeks the entry of an order of this Court that Verizon is not a

"utility" for purposes of § 366 of the Bankruptcy Code.[1] Verizon objected, arguing that it is a utility covered by Bankruptcy Code § 366 and that it is entitled to the special protections provided it under that provision. Thus, the issue is whether an ILEC that provides telecommunications services on a wholesale basis to a CLEC for resale to the CLEC's customers is a "utility" governed by § 366 of the Bankruptcy Code.

Utilities Covered by § 366 of the Bankruptcy Code

In determining whether Verizon should be considered a "utility" for purposes of § 366 of the Bankruptcy Code, the Court must first look to the precise language of the statute, *see, U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989). Section 366 provides,

> (a) Except as provided in subsection (b) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.
>
> (B) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

11 U.S.C. § 366. Under this special provision of the Bankruptcy Code, any executory contract between a debtor and a utility covered by the section receives special treatment. *See, In re Tel-*

---

[1]The Debtor filed an Emergency Motion for Order Deeming Certain Entities as Non-utilities or, Alternatively Deeming Utilities Adequately Assured of Future Performance and Establishing Procedures for Determining Adequate Assurance of Future Utility Payments (the "Motion").

Central Communications, Inc., 212 B.R. 342, 346 (Bankr. W.D. Mo. 1997)(noting that the bankruptcy court in *In re Gehrke*, 57 B.R. 97, 98 (Bankr. D. Or. 1985), "ruled that section 366 and not section 365 governs written agreements for the furnishing of utilities."). The utility may not exert its clout as the debtor's sole source of vital utility service to extort payment. *See generally, In re One Stop Realtour Place, Inc.*, 268 B.R. 430, 435-38 (Bankr. E.D. Pa. 2001). In exchange for such protections, however, the debtor must, early in the case, provide assurance that it will be able to pay for utility service as it goes along. *Id.*

Neither § 366 nor any other provision of the Bankruptcy Code, however, defines the term "utility." Black's Law Dictionary defines a utility as "a business enterprise that performs essential public service that is subject to government regulation." Black's Law Dictionary at 1544 (7th ed. 1999). Other cases have looked to the ordinary meaning of the term "utility" in addressing whether a particular entity is a utility for purposes of § 366. *See, e.g., In re One Stop Realtour Place, Inc.*, 268 B.R. 430, 435 (Bankr. E.D. Pa. 2001).

Clearly, Verizon, a provider of telecommunications services to the public that is regulated by the state and federal governments, is a utility. However, meeting the definition of utility in one capacity does not necessarily mean that Verizon would be a utility with respect to *this* Debtor, in *this* bankruptcy case, for purposes of § 366.

Verizon's Argument

Verizon cites the legislative history in support of its position and notes that the Debtor cites the same language in support of its position. The legislative history cited by both parties provides,

> This section is intended to cover utilities that have some special position with respect to the debtor, such as an electric company, gas supplier, or telephone company that is a monopoly in the area so that the debtor cannot easily obtain comparable service from another utility.

S. Rep. No. 95-989. Verizon points out that the legislative history indicates that § 366 is intended to cover utilities that have a "special position" with the debtor and then asserts that the Debtor's argument that Verizon does not maintain a "special position" with them is refuted by the Debtor's claims in its Motion that "the failure to maintain service from [Verizon] will cause [Comm South] to lose it going concern value" and "[w]ithout [Verizon's] ongoing service, [Comm South] *will have to shut down and liquidate." Verizon Objection, ¶ 16, pp. 7-8 (citing* Comm South's Motion at p. 3).

These claims of the Debtor are not contradictory of its position that Verizon is not a utility entitled to the special protections of § 366. The Debtor's position simply recognizes that Verizon is a major supplier to the Debtor, on a wholesale basis, of a commodity that the Debtor sells to its customers and that the cessation of the provision of such commodity would have a significant detrimental impact on its business. Thus, while the provisioning of telecommunications services by Verizon to this Debtor is "essential" to the continuation of the Debtor's business, the same could be said of the provisioning by a wholesaler of any commodity to any other debtor that relies on that wholesaler for a substantial percentage of the debtor's "inventory" that the debtor retails to its customers.

