

ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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In re: : Chapter 11  
: :  
BIRCH TELECOM, INC., : Case No. 05-12237 (PJW)  
et al.,<sup>1</sup> : :  
: Jointly Administered  
Debtors. : :  
: Hrg. Date: 09/14/05 at 3:00 p.m.  
: Obj. Due: 09/08/05 at 4:00 p.m.  
: :  
- - - - -X Related to Docket Nos. 14 and 41

NOTICE OF MOTION, INTERIM ORDER AND FINAL HEARING ON  
DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS (I)  
AUTHORIZING DEBTORS (A) TO OBTAIN POST-PETITION FINANCING  
PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 364(c)(1),  
364(c)(2), 364(c)(3), 364(d)(1) AND 364(e) AND (B) TO  
UTILIZE CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363, (II)  
GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED  
PARTIES PURSUANT TO 11 U.S.C. §§ 361, 362, 363 AND  
364 AND (III) SCHEDULING FINAL HEARING PURSUANT  
TO BANKRUPTCY RULES 2002, 4001 AND 9014

PLEASE TAKE NOTICE that on August 12, 2005, the  
above-captioned debtors and debtors-in-possession

<sup>1</sup> The Debtors are the following entities: Birch Telecom, Inc.; Birch Telecom 1996, Inc.; Ionex Communications, Inc.; Ionex Communications North, Inc.; Ionex Communications South, Inc.; Ionex Telecommunications Leasing Inc.; Telecom Resources, Inc.; Birch Equipment, Inc.; Birch Internet Services, Inc.; Birch Kansas Holdings, Inc.; Birch Management Corporation, Birch Telecom Finance, Inc.; Birch Telecom of Arkansas, Inc.; Birch Telecom of Kansas, Inc.; Birch Telecom of Missouri, Inc.; Birch Telecom of Nebraska, Inc.; Birch Telecom of Oklahoma, Inc.; Birch Texas Holdings, Inc.; Birch Telecom of the Great Lakes, Inc.; Birch Telecom of the South, Inc.; Birch Telecom of the West, Inc.; Capital Communications Corporation; Dunn & Associates, Inc.; I.S. Advertising, Inc.; Telesource Communications, Inc.; American Local Telecommunications L.L.C.; Birch Telecom of Texas Ltd., L.L.P.; G.B.S. Communications, Inc.; and M.B.S. Leasing, Inc.

CMP \_\_\_\_\_  
COM \_\_\_\_\_  
CTR \_\_\_\_\_  
ECR \_\_\_\_\_  
GCL \_\_\_\_\_  
OPC \_\_\_\_\_  
RCA \_\_\_\_\_  
SCR \_\_\_\_\_  
SGA \_\_\_\_\_  
SEC 1 \_\_\_\_\_  
OTH \_\_\_\_\_

DKT. NO. 74  
DT. FILED 8/25/05  
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FPSC-COMMISSION CLERK

(collectively, the "Debtors") filed the Motion for Interim and Final Orders (I) Authorizing Debtors (A) to Obtain Post-Petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) and (B) to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363, (II) Granting Adequate Protection to Pre-Petition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364 and (III) Scheduling Final Hearing Pursuant to Bankruptcy Rules 2002, 4001 and 9014 (Docket No. 14) (the "Motion"). A copy of the Motion, without the filed exhibits, is attached hereto as Exhibit A. A copy of the related Senior Secured, Superpriority Debtor-in-Possession Credit Agreement, closing table copy and dated August 25, 2005, is attached hereto as Exhibit B.

PLEASE TAKE FURTHER NOTICE that the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") entered an order approving the relief sought in the Motion on an interim basis (the "Interim Order") (Docket No. 41) at a hearing held on August 15, 2005. A copy of the signed Interim Order is attached hereto as Exhibit C.



PLEASE TAKE FURTHER NOTICE that the final hearing on the Motion (the "Final Hearing") will be held on **September 14, 2005 at 3:00 p.m. (Eastern Time)** before the Honorable Peter J. Walsh, United States Bankruptcy Judge for the District of Delaware, in the United States District Court for the District of Delaware, 844 North King Street, 6<sup>th</sup> Floor, Wilmington, Delaware.

PLEASE TAKE FURTHER NOTICE that at the Final Hearing the Debtors will seek approval of an order (the "Final Order"), substantially in the form attached as Exhibit D hereto, granting the relief sought in the Motion on a final basis, including a waiver of rights under 11 U.S.C. § 506(c). Bankruptcy Code section 506(c) provides that a trustee or debtor may "recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim."

PLEASE TAKE FURTHER NOTICE that objections, if any, to entry of the Final Order must be made in writing, filed with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, Wilmington,

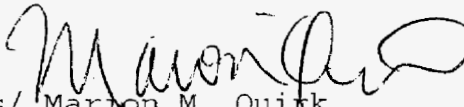
Delaware 19801, and served so as to be received by the following parties no later than **4:00 p.m. Eastern Time on September 8, 2005**: (i) Skadden, Arps, Slate, Meagher & Flom LLP, One Rodney Square, P.O. Box 636, Wilmington, Delaware 19899-0636 (Attn: Mark S. Chehi, Esq. and Marion M. Quirk, Esq.), counsel to the Debtors; (ii) Sidley Austin Brown & Wood LLP, 787 Seventh Avenue, New York, NY 10019 (Attn: Lee S. Attanasio, Esq.), and Richards, Layton & Finger, One Rodney Square, P.O. Box 551, Wilmington, Delaware 19899-0551 (Attn: Mark S. Collins, Esq.), counsel to the agent for the Debtors' prepetition secured lenders; and (iii) the Office of the United States Trustee, 844 North King Street, Room 2207, Lockbox 35, Wilmington, Delaware 19801 (Attn: Mark S. Kenney, Esq.). Only objections made in writing and timely filed and received will be considered by the Bankruptcy Court at such Final Hearing.

PLEASE TAKE FURTHER NOTICE THAT IF NO OBJECTIONS TO ENTRY OF THE MOTION ON A FINAL BASIS ARE TIMELY FILED AND RECEIVED IN ACCORDANCE WITH THE ABOVE PROCEDURES, THE FINAL ORDER MAY BE ENTERED WITHOUT FURTHER NOTICE OR A

HEARING.

Dated: Wilmington, Delaware  
August 25, 2005

SKADDEN, ARPS, SLATE, MEAGHER  
& FLOM LLP

  
/s/ Marion M. Quirk

Mark S. Chehi (I.D. No. 2855)  
Marion M. Quirk (I.D. No. 4136)  
Christopher S. Chow (I.D. No. 4172)  
One Rodney Square  
P.O. Box 636  
Wilmington, Delaware 19899  
(302) 651-3000

-and-

J. Gregory Milmoe  
Four Times Square  
New York, New York 10036  
(212) 735-3000

Attorneys for Debtors and  
Debtors-in-Possession

# EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

- - - - -X  
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In re: : Chapter 11  
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BIRCH TELECOM, INC., : Case No. 05-12237(PJW)  
:  
et al., : Jointly Administered  
:  
Debtors. :  
- - - - -X:

MOTION FOR INTERIM AND FINAL ORDERS  
AUTHORIZING DEBTORS (A) TO OBTAIN POST PETITION  
FINANCING PURSUANT TO 11 U.S.C. §§ 105, 361, 362,  
364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) AND 364(e)  
AND (B) TO UTILIZE CASH COLLATERAL PURSUANT TO 11 U.S.C.  
§ 363, (II) GRANTING ADEQUATE PROTECTION TO PRE-PETITION  
SECURED PARTIES PURSUANT TO 11 U.S.C. §§ 361, 362, 363  
AND 364 AND (III) SCHEDULING FINAL HEARING PURSUANT TO  
BANKRUPTCY RULES 2002, 4001 AND 9014

Birch Telecom, Inc. ("Birch") and its  
subsidiaries (the "Subsidiary Debtors"), debtors and  
debtors-in-possession in the above-captioned cases  
(collectively, the "Debtors"), hereby move for entry of  
an order pursuant to sections 105, 361, 362, 363,  
364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(c) of  
title 11 of the United States Code, 11 U.S.C. §§ 101-  
1330 (as amended, the "Bankruptcy Code") and Rules 2002,

DKT. NO. 14  
DT. FILED 8/12/05

4001 and 9014 of the Federal Rules of Bankruptcy

Procedure (the "Bankruptcy Rules"):

(i) authorizing Birch Telecom Finance, Inc. (the "Borrower") to obtain post petition financing (the "Financing"), and for all of the other Debtors (the "Guarantors") to guaranty the Borrower's obligations in connection with the Financing, up to the aggregate principal amount of \$5,000,000 (the actual available principal amount at any time being subject to those conditions set forth in the DIP Documents (as defined below)), pursuant to the Senior Secured Superpriority Debtor-in-Possession Credit Agreement among the Company, the Borrower, Bank of America, N.A. ("Bank of America"), acting as Administrative Agent (in such capacity, the "DIP Agent") for itself and the other lenders from time to time party thereto, and such lenders (together with Bank of America, the "DIP Lenders"), substantially in the form attached as Exhibit A to the Motion (the "DIP Agreement");

(ii) authorizing the Debtors to execute and enter into the DIP Documents (as defined below) and to perform such other and further acts as may be required in connection with the DIP Documents;

(iii) granting of adequate protection of the security interests and liens (provided that such security interests and liens are valid, perfected and indefeasible as of the Petition Date) of Bank of America, as administrative agent (in such capacity, the "Pre-Petition Agent") under the Second Amended and Restated Credit Agreement, dated as of September 30, 2004 (as amended or otherwise modified, the "Pre-Petition Agreement"), among the Company, the Borrower, the Pre-Petition Agent and the other lenders from time to time party thereto (together with Bank of America, the "Pre-Petition Lenders"). All of the Borrower's indebtedness to the Pre-Petition Lenders in respect of loans made by the Pre-Petition Lenders pursuant to, and in accordance with the terms of, the Pre-Petition Agreement, plus, in

each case, interest thereon and fees, expenses (including any attorneys', accountants', appraisers' and financial advisors' fees that are chargeable or reimbursable under the Pre-Petition Agreement), charges and other obligations incurred in connection therewith as provided in the Pre-Petition Agreement hereinafter referred to as the "Pre-Petition Obligations"), whose liens and security interests are being primed by the Financing;

(iv) authorizing the Debtors to use cash collateral (as such term is defined in the Bankruptcy Code) in which the Pre-Petition Lenders have an interest, and the granting of adequate protection to the Pre-Petition Lenders with respect to, inter alia, such use of their cash collateral and all use and diminution in the value of the liens and security interests (the "Pre-Petition Liens") in the personal and real property (the "Pre-Petition Collateral") described in the Security Documents (as defined in the Pre-Petition Agreement);

(v) granting superpriority claims to the DIP Agent and the DIP Lenders payable from, and having recourse to, all Pre-Petition and post-petition property of the Debtors' estates and all proceeds thereof, subject to the Carve-Out (as defined below);

(vi) provide that effective upon entry of the Final Order granting such relief, the limitation of the Debtors' and their estates' right to surcharge against collateral pursuant to section 506(c) of the Bankruptcy Code;

(vii) providing that pursuant to Bankruptcy Rule 4001, that an interim hearing (the "Interim Hearing") on the Motion be held before this Court to consider entry of the proposed interim order annexed to the Motion (the "Interim Order") (a) authorizing the Borrower, on an interim basis, to forthwith borrow from the DIP Lenders under the DIP Documents up to an aggregate principal amount not to exceed \$2,000,000 (subject to any limitations of extensions of credit



under the DIP Documents), (b) authorizing the Debtors' use of cash collateral, and (c) granting the adequate protection described herein; and

(viii) scheduling a final hearing (the "Final Hearing") to be held within 35 days of the date on which the Debtors filed the Cases (the "Petition Date") to consider entry of a final order authorizing the balance of the borrowings under the DIP Documents on a final basis, as set forth in the Motion and the DIP Documents filed with this Court (the "Final Order" and, together with the Interim Order, the "Orders").