After reviewing the language of both the statute and the legislative history, this Court finds that § 366 addresses the provision by a public utility of an essential *service* to a debtor that is used by a debtor as a *service*. Section 366 does not address the provision by a utility of a

commodity on a wholesale basis to a debtor that is also a utility that resells that commodity to a retail customer.

Application of § 366 to Verizon?

Here, Verizon provides telecommunications services to the Debtors, not for the Debtor's own use, but for the resale by the Debtor to its customers, the end users. The contracts between Verizon and the Debtor, in fact, specifically prohibit the Debtor from using the telecommunications services provided by Verizon under the contract for its own use. Paragraph 1 of the Resale Attachment to the contract between Verizon and the Debtor provides, in part, "Verizon shall provide to Comm South, in accordance with this Agreement (including, but not limited to, Verizon's applicable Tariffs) and the requirements of Applicable Law, Verizon's Telecommunications Services *for resale* by Comm South," and ¶ 2 of the Resale Attachment provides,

> Verizon Telecommunications Services to be purchased by Comm South for other purposes (including, but not limited to, Comm South's own use) must be purchased by Comm South pursuant to other applicable Attachments to this Agreement (if any), or separate written agreements, including, but not limited to, applicable Verizon Tariffs.

Verizon's own description of its contracts with the Debtor recognizes that the Debtor's customers, not the Debtors, are the end users of the telecommunications services provided under the contract. *See,* Verizon Objection, ¶ 10, p. 5 ("The interconnection agreements between the Debtors and Verizon establish the terms, conditions and pricing under which Verizon will provide the Debtors with access to Verizon's network and under which the Debtors do resell Verizon's local telephone service *for the benefit of the Debtor's end user customers.*")(Emphasis

added). Thus, the relationship between Verizon and the Debtor is not one of utility to consumer (which would clearly be governed by § 366 of the Bankruptcy Code), but rather one of utility wholesaler to utility retailer.

In its Objection, Verizon implores the Court to "disregard the Debtors' arguments that Verizon is not a "utility" and – consistent with other bankruptcy courts throughout the country – treat the Debtors' obligations to Verizon as obligations that arise under Section 366 of the Bankruptcy Code." Verizon Objection, ¶ 5, p. 3. Verizon cites two published cases that involve orders from bankruptcy courts relating to the provisioning by an ILEC of telecommunications services to a CLEC debtor. Verizon Objection, ¶ 27, pp. 12-13 (citing, *inter alia, In re Tel-Central Communications, Inc.*, 212 B.R. 342 (Bankr. W.D. Mo. 1997) and *In re Sun-Tel Communications, Inc.*, 39 B.R. 10 (Bankr. S.D. Fla. 1984)). Neither of the cases, however, involved a contest of the specific issue before this Court.

In fact, Verizon's reliance on *Tel-Central* is misplaced. Verizon argues that the court in *Tel-Central* "not[ed] that it entered preliminary order finding that a telecommunications service provider was a 'utility' under Section 366 where such entity provided services to a reseller." Verizon Objection, ¶ 27, p.13. However, a closer reading of the case indicates that the court took great pains to point out that it had "for the limited purpose of establishing the security deposit, . . . *temporarily* ruled against [the ILEC] on the issue of whether [the ILEC] is a 'utility' within the meaning of section 366." *Tel-Central*, 212 B.R. at 343. The court in *Tel-Central* also noted that "[u]pon reviewing additional evidence in future proceedings the Court may find that [the ILEC] is not a utility . . . ." *Id.* at 347. It was thus not so clear to the *Tel-Central* court that an ILEC that

provides telecommunications services to a CLEC for resale, although clearly a utility in the ordinary sense of the word, would also be a "utility" covered by the special provisions of § 366 of the Bankruptcy Code.

The *Sun-Tel* case, also relied upon by Verizon, provides little support for Verizon's position. First, there is no indication in the *Sun-Tel* opinion that the issue was even contested. In *Sun-Tel*, the bankruptcy court addressed whether a security deposit that had been required of the debtor, a CLEC, for continued telecommunications services by an ILEC should be reduced based on the debtor's assertions that it could not afford to pay the deposit. For all that is apparent from the face of the opinion, the debtors could have consented at the earlier hearing (out of which the security deposit was ordered) that the ILEC in that case was a utility for purposes of § 366. Thus, the bankruptcy court's order affirming the amount of the security deposit that it had previously ordered is not particularly probative of the issue before this court: whether an ILEC should be treated as a utility for purposes of § 366 of the Bankruptcy Code when the debtor contests such treatment.

Verizon claims that "virtually all CLECs and other debtors in the telecommunications industry that obtain telecommunications services from Verizon have asserted that Verizon is a 'utility' within the meaning of Section 366." Verizon Objection, ¶ 28, p. 13. The Court has no reason to doubt that assertion. As Verizon points out, the debtors in those cases have taken such positions "in part, no doubt, because they wished to continue receiving such services from Verizon without interruption." *Id.* Verizon cited several examples of cases throughout the country where debtors have filed motions recognizing that Verizon is a "utility" covered by

Section 366 ranging from *In re Coserv* before Judge Lynn of the bankruptcy court for this district to *In re Worldcom, Inc.* in New York. However, the fact that *those* debtors *consented* to such treatment of Verizon under § 366 of the Bankruptcy Code does not, and should not, bind *this* Debtor, which, for reasons of its own, has sought an order from this Court declaring that Verizon is not a utility for purposes of § 366.

Conclusion

The plain meaning of the statute, the legislative history, and the contracts between the parties all lead to the conclusion that the relationship between the Debtor and Verizon under the contracts is not covered by Bankruptcy Code § 366. What this means for the Debtor, Verizon, and this bankruptcy case will be determined as the case proceeds. Verizon and the Debtor must look to the more general executory contract provision in § 365 of the Bankruptcy Code tempered by the stay provisions of § 362.

Based on the foregoing, the Court finds that, under the contracts at issue, Verizon is not a "utility" vis-a-vis this Debtor for purposes of § 366 of the Bankruptcy Code. The provisioning of telecommunications services by Verizon to the Debtor is pursuant to executory contracts, which are governed by § 365 of the Bankruptcy Code.

Debtor's counsel shall submit by November 21, 2003, a proposed order, agreed to by counsel for Verizon as to form, that is consistent with the Court's findings herein.

Signed this 10 day of November, 2003.

HONORABLE HARLIN D. HALE
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT "3"

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
TRANSCOM ENHANCED SERVICES, LLC,	§	**Case No. 05-31929-HDH-11**
	§	
	§	
Debtor.	§	

MEMORANDUM OPINION

On April 14, 2005, this Court considered Transcom Enhanced Services, LLC's (the "Debtor's") Motion To Assume AT&T Master Agreement MA Reference No. 120783 Pursuant To 11 U.S.C. § 365 ("Motion").[1] At the hearing, the Debtor, AT&T, and Southwestern Bell Telephone, L.P., et al ("SBC Telcos") appeared, offered evidence, and argued. These parties also submitted post-hearing briefs and proposed findings of fact and conclusions of law supporting their positions. This memorandum opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 151, and the standing order of reference in this district. This matter is a core proceeding, pursuant to 28 U.S.C. § 157(b)(2)(A) & (O).

I. Background Facts

This case was commenced by the filing of a voluntary Bankruptcy Petition for relief under Chapter 11 of the Bankruptcy Code on February 18, 2005. The Debtor is a wholesale

---

[1]Debtor's Exhibit 1, admitted during the hearing, is a true, correct and complete copy of the Master Agreement between Debtor and AT&T.

provider of transmission services providing its customers an Internet Protocol ("IP") based network to transmit long-distance calls for its customers, most of which are long-distance carriers of voice and data.

In 2002, a company called DataVoN, Inc. invested in technology from Veraz Networks designed to modify the aural signal of telephone calls and thereby make available a wide variety of potential new services to consumers in the area of VoIP. The FCC had long supported such new technologies, and the opportunity to change the form and content of the telephone calls made it possible for DataVoN to take advantage of the FCC's exemption provided for Enhanced Service Providers ("ESP"s), significantly reducing DataVoN's cost of telecommunications service.