In support of this Motion, the Debtors rely on the Declaration of Thomas Peterson in Support of Chapter 11 Petitions and First-Day Orders (the "Peterson Declaration"). In further support of this Motion, the Debtors respectfully represent as follows:

#### BACKGROUND

##### A. The Chapter 11 Filings

1. On August 12, 2005 (the "Petition Date"), the Debtors filed voluntary petitions in this Court for reorganization relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330 (as amended, the "Bankruptcy Code"). The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

2. No trustee or examiner has been appointed in these chapter 11 cases, and no committees have yet been appointed or designated.

3. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. Venue is proper under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b)(2).

4. The statutory predicates for the relief requested herein are sections 105, 361, 362, 363 and 364 of the Bankruptcy Code and Bankruptcy Rule 2002, 4001 and 9014, and Rule 4001-2 of the Local Rules of the United States Bankruptcy Court for the District of Delaware (the "Local Rules").

B. Company Background

5. Birch, a Delaware corporation, together with its twenty-eight direct and indirect debtor subsidiaries (collectively, the "Birch Group" or "Company"), provides small and medium-sized businesses with comprehensive voice and data services. The Company is one of the largest competitive local exchange

carriers (a "CLEC") providing telecommunications services in the central and southern United States.

6. Voice services include local dial tone, long distance, and various calling features such as "911" and call waiting. Data services include digital high speed Internet access, web hosting and other services such as virtual networking.

7. The Company offers its services through its own integrated voice and data network, and through network elements leased from incumbent local exchange carriers ("ILECs"):

- UNE-P. The Company provides the majority of its telecommunications services by leasing unbundled network elements ("UNE-P") necessary to provide telecommunications service from ILECs.
- Facilities Based Services. The Company leases transmission and distribution facilities from ILECs to connect customer premises to the Company's voice and data switches. Additionally, the Company delivers a comprehensive package of voice and high-speed Internet access over a single connection, using digital subscriber line technology or T-1 Loops.

8. In certain markets, the Company offers its customers the equipment needed to run their internal

phone systems, including data routers and wiring, telephone equipment and integrated access devices. The Company also sells and services standard key systems, private branch exchanges and voicemail systems, and provides inside-wire services for commercial accounts, including wiring for data networking.

9. The Company maintains its headquarters in Kansas City, Missouri. Following recent significant workforce reductions, the Company employs approximately 526 employees throughout the southern and central United States. Currently, the Company operates sales offices and operations facilities across nine states including Alabama, Georgia, Kansas, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee and Texas, and maintains a customer base in eight additional states.

10. In 2004, the Company recognized over \$292 million in revenue. The Company occupies 146 operational collocation facilities today.

C. Events Leading To Commencement Of The Cases

11. 2002 Prepackaged Restructuring. On July 29, 2002, certain members of the Birch Group (the "2002

Debtors") commenced a prepackaged chapter 11 case in this Court (the "2002 Chapter 11 Case") to accomplish a financial restructuring that was then required to address then-existing competitive pricing pressures, adverse economic conditions and relatively limited capital resources.

12. The joint prepackaged plan of reorganization (the "Prepackaged Plan") filed by the 2002 Debtors contemplated, among other things, the replacement of their then-existing senior credit facility with the Second Amended and Restated Credit Agreement (defined below) in the principal amount of \$100 million. On September 18, 2002, the United States District Court for the District of Delaware (the "District Court") confirmed the Prepackaged Plan.

13. On September 30, 2002, as contemplated by the Prepackaged Plan, Birch Telecom Finance, Inc. ("Finance"), as borrower, the Administrative Agent and certain lenders (the "Senior Lenders") entered into a Second Amended and Restated Credit Agreement (as amended, modified and otherwise supplemented, the

"Second Amended and Restated Credit Agreement"). On the same date, the 2002 Debtors and the Administrative Agent entered into a Second Amended and Restated Guarantee and Collateral Agreement (as amended, modified and otherwise supplemented, the "Guarantee and Collateral Agreement" and, together with the Second Amended and Restated Credit Agreement, the "Pre-Petition Agreement").

14. The Prepackaged Plan became effective in October of 2002.<sup>1</sup>

15. Subsequent Business Downturn. Following their prepackaged financial restructuring, the 2002 Debtors (as reorganized) began to experience a prolonged downturn in their core long distance market and decreases in revenue per line due to rate reductions caused by competitive pricing pressures and federally mandated limits to pricing. Demand for their products and services also was weakened by a general economic

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<sup>1</sup> On March 26, 2003, the 2002 Chapter 11 Case was closed in the District Court by a final decree entered by the District Court. On April 14, 2003, the 2002 Chapter 11 Case was closed in this Court.

slowdown affecting the U.S. telecommunications industry during 2002 and 2003. In response, the 2002 Debtors (as reorganized) attempted to lower costs, raise capital and reduce their indebtedness.

16. Ionex Merger. On March 19, 2003, Birch Telecom, Inc. (n/k/a Birch Telecom 1996, Inc.) completed a merger (the "Ionex Merger") with and into a wholly owned subsidiary of Ionex Telecommunications, Inc., which was an integrated communications provider offering voice and data services to customers in Texas, Oklahoma, Kansas and Missouri and smaller operations in eleven additional states. Upon effectuation of the Ionex Merger transaction, Ionex Telecommunications, Inc. was renamed Birch Telecom, Inc. (which is the entity defined as "Birch" herein).

17. In connection with and as a result of the Ionex Merger transaction, Birch received approximately \$36.0 million in needed equity funding for the merged business enterprise (defined as the "Company" or "Birch Group" herein) from certain equity investors.



18. Need For Further Financial Restructuring.

Following the Ionex Merger, in 2004, the Company began to experience liquidity problems due, in part, to price competition, customer turnover and federally mandated limits on telecommunications pricing. This led to certain management changes.

19. As early as June 2004, the Company communicated its need for a further financial restructuring to its Senior Lenders and other equity investors including some of the holders of Birch's Series A Preferred Stock (the "Series A Stockholders").

20. In September 2004, the Company defaulted under the Credit Agreement by failing to make a scheduled \$5 million amortization payment due thereunder. Since then, the Company negotiated and obtained a series of agreements from its Senior Lenders whereby they have agreed to forbear from exercising their remedies under the Pre-Petition Agreement.

21. Exploration of Strategic Alternatives.

Since September 2004, the Company has assessed and pursued various strategic alternatives with the

assistance of financial advisors and restructuring counsel.

22. The Company and its advisors negotiated into the first quarter of 2005 with both its Senior Lenders and certain Series A Stockholders in an effort to reach agreement with them on an out-of-court (or prepackaged chapter 11) restructuring that would maximize the long-term value of the business, significantly reduce the Company's leverage, raise additional equity capital through the possible sale and issuance of new preferred stock, leave general unsecured creditors unimpaired, and maximize recoveries for all stakeholders, including Series A Stockholders.

23. The Company was unsuccessful in its efforts to negotiate a restructuring agreement with and between the Senior Lenders and certain Series A Stockholders. Following the regulatory developments described below that had a material adverse impact on the Company's business and related values, the Company continued to negotiate with its Senior Lenders in an effort to reach agreement on a prepackaged chapter 11

restructuring that would reduce the Company's indebtedness, leave general unsecured creditors unimpaired, and provide the highest possible recoveries to Series A Stockholders. Ultimately, given the adverse impact of the regulatory developments, the Company's negotiations with the Senior Lenders failed to produce agreement on a prepackaged chapter 11 plan.

24. In the months preceding the filing of these chapter 11 cases, the Company continued and renewed its efforts to explore restructuring alternatives, including possible sales of its businesses, in whole or part. The Company and its advisors identified potential purchasers and solicited offers of interest from financial and strategic buyers.

25. To date, the Company has not yet received binding, non-contingent third-party purchase offers or other proposals that represent a sufficient basis for the Company's needed financial restructuring.

26. Adverse Regulatory Changes. The Company's recent restructuring efforts were complicated by a December 2004 announcement by the Federal

Communications Commission ("FCC") of its intention to change certain FCC rules governing the availability and pricing of unbundled network elements, used by CLECs like the Birch Group for both its UNE-P services and facilities-based services.

27. In February 2005, the FCC released its new unbundled network element rules, which had significant adverse implications for the Company's business in its markets. The new rules substantially increased the costs of providing UNE-P and facilities-based telecommunications services to the Company's customers.

28. Liquidity Credit Agreement. On April 29, 2005, after the Company had explored possible alternative sources of interim liquidity, Birch, Finance (as borrower), Bank of America, N.A. (as Administrative Agent), and certain of the Senior Lenders entered into a Liquidity Credit Agreement (as amended, modified and otherwise supplemented, the "Liquidity Credit Agreement") whereby the lenders thereunder extended needed additional liquidity secured by first priority

liens (senior to the liens securing the Senior Lenders' rights under the Pre-Petition Agreement) on substantially all of the Company's assets.

29. On August 8, 2005, consistent with the terms of the Liquidity Credit Agreement, the Company repaid amounts outstanding thereunder, and paid reimbursable fees and expenses incurred by the Senior Lenders under the Pre-Petition Agreement.

30. As of the Petition Date, the Debtors' obligations under the Pre-Petition Agreement totaled approximately \$108.7 million.

31. Purpose of Chapter 11 Cases. The Debtors commenced these cases after concluding a prepackaged restructuring strategy was no longer viable. The Debtors intend to utilize the chapter 11 process to promptly file a reorganization plan, preserve the value of their businesses, maximize recoveries to stakeholders to the extent possible, and restructure and reduce their indebtedness.