On September 20, 2002, DataVoN and its affiliated companies filed for protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Texas, before Judge Steven A. Felsenthal. Southwestern Bell was a claimant in the DataVoN bankruptcy case. On May 19, 2003, the Debtor was formed for purposes of acquiring the operating assets of DataVoN. The Debtor was the winning bidder for the assets of DataVoN and on May 28, 2003, the bankruptcy court approved the sale of substantially all of the assets of DataVoN to the Debtor. Included in the order approving the sale, were findings by Judge Felsenthal that DataVoN provided "enhanced information services".

On July 11, 2003, AT&T and the Debtor entered into the AT&T Master Agreement MA Reference No. 120783 (the "Master Agreement"). In an addendum to the Master Agreement, executed on the same date, the Debtor states that it is an "enhanced information services" provider, providing data communications services over private IP networks (VoIP), such VoIP

services are exempt from the access charges applicable to circuit switched interexchange calls, and such services would be provided over end user local services (such as the SBC Telcos).

AT&T is both a local-exchange carrier and a long-distance carrier of voice and data. The SBC Telcos are local exchange carriers that both originate and terminate long distance voice calls for carriers that do not have their own direct, "last mile" connections to end users. For this service, SBC Telcos charge an access charge. Enhanced service providers ("ESP's") are exempt from paying these access charges, and the SBC Telcos had been in litigation with DataVoN during its bankruptcy, and has recently been in litigation with the Debtor, AT&T and others over whether certain services they provide are entitled to this exemption to access charges.

On April 21, 2004, the FCC released an order in a declaratory proceeding between AT&T and SBC (the "AT&T Order") that found that a certain type of telephone service provided by AT&T using IP technology was not an enhanced service and was therefore not exempt from the payment of access charges. Based on the AT&T Order, before the instant bankruptcy case was filed, AT&T suspended Debtor's services under the Master Agreement on the grounds that the Debtor was in default under the Master Agreement. Importantly, the alleged default of the Debtor is not a payment default, but rather pursuant to Section 3.2 of the Master Agreement, which, according to AT&T, gives AT&T the right to immediately terminate any service that AT&T has reason to believe is being used in violation of laws or regulations.

AT&T asserts that the services that the Debtor provides over its IP network are substantially the same as were being provided by AT&T, and therefore, the Debtor is also not exempt from paying these access charges. At the point that the bankruptcy case was filed, service had been suspended by AT&T pending a determination that the Debtor is an ESP, but

AT&T had not yet assessed the access charges that it asserts are owed by the Debtor.

II. Issues

The issues before the Court are:

(1) Whether the Debtor has met the requirements of § 365 in order to assume the Master Agreement; and

(2) Whether the Debtor is an enhanced service provider ("ESP"), and is thus exempt from the payment of certain access charges in compliance with the Master Agreement.[2]

---

[2] AT&T has stated in its Objection to the Motion that since it does not object to the Debtor's assumption of the Master Agreement provided the amount of the cure payment can be worked out, the Court need not reach the issue of whether the Debtor is an ESP. However, this argument appears disingenuous to the Court. AT&T argues that the entire argument over cure amounts is a difference of about $28,000.00 that AT&T is willing to forgo for now. However, AT&T later states in its objection (and argued at the hearing):

> To be sure, this is not the total which ultimately Transcom may owe. It is also possible that . . . Transcom will owe additional amounts if it is determined that it should have been paying access charges. But at this point, AT&T has not billed for the access charges, so under the terms of the Addendum, they are not currently due. . . . AT&T is not requiring Transcom to provide adequate assurance of its ability to pay those charges should they be assessed, but will rely on the fact that post-assumption, these charges will be administrative claims. . . . Although Transcom's failure to pay access charges with respect to prepetition traffic was a breach, the Addendum requires, as a matter of contract, that those pre-petition charges be paid when billed. This contractual provision will be binding on Transcom post-assumption, and accordingly, is not the subject of a damage award now."

AT&T Objection p. 3-4. As will be discussed below, in evaluating the Debtor's business judgment in approving its assumption Motion, the Court must determine whether or not its approval of the Motion will result in a potentially large administrative expense to be borne by the estate.

AT&T argues against the Court's jurisdiction to determine this question as part of an assumption motion. However, the Court wonders if AT&T will make the same argument with regard to its post-assumption administrative claims it plans on asserting for past and future access charges that it states it will rely on for payment instead of asking for them to be included as cure

III. Analysis

Under § 365(b)(1), a debtor-in-possession that has previously defaulted on an executory contract[3] may not assume that contract unless it: (A) cures, or provides adequate assurance that it will promptly cure, the default; (B) compensates the non-debtor party for any actual pecuniary loss resulting from the default; and (C) provides adequate assurance of future performance under such contract. *See* 11 U.S.C. § 365(b)(1).

In its objection, briefing and arguments made at the hearing, AT&T does not object to the Debtor's assumption of the Master Agreement, provided the Debtor pays the cure amount, as determined by the Court. It does not expect the Debtor to cure any non-monetary defaults, including payment or proof of the ability to pay the access charges that have been incurred, as alleged by the SBC Telcos, as a prerequisite to assumption. *See In re BankVest Capital Corp.*, 360 F.3d 291, 300-301 (1st Cir. 2004), *cert. denied*, __ U.S. __, 124 S.Ct. 2874, 159 L.Ed. 2d 776 (2004) ("Congress meant § 365(b)(2)(D) to excuse debtors from the obligation to cure non-monetary defaults as a condition of assumption.").

Only the Debtor offered evidence of the cure amounts due at the hearing totaling $103,262.55. Therefore, based on this record, the current outstanding balance due from Debtor to AT&T is $103,262.55 (the "Cure Amount"). Thus, upon payment of the Cure Amount Debtor's Motion should be approved by the Court, provided the Debtor can show adequate assurance of future performance.

AT&T argues that this is where the Court's inquiry should cease. Since AT&T has

---

payments under the present Motion.

[3] The parties agree that the Master Agreement is an executory contract.

suspended service under the Master Agreement, whether or not the Debtor is an ESP, and thus exempt from payment of the disputed access charges is irrelevant, because no future charges will be incurred, access or otherwise. This is because no service will be given by AT&T until the proper court makes a determination as to the Debtor's ESP status. However, in its argument, AT&T ignores the fact that part of the Court's necessary determination in approving the Debtor's motion to assume the Master Agreement is to ascertain whether or not the Debtor is exercising proper business judgment. *See In re Lilgeberg Enter., Inc.*, 304 F.3d 410, 438 (5th Cir. 2002); *In re Richmond Leasing Co.*, 762 F.2d 1303, 1309 (5th Cir. 1985).

If by assuming the Master Agreement the Debtor would be liable for the large potential administrative claim, to which AT& T argues that it will be entitled,[4] or if the Debtor cannot show that it can perform under the Master Agreement, which states that the Debtor is an enhanced information services provider exempt from the access charges applicable to circuit switched interexchange calls, and the Debtor would loose money going forward under the Master Agreement should it be determined that the Debtor is not an ESP, then the Court should deny the Motion. On this record, the Debtor has established that it cannot perform under the Master Agreement, and indeed cannot continue its day-to-day operations or successfully reorganize, unless it qualifies as an Enhanced Service Provider.

AT&T and SBC Telcos argue that a forum selection clause in the Master Agreement should be enforced and that any determination as to whether the Debtor is an ESP, and thus exempt from access charges, must be tried in New York. While this argument may have validity in other contexts, the Court concludes that it has jurisdiction to decide this issue as it arises in the

---

[4] See n. 2 above.

context of a motion to assume under § 365. *See In re Mirant Corp.*, 378 F.3d 511, 518 (5th Cir. 2004) (finding that district court may authorize the rejection of an executory contract for the purchase of electricity as part of a bankruptcy reorganization and that the Federal Energy Regulatory Commission did not have exclusive jurisdiction in this context); *see also, Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056 (5th Cir. 1997) (Bankruptcy Court possessed discretion to refuse to enforce an otherwise applicable arbitration provision where enforcement would conflict with the purpose or provisions of the Bankruptcy Code).