32. The Senior Lenders (or "DIP Lenders") have agreed to provide debtor-in-possession financing to facilitate the chapter 11 restructuring process.

D. The Pre-Petition Credit Facility

33. Under the Pre-Petition Agreement and all collateral and ancillary documents executed in connection therewith (collectively, the "Pre-Petition Loan Documents"), the Debtors granted a security interest (the "Pre-Petition Liens") to the Pre-Petition Lenders on and in substantially all the Debtors' real and personal property and other assets, including without limitation, inventory, accounts receivable, equipment, general intangibles, and other tangible and intangible personal property and the proceeds thereof, and the setoff rights described in the Pre-Petition Loan Documents and arising by operation of law (the "Pre-Petition Collateral").

34. The Pre-Petition Lenders under the Pre-Petition Agreement assert that they have first priority liens. The Pre-Petition Lenders further assert that all the Debtors' cash on hand and amounts generated by the

collections of accounts receivable, sale of inventory or other disposition of the Pre-Petition Collateral constitutes proceeds of the Pre-Petition Collateral and, therefore, is cash collateral of the Pre-Petition Lenders within the meaning of Bankruptcy Code section 363(a) (the "Cash Collateral").

35. The Debtors understand that the Pre-Petition Lenders have agreed to the Debtors' use of the Cash Collateral on the terms described herein.

RELIEF REQUESTED

36. By this Motion, the Debtors seek, among other things, entry of interim and final orders: (I) (a) authorizing the Debtors to obtain the Financing and execute and enter into the DIP Documents; (b) granting the DIP Lenders security interests in all of the Debtors' presently owned and after-acquired real and personal property to secure the Debtors' obligations under the DIP Documents, and (c) granting the DIP Lenders priority in payment with respect to obligations over any and all administrative expenses of the kinds specified in Bankruptcy Code sections 503(b) and 507(b)



(except for the Carve-Out, described below); (II) authorizing the Debtors to use Cash Collateral and granting adequate protection to the Pre-Petition Lenders with respect to such use of their cash collateral; (III) granting adequate protection to the Pre-Petition Lenders in respect of any diminution in the value of their interests in their collateral subject to the security interests and liens under the Pre-Petition Credit Agreement; (IV) authorizing the Debtors on an interim basis to obtain loans up to an aggregate of \$2 million for a period expiring on the earlier of (x) thirty-five (35) days after the Petition Date and (y) entry of the Final Order (the "Interim Financing Period"); and (V) scheduling a Final Hearing to consider entry of the Final Order, and establishing and approving notice procedures in respect thereof.

37. The Debtors respectfully request that the Court approve the terms and conditions of the DIP Documents, and authorize Finance and all of the other Debtors to comply with and perform all of the terms and conditions contained therein, including payment of (i)

all loans made under the DIP Agreement (the "Loans") and interest thereon and (ii) all reasonable fees, costs, expenses, indebtedness, obligations and liabilities of Birch, Finance and each Guarantor to the DIP Agent and the DIP Lenders under the Credit Documents (as defined in the DIP Agreement) and the Final Order ((i) through (iii) collectively, the "Obligations"), in accordance with and subject to the terms and conditions set forth in the Credit Documents (as defined in the DIP Agreement) and the Orders.

38. The Debtors further request that the Court authorize (i) Finance to obtain Loans from the DIP Lenders and (ii) Birch and the Guarantors to guarantee all Obligations in respect of such Loans, all on the terms and subject to the conditions set forth in the Credit Documents (as defined in the DIP Agreement) and the Orders up to a total of (x) \$2 million during the Interim Financing Period and (y) \$5 million thereafter. The Debtors also request authorization to use the proceeds of the Loans and to use the Cash Collateral in

the operation of their businesses, and to grant the Pre-Petition Lenders adequate protection in respect thereof.

#### BASIS FOR RELIEF

39. The Debtors do not have sufficient available sources of working capital and financing to operate their businesses without the Financing and use of Cash Collateral. The Debtors' ability to maintain business relationships with their vendors, suppliers and customers, pay their employees and otherwise finance their business operations, is essential to the Debtors' continued viability. In the absence of immediate authorization of the Financing and use of Cash Collateral, the Debtors could not continue to operate their businesses, and serious and irreparable harm to the Debtors and their estates would occur.

40. The preservation, maintenance and enhancement of the going concern value of the Debtors are of the utmost significance and importance to a successful reorganization under chapter 11 of the Bankruptcy Code. The Financing and use of Cash Collateral are vital to the Debtors' ability to

successfully reorganize and maintain their enterprise value for the benefit of all creditors and parties in interest.

41. For these reasons, the Debtors have an immediate need for adequate postpetition financing. Given the Debtors' current financial condition, financing arrangements and capital structure, the Debtors were unable to obtain financing on an unsecured administrative expense basis under Bankruptcy Code section 364(b) or 364(c)(1), or secured by only junior liens under Bankruptcy Code section 364(c)(3). Moreover, the Debtors concluded that Bank of America, as the Pre-Petition Agent, possessed unique knowledge of their businesses and restructuring needs, and could serve as agent under the Financing, ensuring the provision of the Financing on the most advantageous terms. Therefore, the Debtors determined, in their sound business judgment, and after investigating and soliciting other sources of financing (as described below) without success, that the proposal for debtor-in-possession financing provided by Bank of America was the

most favorable under the circumstances, and addressed the Debtors' reasonably foreseeable capital needs.

42. The Financing has been negotiated in good faith and at arm's length. The Debtors believe that the terms of the Financing are fair and reasonable, reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duties, and are supported by reasonably equivalent value and fair consideration.

43. The Debtors believe that the proposed adequate protection negotiated with the Pre-Petition Agent, the Pre-Petition Lenders, the DIP Agent and the DIP Lenders will be sufficient to protect the Pre-Petition Agent and the Pre-Petition Lenders from any diminution in value of their interest in the Pre-Petition Collateral and the priming of the Pre-Petition Lenders' Liens.

44. The adequate protection terms set forth in the proposed Orders have been negotiated in good faith and at arm's length among the Debtors, the Pre-Petition Agent, the Pre-Petition Lenders, the DIP Agent

and the DIP Lenders, are fair and reasonable under the circumstances, reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duties and are supported by reasonably equivalent value and fair consideration.

I.

THE COURT SHOULD APPROVE  
THE FINANCING

Terms Of The DIP Agreement

45. The DIP Agreement is the result of arm's length negotiations by the Debtors with the DIP Agent and the DIP Lenders. The DIP Agreement's key provisions are:<sup>2</sup>

- Borrower: Birch Telecom Finance, Inc.
- Guarantors: Birch Telecom, Inc. and all  
Subsidiary Debtors
- DIP Agent: Bank of America, N.A.
- DIP Lenders: Banc of America Strategic  
Solutions, Inc.

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<sup>2</sup> The description herein of the DIP Agreement is only a summary, and is qualified in its entirety by the DIP Agreement, a draft form of which is attached hereto as Exhibit A. Any capitalized term used and not defined herein is ascribed the meaning given to such term in the DIP Agreement.

Bear Stearns Corporate Lending  
Inc.

Man Mac 3 Limited  
Merrill Lynch Credit Products,  
LLC

Ritchie Special Credit  
Investments, Ltd.

Strategic Value Credit  
Opportunities Master Fund L.P.  
Strategic Value Master Fund  
Ltd.

UBS Willow Fund, LLC

- Total  
Commitment: From the Closing Date (as defined in the DIP Agreement) through but not including the date of the entry of the Final Order, the total revolving credit commitment is \$2,000,000 and from the date of the entry of the Final Order through the revolving credit termination date, the amount of the total revolving credit commitment is \$5,000,000.
- Term: The Financing will terminate on the earliest of (a) the date that is two hundred seventy (270) days after the petition date (which date may be extended pursuant to terms within the DIP Agreement), (b) the date of termination of the revolving credit commitments or the date on which existing revolving credit loans are no longer permitted to remain outstanding pursuant to the terms of the DIP Agreement, (c) the date of indefeasible payment in full by the Borrower of the revolving credit loans and the permanent reduction of the revolving credit commitment to zero dollars (\$0), (d) thirty-



five (35) days following the petition date if the Final Order has not been entered by the Bankruptcy Court by such date, (e) the date upon which the Interim Order expires, unless the Final Order shall have been entered and become effective by such date, (f) the date of the filing of any motion or request for approval of a sale of all or substantially all of any Credit Party's (as defined in the DIP Agreement) assets pursuant to section 363 of the Bankruptcy Code, a confirmed plan of reorganization or a liquidation pursuant to Chapter 7 of the Bankruptcy Code, other than any such filing which has been approved by the DIP Agent and the Required Lenders (as defined in the DIP Agreement), and (g) the effective date of a plan of reorganization in the Debtors' Chapter 11 Case.

- Priority: All Obligations shall constitute allowed Claims against the Borrower and the Guarantors in the Chapter 11 case, with administrative superpriority under section 364(c)(1) of the Bankruptcy Code and with priority over all other administrative expenses, diminution claims (including Adequate Protection Obligations) and all other claims against the Debtors, costs and expenses of the kinds specified in, or ordered pursuant to, sections 105, 326, 330, 331, 503(b), 506(c), 507(a), 507(b), 726, 1113, 1114 or any other provision of the Bankruptcy Code, subject, as to priority, to the Carve-Out.

- Liens:

Pursuant to Bankruptcy Code section 364(c)(2) the Obligations will be secured by a valid and perfected first priority Lien on all of the Collateral, subject only, as to priority, to (i) the Carve-Out, (ii) any valid, perfected, enforceable and non-avoidable Liens in

existence as of the Petition Date (other than the Liens securing the Pre-Petition Obligations), and (iii) certain Liens permitted under the DIP Agreement.

Junior Lien. Pursuant to Bankruptcy Code section 364(c)(3) and subject to the Carve-Out, the Obligations under the DIP Agreement shall be secured by a perfected, second priority, junior Lien upon all Collateral (other than that described under Priming Lien below) subject to a validly perfected security interest, which security interest is (i) in existence as of the petition date and not subject to Bankruptcy Code section 552(a); (ii) perfected (but not granted) after the petition date to the extent such perfection in respect of a claim arising prior to the petition date is expressly permitted under the Bankruptcy Code and that is not subject to Bankruptcy Code section 552(a); or (iii) is a permitted encumbrance and expressly permitted by the DIP Agreement to be senior to the Liens created to secure the Obligations.