In re Orion, which is heavily relied upon by AT&T, is inapplicable in this proceeding. *See In re Orion Pictures Corp.*, 4 F.3d 1095 (2d Cir. 1993). On its face, *Orion* is distinguishable from this case in that in *Orion*, the debtor sought damages in an adversary proceeding at the same time it was seeking to assume the contract in question under Section 365. The bankruptcy court decided the Debtor's request for damages as a part of the assumption proceedings awarding the Debtor substantial damages. Here, the Debtor is not seeking a recovery from AT&T under the contract which would augment the estate. Rather the Debtor is only seeking to assume the contract within the parameters of Section 365. Similar issues to the one before this Court have been advanced by another bankruptcy court in this district.

The court in *In re Lorax Corp.*, 307 B.R. 560 (Bankr. N.D. Tex. 2004), succinctly pointed out that a broad reading of the Orion opinion runs counter to the statutory scheme designed by Congress. *Lorax*, 307 B.R. at 566 n. 13. The *Lorax* court noted that *Orion* should not be read to limit a bankruptcy court's authority to decide a disputed contract issue as part of hearing an assumption motion. *Id.* To hold otherwise would severely limit a bankruptcy court's inherent

equitable power to oversee the debtor's attempt at reorganization and would diffuse the bankruptcy court's power among a number of courts. The *Lorax* court found such a result to be at odds with the Supreme Court's command that reorganization proceed efficiently and expeditiously. *Id.* at 567 (citing *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 376 (1988)). This Court agrees. The determination of the Debtors status as an ESP is an important part of the assumption motion.

Since the Second Circuit's 1993 *Orion* opinion, the Second Circuit has further distinguished non-core and core jurisdiction proceedings involving contract disputes. In particular, if a contract dispute would have a "much more direct impact on the core administrative functions of the bankruptcy court" versus a dispute that would merely involve "augmentation of the estate," it is a core proceeding. *In re United States Lines, Inc.*, 197 F.3d 631, 638 (2d Cir. 1999) (allowing the bankruptcy court to resolve disputes over major insurance policies, and recognizing that the debtor's indemnity contracts could be the most important asset of the estate). Accordingly, the Second Circuit would reach the same conclusion of core jurisdiction here since the dispute addressed by the Motion "directly affect[s]" the bankruptcy court's "core administrative function." *United States Lines.* at 639 (citations omitted).

Determination, for purposes of the motion to assume, of whether the Debtor qualifies as an ESP and is exempt from paying access charges (the "ESP Issue") requires the Court to examine and take into account certain definitions under the Telecommunications Act of 1996 (the "Telecom Act"), and certain regulations and rulings of the Federal Communications Commission ("FCC"). None of the parties have demonstrated, however, that this is a matter of first impression or that any conflict exists between the Bankruptcy Code and non-Code cases.

Thus, the Court may decide the ESP issues for purposes of the motion to assume.

Several witnesses testified on the issues before the Court. Mr. Birdwell and the other representatives of the Debtor were credible in their testimony about the Debtor's business operations and services. The record establishes by a preponderance of the evidence that the service provided by Debtor is distinguishable from AT&T's specific service in a number of material ways, including, but not limited to, the following:

(a) Debtor is not an interexchange (long-distance) carrier.

(b) Debtor does not hold itself out as a long-distance carrier.

(c) Debtor has no retail long-distance customers.

(d) The efficiencies of Debtor's network result in reduced rates for its customers.

(e) Debtor's system provides its customers with enhanced capabilities.

(f) Debtor's system changes the content of every call that passes through it.

On its face, the AT&T Order is limited to AT&T and its specific services. This Court holds, therefore, that the AT&T Order does not control the determination of the ESP Issue in this case.

The term "enhanced service" is defined at 47 CFR § 67.702(a) as follows:

> For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.