Priming Lien. Pursuant to Bankruptcy Code section 364(d)(1) and subject to the Carve-Out, the Obligations under the DIP Agreement shall be secured by a perfected, first priority, senior, priming Lien (A) on all Pre-Petition Collateral, subject to any validly perfected security interest (other than the liens and security interests of the Pre-Petition Agent and the Pre-Petition Lenders), that is a permitted lien that is expressly permitted by the DIP Agreement to be senior to the Liens created to secure the Obligations, and (B) upon any property of the Debtors upon which Replacement Liens (as defined below) are granted to provide adequate protection in respect of the Pre-Petition Obligations, senior to the Replacement Liens.

- Carve-Out: The liens, security interests and superpriority claims granted to the Agent and DIP Lenders pursuant to the DIP Documents and Orders are subject to a carve-out (the "Carve-Out") for the payment of (A) all allowed professional fees and disbursements incurred by the professionals retained pursuant to Bankruptcy Code §§ 327 or 1103(a) by the Debtors and any statutory committee of unsecured creditors appointed in the Chapter 11 Cases (and any disbursements of any member of such committee) (i) in an aggregate allowed amount not to exceed \$1,000,000 (the "Post-Default Carve-Out Amount") on account of such professional fees and disbursements incurred following the "Default Point" (as defined below), plus (ii) the aggregate allowed amount (the "Pre-Default Carve-Out Amount") of all unpaid professional fees and disbursements incurred, accrued or invoiced from the Petition Date until the Default Point; provided, that all such professional fees and disbursements to the extent allowed shall be paid pursuant to interim compensation procedures established in an order of the Bankruptcy Court and shall be subject to final allowance by order of the Bankruptcy Court under sections 330 and 331 of the Bankruptcy Code; and (B) quarterly fees required to be paid pursuant to 28 U.S.C. § 1930(a)(6) and any fees payable to the Clerk of the Bankruptcy Court. Notwithstanding anything in this Interim Order to

the contrary, no loans, Cash Collateral or any portion of the Carve-Out may be used to object to or contest in any manner, or raise any defense to, the validity, perfection, priority or enforceability of the Pre-Petition Obligations, the DIP Obligations, the Pre-Petition Liens, the DIP Liens, the Adequate Protection Liens, or to assert any claims or causes of action against the Pre-Petition Lenders, the Pre-Petition Agent, the DIP Lenders or the DIP Agent, whether through an adversary proceeding, contested matter or otherwise, *provided, however*, that up to \$50,000 of the Carve-Out may be used to pay for professional fees and disbursements incurred in connection with the investigation of the matters described above. None of the DIP Agent, the DIP Lenders, the Pre-Petition Agent or the Pre-Petition Lenders shall be responsible for the direct payment or reimbursement of any professional fees or disbursements incurred in connection with the Debtors' cases under any chapter of the Bankruptcy Code, and nothing in this Order or otherwise shall be construed to obligate the DIP Agent, the DIP Lenders, the Pre-Petition Agent or the Pre-Petition Lenders in any way to pay professional fees or disbursements, or to ensure that the Debtors have sufficient funds to pay such professional fees or disbursements. As used herein, "Default Point" means that date when (x) an unwaived event of Default (as

defined in the DIP Agreement) shall have occurred and is continuing; (y) the DIP Agent and the DIP Lenders have permanently ceased making advances or extensions of credit to the Debtors under the DIP Agreement; and (z) (i) either the DIP Agreement and the other DIP Documents or the Debtors' rights to use Cash Collateral are permanently terminated (or both) and (ii) the DIP Agent or the Pre-Petition Agent shall have provided at least five (5) business days' notice to the affected professionals of a date certain on which a Default Point shall occur.

- Fees: In addition to fees and expenses incurred and paid pre-petition in connection with due diligence, preparation and negotiation of the Financing, the following fees are payable:
  - (a) On the Closing Date (as defined in the DIP Agreement), the Borrower shall pay to the DIP Agent, for the ratable benefit of the DIP Lenders, an upfront fee of three percent (3.00%) of the total revolving credit commitment;
  - (b) Borrower shall pay to the DIP Agent, for the ratable benefit of the DIP Lenders, a fee equal to the one-half of one percent (0.50%) per annum times the actual daily amount by which the total revolving credit commitment exceeds the total

revolving extensions of credit. The commitment fee shall accrue at all times until the revolving credit termination date, and shall be due and payable quarterly in arrears on the last Business Day (as defined in the DIP Agreement) of each fiscal quarter, commencing with the first such date to occur after the Closing Date (as defined in the DIP Agreement), and on the revolving credit termination date; and

- (c) Borrower shall pay to the DIP Agent, for its own account, each of the fees, in the amounts and at such times, as are set forth in the Fee Letter (as defined in the DIP Agreement).

- Interest Rate: Base Rate plus seven percent (7.0%).

Base Rate: for any day, a rate per annum (rounded upwards, if necessary, to the next 1/16 of 1%) equal to the greatest of (a) the Prime Rate (as defined in the DIP Agreement) in effect on such day and (b) the Federal Funds Effective Rate (as defined in the DIP Agreement) in effect on such day plus 0.50%.

- Events of Default: Events of default under the DIP Agreement include, among others: (a) failure to pay any principal when due; (b) failure to pay any interest or any other amount payable under any Credit Document (as defined in the DIP Agreement) within five (5) days after any

such amount becomes due; (c) any representation or warranty made or deemed made by any Credit Party (as defined in the DIP Agreement) or in any Credit Document (as defined in the DIP Agreement) shall prove to have been inaccurate in any material respect on or as of the date made or deemed made; (d) any Credit Party (as defined in the DIP Agreement) shall default in the observance or performance of any agreement contained in certain covenants contained in the DIP Agreement (with certain applicable grace periods for specific defaults); (e) except for defaults occasioned by the filing of the Debtors' Chapter 11 case, a default or breach occurs under any other agreement, document or instrument that the Company or any of its Subsidiaries entered into shall have occurred and be continuing with respect to Indebtedness (as defined in the DIP Agreement) the outstanding principal amount of which exceeds in the aggregate \$250,000; or (f) certain ERISA-related defaults; (g) one or more judgments or decrees as to a post-petition liability shall be entered against the Company or any of its Subsidiaries involving for the Company and its Subsidiaries taken as a whole a liability (to the extent not paid or fully covered by insurance as to which the relevant insurance company has not denied in writing coverage) of \$250,000 or more, and all such judgments or decrees shall not have been satisfied, vacated, discharged, stayed or bonded pending appeal within 60 days from the entry thereof; (h) any Lien created by any of the Security Documents (as defined in the DIP Agreement) shall cease (with

respect to Collateral having a value, in the reasonable judgment of the DIP Agent, of at least \$250,000) to be enforceable and of the same effect and priority provided pursuant to the Orders (unless released by the DIP Agent at the direction of the Required Lenders (as defined in the DIP Agreement) or as otherwise permitted under the DIP Agreement or the other Credit Documents (as defined in the DIP Agreement)); (i) the guarantee of any Credit Party (as defined in the DIP Agreement) shall cease, for any reason, to be in full force and effect or any Credit Party (as defined in the DIP Agreement) or any Affiliate (as defined in the DIP Agreement) of any Credit Party (as defined in the DIP Agreement) shall deny or disaffirm its obligation in respect of such guarantee; (j) a Change in Control (as defined in the DIP Agreement) shall occur; (k) all or substantially all of the property of any Credit Party (as defined in the DIP Agreement) is attached, seized, levied upon or subjected to a writ or distress warrant, or come within the possession of any receiver, trustee, custodian or assignee for the benefit of creditors of any Credit Party; (l) the occurrence of the loss, suspension or revocation of, or failure to renew, any Communications License (as defined in the DIP Agreement) or other license or permit now held or hereafter acquired by any Credit Party (as defined in the DIP Agreement), if such loss, suspension, revocation or failure to renew could reasonably be expected to have a Material Adverse Effect; (n) the occurrence of certain events in the Debtors' Chapter 11 case,



including (i) the Final Order is not entered into prior to the earlier of (x) the date 35 days after the Petition Date or (y) the expiration of the Interim Order; (ii) the Final Order, or, prior to the entry of the Final Order, the Interim Order, ceases to be in full force and effect; and (iii) the allowance of any claim or claims under section 506(c) of the Bankruptcy Code against or with respect to any of the Collateral; and (m) the dismissal of the Debtors' Chapter 11 case, or the conversion of the Chapter 11 Case from one under Chapter 11 to one under Chapter 7 of the Bankruptcy Code, or any Credit Party (as defined in the DIP Agreement) shall file a motion or other pleading seeking the dismissal of the Chapter 11 Case under section 1112 of the Bankruptcy Code or otherwise.

- Remedies/Termination of Automatic Stay: Notwithstanding the provisions of section 362 of the Bankruptcy Code but subject to the terms of the Orders, without any application, motion or notice to, or order from, the Bankruptcy Court: (i) with the consent of the Required Lenders (as defined in the DIP Agreement), the DIP Agent may, or upon the request of the Required Lenders (as defined in the DIP Agreement), the DIP Agent shall, by notice to the Borrower declare the revolving credit commitments to be terminated forthwith, whereupon the revolving credit commitments shall immediately terminate; (ii) with the consent of the Required Lenders (as defined in the DIP Agreement), the DIP Agent may, or upon the request of the Required Lenders (as defined in the DIP Agreement), the DIP Agent shall, by

notice to the Borrower, declare the revolving credit loans under the DIP Agreement (with accrued interest thereon) and all other amounts owing under the DIP Agreement and the other Credit Documents (as defined in the DIP Agreement) to be due and payable forthwith, whereupon the same shall immediately become due and payable; (iii) with the consent of the Required Lenders (as defined in the DIP Agreement), the DIP Agent may, or upon the request of the Required Lenders (as defined in the DIP Agreement), the DIP Agent shall, increase the rate of interest applicable to the revolving credit loans as provided in the DIP Agreement and pursuant to and on the terms set forth in the Orders; (iv) the automatic stay of section 362 of the Bankruptcy Code shall be modified and vacated to permit the Lenders to exercise their remedies under the DIP Agreement and any other Credit Documents (as defined in the DIP Agreement), without further application or motion to, or order from, the Bankruptcy Court, except that remedies against the Collateral may be exercised only on 5 days' notice.

- Section 506(c) Waiver: The Debtors have agreed, upon entry of the Final Order, not to assert any claim under Bankruptcy Code section 506(c) for any costs and expenses incurred in connection with the preservation, protection or enhancement of, or realization by the DIP Agent, the DIP Lenders, the Pre-Petition Agent, the Liquidity Agent or the Pre-Petition Lenders upon the Collateral or the Pre-Petition Collateral, and upon entry of the Final Order after notice, such section 506(c) waiver shall be binding on

all parties in interest.