The term "information service" is defined at 47 USC § 153(20) as follows:

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Dr. Bernard Ku, who testified for SBC was a knowledgeable and impressive witness. However, during cross examination, he agreed that he was not familiar with the legal definition for enhanced service.

The definitions of "enhanced service" and "information service" differ slightly, to the point that all enhanced services are information services, but not all information services are also enhanced services. See First Report And Order, *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, as amended, 11 FCC Rcd 21905 (1996) at ¶ 103.

The Telecom Act defines the terms "telecommunications" and "telecommunications service" in 47 USC § 153(43) and (46), respectively, as follows:

> The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, *without change in the form or content* of the information as sent and received. (emphasis added).

> The term "telecommunications service" means the offering of *telecommunications* for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used. (emphasis added).

These definitions make clear that a service that routinely changes either the form or the content of the transmission would fall outside of the definition of "telecommunications" and therefore would not constitute a "telecommunications service."

Whether a service pays access charges or end user charges is determined by 47 C.F.R.

§ 69.5, which states in relevant part as follows:

> (a) End user charges shall be computed and assessed upon end users . . . as defined in this subpart, and as provided in subpart B of this part. (b) Carrier's carrier charges [i.e., access charges] shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities *for the provision of interstate or foreign telecommunications services*. (emphasis added).

As such, only telecommunications services pay access charges. The clear reading of the above provisions leads to the conclusion that a service that routinely changes either the form or the content of the telephone call is an enhanced service and an information service, not a telecommunications service, and therefore is required to pay end user charges, not access charges.

Based on the evidence and testimony presented at the hearing, the Court finds, for purposes of the § 365 motion before it, that the Debtor's system fits squarely within the definitions of "enhanced service" and "information service," as defined above. Moreover, the Court finds that Debtor's system falls outside of the definition of "telecommunications service" because Debtor's system routinely makes non-trivial changes to user-supplied information (content) during the entirety of every communication. Such changes fall outside the scope of the operations of traditional telecommunications networks, and are not necessary for the ordinary management, control or operation of a telecommunications system or the management of a telecommunications service. As such, Debtor's service is not a "telecommunications service" subject to access charges, but rather is an information service and an enhanced service that must pay end user charges. Judge Felsenthal made a similar finding in his order approving the sale of the assets of DataVoN to the Debtor, that DataVoN provided "enhanced information services". *See* Order Granting Motion to Sell, 02-38600-SAF-11, no. 465, entered May 29, 2003. The

Debtor now uses DataVoN's assets in its business.

Because the Court has determined that the Debtor's service is an "enhanced service" not subject to the payment of access charges, the Debtor has met its burden of demonstrating adequate assurance of future performance under the Master Agreement. The Debtor has demonstrated that it is within Debtor's reasonable business judgment to assume the Master Agreement.

Regardless of the ability of the Debtor to assume this agreement, the Court cannot go further in its ruling, as the Debtor has requested to order AT&T to resume providing service to the Debtor under the Master Agreement. The Court has reached the conclusions stated herein in the context of the § 365 motion before it and on the record made at the hearing. An injunction against AT&T would require an adversary proceeding, a lawsuit. Both the Debtor and AT&T are still bound by the exclusive jurisdiction provision in § 13.6 of the Master Agreement, as found by the United States District Court for the Northern District of Texas, Hon. Terry R. Means. As Judge Means ruled, any suit brought to enforce the provisions of the Master Agreement must be brought in New York.

IV. Conclusion

In conclusion, the Court finds that the provisions of 11 U.S.C. § 365 have been met in this case. Because the Court finds that the Debtor's service is an enhanced service, not subject to payment of access charges, it is therefore within Debtor's reasonable business judgment to assume the Master Agreement with AT&T.

Only the Debtor offered evidence of the cure amounts at the hearing. Based on the record at the hearing, the current outstanding balance due from Debtor to AT&T is $103,262.55. To

assume the Master Agreement, the Debtor must pay this Cure Amount to AT&T within ten (10) days of the entry of the Court's order on this opinion.