Approval Of The Postpetition  
Financing Is Authorized Under  
The Bankruptcy Code And Bankruptcy Rules

46. Bankruptcy Code sections 364(c) and

(d) (1) provide:

- (c) If the trustee is unable to obtain unsecured credit allowable under section 503(b) (1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt-
  - (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
  - (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
  - (3) secured by a junior lien on property of the estate that is subject to a lien.

(d) (1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if -

- (A) the trustee is unable to obtain such credit otherwise; and
- (B) there is adequate protection of the interest of the holder of the lien

on the property of the estate on which such senior or equal lien is proposed to be granted.

11 U.S.C. §§ 364(c), 364(d)(1).

47. Bankruptcy Rule 4001(c) provides:

(c) Obtaining Credit

- (1) *Motion; Service.* A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.
- (2) *Hearing.* The court may commence a final hearing on a motion for authority to obtain credit no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 15 day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.
- (3) *Notice.* Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this

subdivision and to such other entities as the court may direct.

Fed. R. Bankr. P. 4001(c).

48. Bankruptcy Rule 4001(d) provides in relevant part that (i) a motion for approval to modify or terminate the automatic stay shall be served on any official creditors' committee, on the creditors included on the list filed under Bankruptcy Rule 1007(d), and on such other entities as the court may direct, and (ii) objections may be filed within 15 days of the mailing of the notice of the motion and the time for filing objections thereto. Accordingly, this Court is authorized by the Bankruptcy Code and Bankruptcy Rules to grant the relief requested in this Motion.

Approval of the Postpetition Financing  
Is Necessary To Preserve The Debtors' Going  
Concern Value and Warranted Under the Circumstances

49. Prior to determining that the Financing was the most favorable financing available, the Debtors through their advisors contacted several other potential sources of debtor-in-possession financing to solicit and obtain financing proposals. Given the Debtors' financial position, the preexisting liens on

substantially all of their assets, the limited size of the contemplated financing, and timing issues, none of these sources submitted a proposal.

50. The Debtors were unable to procure the required funds in the form of unsecured credit or unsecured debt with an administrative priority because substantially all the Debtors' assets are encumbered. The circumstances of these cases require the Debtors to obtain financing under Bankruptcy Code sections 364(c) and 364(d). Therefore, the Debtors believe that this Court should authorize the Debtors to obtain the Financing to the extent and pursuant to the terms contained herein, in the DIP Agreement, the proposed Interim Order attached hereto as Exhibit B, and the proposed Final Order attached hereto as Exhibit C.<sup>3</sup>

51. The proposed Financing is required to preserve and enhance the Debtors' going concern value, and is therefore in the best interests of the Debtors'

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<sup>3</sup> The proposed form of Final Order will be filed separately.

estates and creditors. The availability of credit under the DIP Agreement is necessary to provide working capital for the Debtors to continue to operate their businesses. Moreover, the available credit will give the Debtors' vendors and suppliers the necessary confidence to continue ongoing relationships with the Debtors, including the extension of credit terms for the payment of goods and services -- and also will be viewed favorably by the Debtors' employees and customers, and thereby help promote the Debtors' successful reorganization.

52. Under Bankruptcy Code section 364(d), a secured creditor's lien may be primed when the debtor demonstrates that it is unable to obtain credit otherwise and the liens to be primed are adequately protected. As detailed above, the Debtors are unable to obtain financing without priming the Pre-Petition Lenders' liens. As set forth under "Adequate Protection" below, the Pre-Petition Lenders have agreed to the consensual use of Cash Collateral in which they have an interest on the terms set forth in the Orders.

Moreover, the Debtors understand that the Pre-Petition Lenders have consented to the priming of their liens. Other than the liens of the Pre-Petition Lenders, no other liens will be primed by the Financing.

53. After determining that financing was available only under Bankruptcy Code sections 364(c) and 364(d), the Debtors negotiated the Financing at arm's length and pursuant to their business judgment, which is to be accorded deference so long as it does not run afoul of the provisions of and policies underlying the Bankruptcy Code. See, e.g., Bray v. Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe Co.), 789 F.2d 1085, 1088 (4th Cir. 1986) (approving debtor-in-possession financing necessary to sustain seasonal business); In re Ames Department Stores, Inc., 115 B.R. 34, 40 (S.D.N.Y. 1990) ("cases consistently reflect that the court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and



powers or its purpose is not so much to benefit the estate as it is to benefit parties in interest").

54. The terms and conditions of the DIP Agreement are fair and reasonable and were negotiated by the parties in good faith and at arm's length. Accordingly, the DIP Lenders should be accorded the benefits of Bankruptcy Code section 364(e) with respect to the Postpetition Financing.

## II.

### THE COURT SHOULD AUTHORIZE THE USE OF CASH COLLATERAL

55. In addition to the need for debtor-in-possession financing, the Debtors have a critical need for the immediate use of Cash Collateral to continue their operations. Bankruptcy Code section 363(c)(2) provides that the Debtors may not use, sell or lease cash collateral unless "(A) each entity that has an interest in such cash collateral consents; or (B) the court, after notice and hearing, authorizes such use, sale, or lease in accordance with the provisions of this section." 11 U.S.C. § 363(c)(2). The Debtors understand that the Pre-Petition Lenders have consented

to the use of Cash Collateral conditioned upon the Debtors providing the adequate protection described herein and in the proposed Orders.

56. The approval of the use of Cash Collateral and the grant of the replacement liens and other adequate protection to the Pre-Petition Lenders as of the Petition Date is crucial to the Debtors' ability to continue the operation of their businesses. The failure to obtain such authorization would be fatal to the Debtors' businesses, and disastrous to their creditors, both secured and unsecured. In sum, in order to enable the Debtors to reorganize and preserve the value of the Debtors' assets and operations, approval of both the Financing and the use of Cash Collateral is imperative.

#### Adequate Protection

57. Under Bankruptcy Code section 363(c)(2), the Debtors may not use the Cash Collateral without the consent of the Pre-Petition Lenders or authority granted by the Court. Bankruptcy Code section 363(e) provides that on request of an entity that has an interest in

property to be used by a debtor, the Court shall prohibit or condition such use as necessary to provide adequate protection of such interest. Additionally, Bankruptcy Code section 364(d) requires that adequate protection be provided where, as here, the liens of secured creditors are being primed to secure the obligations under the Financing.

58. The Debtors request that the Court approve, as of the Petition Date, the following protections of the Pre-Petition Lenders interests in the Cash Collateral from any diminution in value of the Pre-Petition Collateral resulting from (a) the priming of the Pre-Petition Agent's and the Pre-Petition Lenders' liens on the Pre-Petition Collateral by the Liens to be granted under Bankruptcy Code section 364(d) to secure the Obligations under the Financing; (b) the Debtors' use, sale, lease or other disposition of the Pre-Petition Collateral (including the Cash Collateral); and (c) the imposition of the automatic stay pursuant to Bankruptcy Code section 362, on which the Pre-Petition

Lenders have provided their consent in accordance with section 363(c)(2):

- the Pre-Petition Agent and the Pre-Petition Lenders shall have (effective upon the date of the Interim Order and without the necessity of the execution by the Debtors of any mortgages, security interests, pledge agreements, financing statements or other documents) valid and perfected, security interests in, and liens upon (the "Replacement Liens") all of the Debtors' right, title and interest in, to and under the Collateral, having a priority immediately junior to the Liens granted pursuant to the Orders and/or the DIP Documents to the Agent and the DIP Lenders to secure the Obligations, and subject to the Carve-Out and to any validly perfected liens which remain senior to the Liens granted the Agent and the DIP Lenders pursuant to the Orders and/or the DIP Documents to secure the Obligations;
- the allowed claims of the Pre-Petition Agent and the Pre-Petition Lenders shall be Superpriority Claims having a priority immediately junior only to the Superpriority Claims granted to the Agent and the DIP Lenders in respect of the Obligations pursuant to the Orders;
- subject to section 506(b) of the Bankruptcy Code, the Debtors are authorized to pay all reasonable out-of-pocket costs and expenses incurred by the Pre-Petition Agent and the Pre-Petition Lenders during the chapter 11 cases (including, without limitation, the reasonable fees and expenses of one external counsel, one local counsel and any financial and other consultants advising the Pre-Petition Agent and the Pre-Petition Lenders)

that arise out of or relate to the enforcement and protection of the rights and remedies of the Pre-Petition Agent and the Pre-Petition Lenders in respect of the Pre-Petition Agreement or these chapter 11 cases or any subsequent cases; and

- If an event of default under the DIP Agreement has occurred and is continuing, and the DIP Agent and the DIP Lenders have ceased making advances or extensions of credit to the Debtors under the DIP Documents, the Debtors' right to use Cash Collateral shall terminate on the fifth Business Day after the Pre-Petition Agent, acting at the direction of the Required Lenders (as defined in the Pre-Petition Agreement), provides written notice to the Debtors, the United States Trustee and any statutory committees appointed in these chapter 11 cases.

59. The Debtors additionally request that the Court order that the Liens constitute valid and duly perfected security interests and liens without the filing or service of financing statements, notices of lien or similar instruments or taking of any other action, which otherwise may be required under federal or state law in any jurisdiction to validate and perfect such security interests and liens.

60. The Debtors further request that the Court enter an order providing that the stay imposed by Bankruptcy Code section 362(a) be lifted to allow the

filing and recording of a certified copy of the Orders or any financing statements, notices of lien or similar instruments, and deeming any such documents to have been filed or recorded at the time of and on the date of the Interim Order.

61. As a condition to the use of the Cash Collateral and the Financing, the Pre-Petition Lenders and the DIP Lenders have required that the Order find that the following facts are binding on the estates and all parties in interest for all purposes in these chapter 11 cases and any subsequent chapter 7 cases: (a) as of the Petition Date, the Debtors were liable to the Pre-Petition Lenders for principal and accrued interest in the approximate amount of \$108.7 million in respect of loans made under the Pre-Petition Agreement, and (b) the Pre-Petition Agent's and the Pre-Petition Lenders' security interest and liens on the Pre-Petition Collateral are legal, valid, binding, perfected and otherwise unavoidable, unless (i) a party in interest with standing in these chapter 11 cases (including any statutory committee of unsecured creditors) has properly

filed and served an adversary proceeding or contested matter challenging the validity, enforceability, extent or priority of such claims or the Pre-Petition Agent's and the Pre-Petition Lenders' security interest and liens on the Pre-Petition Collateral in respect thereof, or otherwise asserting any claims or causes of action against the Pre-Petition Agent or the Pre-Petition Lenders within sixty (60) days after the appointment of counsel to any statutory committee of unsecured creditors in any of these cases.

62. The Debtors believe that the findings of fact required by the Pre-Petition Lenders in the proposed Orders, subject to the procedures described above, are reasonable under the circumstances. Unsecured creditors and parties in interest will be protected by the ability to challenge the findings set forth in the Orders for a limited period of time, which is adequate under the circumstances of these cases. For all these reasons, the Debtors believe that the findings of fact required by the Pre-Petition Lenders with

respect to their claims in the proposed Orders are justified and reasonable.

63. The Debtors understand that the Pre-Petition Lenders have consented to the use of Cash Collateral based on the protections detailed above, and that the adequate protection proposed is fair and reasonable and sufficient to protect against any diminution in value of the Pre-Petition Lenders' collateral.

III.  
SCHEDULING THE HEARINGS;  
GRANTING INTERIM APPROVAL

64. Bankruptcy Rule 4001(b) and (c) provide that a final hearing on a motion to use cash collateral pursuant to Bankruptcy Code section 363 and to obtain credit under Bankruptcy Code section 364 may not be commenced earlier than 15 days after the service of such motion. Upon request, however, the Court is empowered to conduct a preliminary expedited hearing on the motion and authorize the use of cash collateral and the obtaining of credit to the extent necessary to avoid immediate and irreparable to the debtor's estate.



65. The Debtors request that the Court schedule and conduct the Preliminary Hearing and authorize the Debtors from and after the entry of the Interim Order until the Final Hearing to use Cash Collateral, and to obtain loans under the DIP Agreement in an amount up to \$2 million upon the terms and conditions set forth in the DIP Documents and the Interim Order. This relief will enable the Debtors to maintain ongoing operations and avoid immediate and irreparable harm and prejudice to their estates and all parties in interest, pending the Final Hearing.

IV.  
Scheduling Final Hearing and  
Establishing Notice Procedures

The Debtors further respectfully request that the Court schedule the Final Hearing, and authorize them to serve a copy of the signed Interim Order, which fixes the time and date for the filing of objections, by first class mail upon (i) the Office of the United States Trustee; (ii) counsel to the Pre-Petition Agent; (iii) the creditors holding the 30 largest unsecured claims against the Debtors on a consolidated basis; (iv)

counsel to any statutory committees appointed in these chapter 11 cases; (v) any party who filed a request for notices in these chapter 11 cases pursuant to Bankruptcy Rule 2002 prior to the date set forth in the Interim Order for service of notice of the Final Hearing; (vi) parties having been given notice of the Interim Hearing; (vii) the landlords on the Debtors' real property leases; (viii) any governmental entity with jurisdiction and authority to levy a tax on the Debtors or their operations; and (ix) any known lienholders of the Debtors. The Debtors request that the Court consider such notice of the Final Hearing to be sufficient notice under Bankruptcy Rule 4001.

66. No previous request for the relief sought herein has been made to this Court or any other court.

Local Rule 4001-2 Statement

67. The proposed Interim Order and DIP Agreement do not contain any provisions of the type proscribed by Local Rule 4001-2, except as follows:

- Decretal paragraph 3(e) of the Interim Order provides that the Debtors (for themselves, but not their

estates or other parties in interest) stipulate and agree to the validity and perfection of the Pre-Petition Lenders' claims and liens, and that the Debtors have not valid claims or causes of action against the Pre-Petition Lenders. Such provision is appropriate because it will not bind the estate or parties in interest absent adequate notice and opportunity to object.


- Decretal paragraph 8 of the Interim Order provides that, "subject to and effective upon entry of the Final Order," no section 506(c) surcharge may be asserted against the Collateral securing the DIP obligations or the Pre-Petition Obligations. Such provision is appropriate because it will not bind the estate or parties in interest absent adequate notice and opportunity to object.
- Decretal paragraph 11(iii) of the Interim Order provides that the Debtors shall pay currently to the Pre-Petition Agent all reasonable and documented fees and expenses payable under the Pre-Petition Agreement. Such provision is appropriate because it is expressly subject to the requirements of section 506 (b) of the Bankruptcy Code.
- Decretal paragraph 17(b) of the Interim Order bars the statutory committee (the "Committee") or any other party in interest from challenging, avoiding or subordinating any claim, lien or security interest of the Pre-Petition Lenders if a challenge is not filed and properly served within 60 days from the date counsel is retained by the Committee.
- Decretal paragraph 19 of the Interim Order provides that the DIP Document and findings and provisions of the Interim Order shall be binding on all parties in interest, without limitation.
- Section 9.17 of the DIP Agreement provides that the Agreement, the Other Credit Documents, and all Liens created thereby and any other Credit Documents is

binding upon the estates of the Debtors, and any Chapter 11 or 7 trustee or successor to any of them. Such provision is appropriate because the Agreement remains subject to Court approval after notice and hearing.

WHEREFORE, the Debtors respectfully request that the Court (i) enter the Interim Order and the Final Order, and (ii) grant such other and further relief as is just and proper.

Dated:       Wilmington, Delaware  
             August 12, 2005

SKADDEN, ARPS, SLATE, MEAGHER  
& FLOM LLP

  
\_\_\_\_\_  
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Debtors-in-Possessio

# EXHIBIT B

**SENIOR SECURED, SUPERPRIORITY DEBTOR-IN-POSSESSION  
CREDIT AGREEMENT**

dated as of

August [25], 2005

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**BIRCH TELECOM, INC.,  
BIRCH TELECOM FINANCE, INC.**

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the Several Lenders  
from time to time Parties Hereto,

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**BANK OF AMERICA, N.A.,  
as Administrative Agent**

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## EXHIBITS:

A	Form of Guarantee and Collateral Agreement
B	Form of Compliance Certificate
C	Form of Closing Certificate
D	Form of Assignment and Acceptance
E-1	Form of Legal Opinion of Skadden, Arps, Slate, Meagher & Flom LLP, special counsel to the Credit Parties
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F	Form of Revolving Credit Note
G	Form of Non-U.S. Lender Certificate
H	Form of Notice of Borrowing
I	List of Closing Documents
J	Form of Interim Order
K	Form of Weekly Forecast
L	Cash Management System
M	Monthly Reporting Certificate

THIS SENIOR SECURED, SUPER-PRIORITY DEBTOR-IN-POSSESSION CREDIT AGREEMENT, dated as of August [25], 2005 among BIRCH TELECOM, INC., a Delaware corporation (the "Company"), BIRCH TELECOM FINANCE, INC., a Delaware corporation (the "Borrower"), the several banks and other financial institutions or entities from time to time parties to this Agreement (the "Lenders") and BANK OF AMERICA, N.A. ("Bank of America"), as administrative agent (in such capacity, the "Administrative Agent").

### RECITALS

WHEREAS, on August [25], 2005 (the "Petition Date"), the Borrower and the Guarantors (as defined below) commenced Chapter 11 Case Nos. 05-12237 through 05-12261, as administratively consolidated at Chapter 11 Case No. 05-12237 (collectively, the "Chapter 11 Case") by filing separate voluntary petitions for reorganization under Chapter 11 of Title 11 of the United States Code, Sec. 11 U.S.C. 101 et seq. (the "Bankruptcy Code"), with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). The Borrower and the Guarantors continue to operate their businesses and manage their properties as debtors and debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code;

WHEREAS, prior to the Petition Date, certain of the Lenders and other financial institutions provided financing to the Borrower pursuant to that certain Second Amended and Restated Credit Agreement, dated as of September 30, 2002, among the Borrower, the Company, Bank of America, N.A., as agent and as a lender, and the other financial institutions from time to time signatory thereto as lenders (as amended, modified or supplemented, the "Pre-Petition Agreement");

WHEREAS, the Borrower has requested that Lenders provide a senior secured, super-priority revolving credit facility to Borrower of up to Five Million Dollars (\$5,000,000) in the aggregate to fund the working capital requirements of the Company and its Subsidiaries during the pendency of the Chapter 11 Case, as further described in Section 2.6 hereof;

WHEREAS, Lenders are willing to make certain loans and other extensions of credit to Borrower of up to such amount upon the terms and conditions set forth herein;

WHEREAS, the Credit Parties have agreed to secure all of their obligations under the Credit Documents by granting to the Administrative Agent, for the benefit of the Administrative Agent and Lenders, a security interest in and lien upon all of their existing and after-acquired personal and real property;

WHEREAS, each Credit Party acknowledges that it will receive substantial direct and indirect benefits by reason of the making of loans and other financial accommodations to the Borrower as provided in this Agreement;

WHEREAS, all annexes, Schedules, Exhibits and other attachments hereto, or expressly identified to this Agreement, are incorporated herein by reference, and taken together with this Agreement, shall constitute but a single agreement. These Recitals shall be construed as part of this Agreement;

NOW, THEREFORE, in consideration of the premises and the mutual covenants hereinafter contained, and for other good and valuable consideration, the parties hereto agree as follows:

## SECTION 1. DEFINITIONS

1.1 Defined Terms. As used in this Agreement, the terms listed in this Section shall have the respective meanings set forth in this Section.

“Administrative Agent”: as defined in the preamble hereto.

“Accounts” means all “accounts,” as such term is defined in the Code, now owned or hereafter acquired by any Credit Party, including (a) all accounts receivable, other receivables, book debts and other forms of obligations (other than forms of obligations evidenced by Chattel Paper, or Instruments), (including any such obligations that may be characterized as an account or contract right under the Code), (b) all of each Credit Party’s rights in, to and under all purchase orders or receipts for goods or services, (c) all of each Credit Party’s rights to any goods represented by any of the foregoing (including unpaid sellers’ rights of rescission, replevin, reclamation and stoppage in transit and rights to returned, reclaimed or repossessed goods), (d) all rights to payment due to any Credit Party for property sold, leased, licensed, assigned or otherwise disposed of, for a policy of insurance issued or to be issued, for a secondary obligation incurred or to be incurred, for energy provided or to be provided, for the use or hire of a vessel under a charter or other contract, arising out of the use of a credit card or charge card, or for services rendered or to be rendered by such Credit Party or in connection with any other transaction (whether or not yet earned by performance on the part of such Credit Party), (e) all health care insurance receivables and (f) all collateral security of any kind, given by any Account Debtor or any other Person with respect to any of the foregoing.

“Account Debtor”: any Person who may become obligated to any Credit Party under, with respect to, or on account of, an Account, Chattel Paper or General Intangibles (including a payment intangible).

“Adjusted Amount”: on the Friday of each calendar week, the difference (which number may be a negative amount) between (i) the actual amount of cash on-hand on such date minus (i) the projected amount of cash on-hand on such Friday as set forth in the Approved Weekly Forecast for the current calendar week.

“Adjusted Excess Cash On-Hand”: as defined in Section 2.5.

“Adjusted Projected Cash On-Hand”: on the Friday of each calendar week, the sum of (i) the projected amount of cash on hand on the Friday of the next succeeding calendar week as set forth in the Approved Weekly Forecast for such succeeding calendar week plus (ii) the Adjusted Amount.