A separate order will be entered consistent with this memorandum opinion.

SIGNED: 4/28/05

Harlin D. Hale
United States Bankruptcy Judge

File a Motion:

10-20932-lbr COMMPARTNERS HOLDING CORPORATION

Type: bk	Chapter: 11 v	Office: 2 (Las Vegas)
Assets: u	Judge: lbr	Case Flag: BAPCPA, JNTADMN, LEAD

U.S. Bankruptcy Court

District of Nevada

Notice of Electronic Filing

The following transaction was received from MATTHEW C. ZIRZOW entered on 7/2/2010 at 1:39 PM PDT and filed on 7/2/2010
Case Name: COMMPARTNERS HOLDING CORPORATION
Case Number: 10-20932-lbr
Document Number: 64

Docket Text:
Application Filed by MATTHEW C. ZIRZOW on behalf of COMMPARTNERS CARRIER SERVICES CORPORATION, COMMPARTNERS HOLDING CORPORATION, COMMPARTNERS NETWORK SERVICES, LLC, COMMPARTNERS, LLC (Attachments: # (1) Exhibit 1# (2) Exhibit 2# (3) Exhibit 3)(ZIRZOW, MATTHEW)

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:C:\fakepath\Motion Determining that Entities are not Utilities.pdf
Electronic document Stamp:
[STAMP bkecfStamp_ID=989277954 [Date=7/2/2010] [FileNumber=16425607-0]
[6219ec2a15d2c1c4f3c79afd1421e793f4e09d6d140e03e0ee0a92e344ee1832d59e
49f3d2087ffbba9c2a8268d11781b2f508f68a41a5a0af591aefc576d7e9]]
Document description: Exhibit 1
Original filename:C:\fakepath\Exhibit 1.pdf
Electronic document Stamp:
[STAMP bkecfStamp_ID=989277954 [Date=7/2/2010] [FileNumber=16425607-1]
[06df82a4bed02583c5bcd68e6d8609e7cbd749cfc0bebb1463d60f4db4607af8ea01
c19f4b39b9357e58ab50c389b98bdba021e7980e804ca60d1fd7da3ac0fe]]
Document description: Exhibit 2
Original filename:C:\fakepath\Exhibit 2.pdf
Electronic document Stamp:
[STAMP bkecfStamp_ID=989277954 [Date=7/2/2010] [FileNumber=16425607-2]
[c97519408008a10cfc7be80140935beb02c35e44a361fdb272836492678d39845718
9bcf85d3a615f3d7113fddec99ab8eb7ba414061251ff4df6d76c9aa6e02]]
Document description: Exhibit 3
Original filename:C:\fakepath\Exhibit 3.pdf
Electronic document Stamp:

[STAMP bkecfStamp_ID=989277954 [Date=7/2/2010] [FileNumber=16425607-3]
[ad74c0339c86fbc06004008097282595c64c6bfdf9c92cc4059cc7d7c0158d78449d
2a969e949dcb204c081aae2ce92840b140b36e4847ca306e99f7d89ed895]]

10-20932-lbr Notice will be electronically mailed to:

BRUCE THOMAS BEESLEY on behalf of Creditor PAETEC COMMUNICATIONS, INC.
bbeesley@lrlaw.com, rmaples@lrlaw.com;jmoulian@lrlaw.com;mburns@lrlaw.com

DAWN M. CICA on behalf of Creditor PAETEC COMMUNICATIONS, INC.
dcica@lrlaw.com, jvienneau@lrlaw.com;cjordan@lrlaw.com

U.S. TRUSTEE - LV - 11
USTPRegion17.lv.ecf@usdoj.gov

MATTHEW C. ZIRZOW on behalf of Debtor COMMPARTNERS CARRIER SERVICES CORPORATION
bankruptcynotices@gordonsilver.com, bknotices@gordonsilver.com

10-20932-lbr Notice will not be electronically mailed to:

TRANSCOM ENHANCED SERVICES, INC.
C/O DAVID WOODS / STEVEN THOMAS/ MCGUIRE
2501 N HANWOOD, STE 1800
DALLAS, TX 75201