“Affiliate”: as to any Person, any other Person which, directly or indirectly, is in control of, is controlled by, or is under common control with, such

Person. For purposes of this definition, “control” of a Person means the power, directly or indirectly, either to (a) vote 10% or more of the securities having ordinary voting power for the election of directors (or persons performing similar functions) of such Person or (b) direct or cause the direction of the management and policies of such Person, whether by contract or otherwise.

“Aggregate Exposure”: with respect to any Lender at any time, an amount equal to the amount of such Lender’s Revolving Credit Commitment then in effect or, if the Revolving Credit Commitments have been terminated, the amount of such Lender’s Revolving Extensions of Credit then outstanding.

“Aggregate Exposure Percentage”: with respect to any Lender at any time, the ratio (expressed as a percentage) of such Lender’s Aggregate Exposure at such time to the Aggregate Exposure of all Lenders at such time.

“Agreement”: this Senior Secured, Super-Priority Debtor-In-Possession Credit Agreement, as amended, restated, supplemented or otherwise modified from time to time.

“Approved Thirteen-Week Cash Forecast”: as defined in Section 5.1(e).

“Approved Weekly Forecast”: as defined in Section 5.12.

“Asset Sale”: any Disposition of Property or series of related Dispositions of Property (excluding (A) any such Disposition permitted by clauses (a), (b), (c) or (d) of Section 6.5 or (B) Dispositions of Property outside of the ordinary course of business in one or more transactions occurring from and after the Closing Date having an aggregate fair market value in an amount not to exceed \$250,000).

“Assignee”: as defined in Section 9.6(c).

“Assignment and Acceptance”: as defined in Section 9.6(c).

“Assignor”: as defined in Section 9.6(c).

“Available Commitment”: as to any Lender at any time, an amount equal to the excess, if any, of (i) such Lender’s Revolving Credit Commitment then in effect over (ii) such Lender’s Revolving Extensions of Credit then outstanding.

“Bank of America”: as defined in the preamble hereto.

“Bankruptcy Code”: as defined in the recitals to this Agreement.

“Bankruptcy Court”: as defined in the recitals to this Agreement.

“Bankruptcy Rules”: the Federal Rules of Bankruptcy Procedure, as the same may from time to time be in effect and applicable to the Chapter 11 Case.

“Base Rate”: for any day, a rate per annum (rounded upwards, if necessary, to the next 1/16 of 1%) equal to the greatest of (a) the Prime Rate in effect on such day and (b) the Federal Funds Effective Rate in effect on such day plus 0.50%. For purposes hereof, “Prime Rate” shall mean the rate of interest per annum publicly announced from time to time by Bank of America as its prime or base rate in effect at its principal office in Charlotte, North Carolina (the Prime Rate not being intended to be the lowest rate of interest charged by Bank of America in connection with extensions of credit to debtors).

“Base Rate Loans”: Revolving Credit Loans for which the rate of interest applicable thereto is based upon the Base Rate.

“Benefited Lender”: as defined in Section 9.7.

“Birch”: Birch Telecom, Inc., a Delaware corporation.

“Board”: the Board of Governors of the Federal Reserve System of the United States (or any successor).

“Borrower”: as defined in the preamble hereto.

“Borrowing Date”: any Business Day specified by the Borrower as a date on which the Borrower requests the Lenders to make Revolving Credit Loans hereunder.

“Business Day”: for all purposes, a day other than a Saturday, Sunday or other day on which commercial banks in New York City are authorized or required by law to close.

“Capital Expenditures”: for any period, with respect to any Person, the aggregate of all expenditures by such Person and its Subsidiaries for the acquisition or leasing (pursuant to a capital lease) of fixed or capital assets or additions to equipment (including replacements, capitalized repairs and improvements during such period) which are capitalized in accordance with GAAP on a consolidated balance sheet of such Person and its Subsidiaries.

“Capital Lease Obligations”: as to any Person, the obligations of such Person to pay rent or other amounts under any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which obligations are classified and accounted for as capital leases on a balance sheet of such Person in accordance with GAAP, and, for the purposes of this Agreement, the amount of such obligations at any time shall be the capitalized amount thereof at such time determined in accordance with GAAP.

“Capital Stock”: any and all shares, interests, participations or other equivalents (however designated) of capital stock of a corporation, any and all equivalent ownership interests in a Person (other than a corporation) and any and all warrants, rights or options to purchase any of the foregoing.



“Carve-Out”: as defined in Paragraph 5(b) of the Interim Order.

“Cash Equivalents”: (a) marketable direct obligations issued by, or unconditionally guaranteed by, the United States Government or issued by any agency thereof and backed by the full faith and credit of the United States, in each case maturing within one year from the date of acquisition; (b) certificates of deposit, time deposits, eurodollar time deposits or overnight bank deposits having maturities of one year or less from the date of acquisition issued by any Lender or by any commercial bank organized under the laws of the United States of America or any state thereof having combined capital and surplus of not less than \$500,000,000; (c) commercial paper of a domestic issuer rated at least A-2 by Standard & Poor’s Ratings Services (“S&P”) or P-2 by Moody’s Investors Service, Inc. (“Moody’s”), or carrying an equivalent rating by a nationally recognized rating agency, if both of the two named rating agencies cease publishing ratings of commercial paper issuers generally; (d) repurchase obligations of any Lender or of any commercial bank satisfying the requirements of clause (b) of this definition, having a term of not more than 90 days with respect to securities issued or fully guaranteed or insured by the United States government; (e) securities with maturities of one year or less from the date of acquisition issued or fully guaranteed by any state, commonwealth or territory of the United States, by any political subdivision or taxing authority of any such state, commonwealth or territory or by any foreign government, the securities of which state, commonwealth, territory, political subdivision, taxing authority or foreign government (as the case may be) are rated at least A by S&P or A by Moody’s; (f) securities with maturities of one year or less from the date of acquisition backed by standby letters of credit issued by any Lender or any commercial bank satisfying the requirements of clause (b) of this definition; or (g) shares of money market mutual or similar funds which invest exclusively in assets satisfying the requirements of clauses (a) through (f) of this definition.

“Cash Management System”: as defined in Section 3.19.

“Change in Control”: the occurrence of any of the following events: (a) Permitted Investors shall at any time not own, in the aggregate, directly or indirectly, beneficially and of record, at least 35% of the outstanding voting interests in the Capital Stock of the Company (other than as a result of one or more widely distributed offerings of common stock of the Company, in each case whether by the Company or by Permitted Investors); (b) any person, entity or “group” (within the meaning of Section 13(d) or 14(d) of the Securities Exchange Act of 1934, as amended) shall at any time have acquired direct or indirect beneficial ownership of a percentage of the outstanding voting interests in the Capital Stock of the Company that exceeds the percentage of such voting interests then beneficially owned, in the aggregate, by Permitted Investors; (c) Permitted Investors shall at any time not have the right or the ability by voting power, contract or otherwise to elect or designate for election a majority of the Board of Directors of the Company; (d) the board of directors of the Company shall cease to consist of a majority of Continuing Directors; or (e) the Company shall cease to own and control, of record and beneficially, directly, 100% of each class of outstanding Capital Stock of the Borrower free and clear of all Liens (except Liens created by the Guarantee and

Collateral Agreement and the "Credit Documents" as defined in the Pre-Petition Agreement).

"Chapter 11 Case": as defined in the recitals to this Agreement.

"Chattel Paper" as defined in the Guarantee and Collateral Agreement..

"Chief Restructuring Officer": Lawrence M. Adelman, or a similar restructuring officer satisfactory to the Required Lenders, retained on terms satisfactory to the Required Lenders.

"Claim": as defined in section 101(5) of the Bankruptcy Code.

"CLEC": a competitive local exchange carrier under applicable Communications Law.

"Closing Date": the date on which the conditions precedent set forth in Section 4 shall have been satisfied.

"Code": the Internal Revenue Code of 1986, as amended from time to time.

"Collateral": all Property of the Credit Parties, now owned or hereafter acquired, upon which a Lien is purported to be created by any Security Document.

"Collocation Sites": the central office premises of a local exchange carrier on which the Company or a Subsidiary of the Company has located telecommunications transmission equipment.

"Committee": the official committee of unsecured creditors, if any, formed, appointed, or approved in the Chapter 11 Case.

"Commonly Controlled Entity": an entity, whether or not incorporated, which is under common control with the Company within the meaning of Section 4001 of ERISA or is part of a group which includes the Company and which is treated as a single employer under Section 414 of the Code.

"Communications Law": the Communications Act of 1934, as amended, and all rules and regulations thereunder, or any successor statute or statutes thereto (including, without limitation, the Telecommunications Act of 1996) and all rules and regulations thereunder, and all rules and regulations of the FCC, any applicable PUC or any other applicable Governmental Authority related to the provision of telecommunication or broadcast services, each as amended or supplemented from time to time.

"Communications License": any license for the provision of CLEC telephony service, and any other license, permit, consent, certificate of compliance, franchise, approval, waiver or authorization granted or issued by FCC or other applicable

Governmental Authority, including, without limitation, any PUC, each of the foregoing authorizing or permitting the acquisition, construction or operation of Network Facilities or any other system for the provision of CLEC telephony service.

“Company”: as defined in the preamble hereto.

“Compliance Certificate”: a certificate duly executed by a Responsible Officer substantially in the form of Exhibit B.

“Consolidated EBITDAR”: for any period, Consolidated Net Income for such period plus, without duplication and to the extent reflected as a charge in the statement of such Consolidated Net Income for such period, the sum of (a) income tax expense, (b) Consolidated Interest Expense, amortization or write-off of debt discount and debt issuance costs and commissions, discounts and other fees and charges associated with Indebtedness (including the Revolving Credit Loans), (c) depreciation and amortization expense, (d) amortization of intangibles (including, but not limited to, goodwill) and organization costs, (e) any extraordinary, unusual or non-recurring expenses or losses (including, whether or not otherwise includable as a separate item in the statement of such Consolidated Net Income for such period, losses on sales of assets outside of the ordinary course of business), (f) any other non-cash charges or reserves including non-cash compensation, all to the extent such charges or reserves do not lead to any cash outlays or cash expenditures, (g) the aggregate amount of transaction costs incurred in such period, which transaction costs shall include, without limitation, attorneys’ and other professional fees and expenses, consulting fees and expenses, agent fees and other costs incurred in connection with the Chapter 11 Case or otherwise during such period; and (h) nonrecurring charges incurred in connection with the restructuring of the operations of the Company and its Subsidiaries, changes in the management structure or personnel at the Company’s or any of its Subsidiaries’ facilities or other changes to the operating facilities of the Company or any of its Subsidiaries, each incurred during such period (without duplication of such restructuring charges set forth in clause (g) hereof) and minus, to the extent included in the statement of such Consolidated Net Income for such period, the sum of (x) interest income (except to the extent deducted in determining Consolidated Interest Expense), (y) any extraordinary, unusual or non-recurring income or gains (including, whether or not otherwise includable as a separate item in the statement of such Consolidated Net Income for such period, gains on the sales of assets outside of the ordinary course of business) and (z) any other non-cash income, all as determined on a consolidated basis.

“Consolidated Interest Expense”: for any period, total cash interest expense (including that attributable to Capital Lease Obligations) of the Company and its Subsidiaries for such period (whether paid or past due) with respect to all outstanding Indebtedness of the Company and its Subsidiaries (including, without limitation, all commissions, discounts and other fees and charges owed with respect to letters of credit and bankers’ acceptance financing and net costs under Hedge Agreements in respect of interest rates to the extent such net costs are allocable to such period in accordance with GAAP).

“Consolidated Net Income”: for any period, the consolidated net income (or loss) of the Company and its Subsidiaries, determined on a consolidated basis in accordance with GAAP; *provided* that there shall be excluded (a) the income (or deficit) of any Person accrued prior to the date it becomes a Subsidiary of the Company or is merged into or consolidated with the Company or any of its Subsidiaries, (b) the income (or deficit) of any Person (other than a Subsidiary of the Company) in which the Company or any of its Subsidiaries has an ownership interest, except to the extent that any such income is actually received by the Company or such Subsidiary in the form of dividends or similar distributions and (c) the undistributed earnings of any Subsidiary of the Company to the extent that the declaration or payment of dividends or similar distributions by such Subsidiary is not at the time permitted by the terms of any Contractual Obligation (other than under any Credit Document) or Requirement of Law applicable to such Subsidiary.

“Continuing Directors”: the directors of the Company on the Closing Date and each other director, if, in each case, (i) such other director’s nomination for election to the board of directors of the Company is recommended by at least a majority of the then Continuing Directors or (ii) such other director receives the vote of Permitted Investors holding at least a majority of the shares of common stock of the Company (on a fully diluted, as converted basis) held by all Permitted Investors in his or her election by the stockholders of the Company.

“Contractual Obligation”: as to any Person, any provision of any security issued by such Person or of any agreement, instrument or other undertaking to which such Person is a party or by which it or any of its Property is bound.

“Control Investment Affiliate”: as to any Person, any other Person which (a) directly or indirectly, is in control of, is controlled by, or is under common control with, such Person and (b) is organized by such Person primarily for the purpose of making equity or debt investments in one or more companies. For purposes of this definition, “control” of a Person means the power, directly or indirectly, to direct or cause the direction of the management and policies of such Person whether by contract or otherwise.

“Credit Documents”: collectively, this Agreement, the Security Documents, the Notes, the Interim Order, the Final Order, and all other agreements, certificates, instruments or documents delivered by any Credit Party or any officer of any Credit Party to, or in favor of, the Administrative Agent or any Lender in connection with this Agreement or the transactions contemplated hereby, including all appendices, schedules, or exhibits thereto, and all amendments, restatements, supplements, or modifications thereto.

“Credit Parties”: collectively, the Company, the Borrower and each other Subsidiary which is a party to a Credit Document.

“Critical Vendor Payment”: any payment on account of a Claim incurred or arising prior to the filing of the Chapter 11 Case made or requested to be made based



on a determination that the recipient of such payment is a critical supplier of materials, goods or services, with whom the Company or any of its Subsidiaries continues to do business and whose materials, goods or services are essential to the Company's or its Subsidiaries' operations.

"Default": any of the events specified in Section 7, whether or not any requirement for the giving of notice, the lapse of time, or both, has been satisfied unless, in accordance with Section 9.1, there has been granted a written waiver of such event or a written forbearance of the right to exercise remedies with respect thereto.

"Deposit Return": means any recovery or return of any deposits, security deposits, cash or cash equivalents or similar amount held by a third party, including, without limitation, third party vendors, professionals, landlords, or lessors.

"Disclosure Statement": any disclosure statement of the Company filed in connection with the Chapter 11 Case, as amended, supplemented or otherwise modified from time to time.

"Disposition": with respect to any Property, any sale, lease, sale and leaseback, assignment, conveyance, transfer or other disposition thereof, other than any such transfer or assignment solely for purposes of securing an obligation; the terms "Dispose" and "Disposed of" shall have correlative meanings.

"Dollars" and "\$": dollars in lawful currency of the United States of America.

"Eligible Accounts" for purposes of this Agreement, all of the Accounts owned by each Credit Party and reflected in the most recent Monthly Reporting Certificate delivered by the Company and the Borrower to the Administrative Agent, except any Account to which any of the exclusionary criteria set forth below applies. In addition, Administrative Agent reserves the right, at any time and from time to time after the Closing Date upon prior notice to the Company and the Borrower to adjust any of the criteria set forth below and to establish new criteria, in its reasonable credit judgment, reflecting changes in the collectibility or realization values of such Accounts arising or discovered by Administrative Agent after the Closing Date. Eligible Accounts shall not include any Account of any Credit Party:

(a) that does not arise from the sale of goods or the performance of services by such Credit Party in the ordinary course of its business;

(b) (i) upon which such Credit Parties' right to receive payment is not absolute or is contingent upon the fulfillment of any condition whatsoever or (ii) as to which such Credit Party is not able to bring suit or otherwise enforce its remedies against the Account Debtor through judicial process or (iii) if the Account represents a progress billing consisting of an invoice for goods sold or used or services rendered pursuant to a contract under which the Account Debtor's obligation to pay that invoice is subject to such Borrower's completion of further performance under such contract or is subject to the equitable lien of a surety bond issuer;

(c) to the extent that any defense, counterclaim, setoff or dispute is asserted as to such Account;

(d) that is not a true and correct statement of bona fide indebtedness incurred in the amount of the Account for merchandise sold to or services rendered and accepted by the applicable Account Debtor;

(e) with respect to which an invoice, reasonably acceptable to Administrative Agent in form and substance, has not been sent to the applicable Account Debtor;

(f) that (i) is not owned by such Credit Party or (ii) is subject to any Lien of any other Person, other than Liens in favor of Administrative Agent on behalf of itself and Lenders and or Liens permitted by Section 6.3 of this Agreement;

(g) that arises from a sale to any director, officer, other employee or Affiliate of any Credit Party, or to any entity that has any common officer or director with any Credit Party;

(h) that is the obligation of an Account Debtor that is the United States government or a political subdivision thereof, or any state, county or municipality or department, agency or instrumentality thereof unless Administrative Agent, in its sole discretion, has agreed to the contrary in writing and such Credit Party, if necessary or desirable, has complied with respect to such obligation with the Federal Assignment of Claims Act of 1940, or any applicable state, county or municipal law restricting assignment thereof;

(i) that is the obligation of an Account Debtor located in a foreign country other than Canada unless payment thereof is assured by a letter of credit assigned and delivered to Administrative Agent, reasonably satisfactory to Administrative Agent as to form, amount and issuer;

(j) to the extent such Credit Party thereof is liable for goods sold or services rendered by the applicable Account Debtor to Credit Party but only to the extent of the potential offset;

(k) that is in default; provided, that, without limiting the generality of the foregoing, an Account shall be deemed in default upon the occurrence of any of the following:

- (i) the Account is not paid within the earlier of: sixty (60) days following its due date or ninety (90) days following its original invoice date;
- (ii) the Account Debtor obligated upon such Account suspends business, makes a general assignment for the benefit of creditors or fails to pay its debts generally as they come due; or

(iii) a petition is filed by or against any Account Debtor obligated upon such Account under any bankruptcy law or any other federal, state or foreign (including any provincial) receivership, insolvency relief or other law or laws for the relief of debtors;

(l) that is the obligation of an Account Debtor if fifty percent (50%) or more of the Dollar amount of all Accounts owing by that Account Debtor are ineligible under the other criteria set forth in this definition;

(m) as to which Administrative Agent's Lien thereon, on behalf of itself and Lenders, is not a first priority perfected Lien;

(n) as to which any of the representations or warranties in the Credit Documents are untrue in any material respect;

(o) to the extent such Account is evidenced by a judgment, Instrument or Chattel Paper; or

(p) that is payable in any currency other than Dollars.

"Eligible Assignee": (i) a commercial bank having total assets in excess of \$1,000,000,000; (ii) a finance company, insurance company or other financial institution or fund, in each case reasonably acceptable to the Administrative Agent, which in the ordinary course of business extends credit of the type contemplated herein and has total assets in excess of \$200,000,000 and whose becoming an Assignee would not constitute a prohibited transaction under Section 4795 of ERISA; and (iii) any other financial institution satisfactory to the Administrative Agent.

"Environmental Laws": any and all laws, rules, orders, regulations, statutes, ordinances, guidelines, codes, decrees, or other legally enforceable requirements (including, without limitation, common law) of any international authority, foreign government, the United States, or any state, local, municipal or other governmental authority, regulating, relating to or imposing liability or standards of conduct concerning protection of the environment or of human health, or employee health and safety, as has been, is now, or may at any time hereafter be, in effect.

"Environmental Permits": any and all permits, licenses, approvals, registrations, notifications, exemptions and/or other authorization required under any applicable Environmental Law.

"ERISA": the Employee Retirement Income Security Act of 1974, as amended from time to time.

"Event of Default": any of the events specified in Section 7; provided that any requirement for the giving of notice, the lapse of time, or both, has been satisfied.

“Excess Cash On-Hand”: for any calendar week of the Company and its consolidated Subsidiaries, the actual amount of cash on hand, if any, on the Friday of such calendar week which is in excess of \$5,000,000.

“FCC”: the U.S. Federal Communications Commission.

“Federal Funds Effective Rate”: for any day, the weighted average of the rates on overnight federal funds transactions with members of the Federal Reserve System arranged by federal funds brokers, as published on the next succeeding Business Day by the Federal Reserve Bank of New York, or, if such rate is not so published for any day which is a Business Day, the average of the quotations for the day of such transactions received by Bank of America from three federal funds brokers of recognized standing selected by it.

“Fee Letter”: that certain fee letter dated as of the date hereof between the Borrower and the Administrative Agent, as such may be amended, restated, supplemented or otherwise modified from time to time.

“Financing Orders”: collectively, the Interim Order and the Final Order.

“Final Order”: the order of the Bankruptcy Court entered in the Chapter 11 Case after a final hearing under Bankruptcy Rule 4001(c)(2) or such other procedures as approved by the Court, which order and procedures shall be satisfactory in form and substance to the Administrative Agent, and from which no appeal or motion to reconsider has been timely filed, or if timely filed, such appeal or motion to reconsider has been dismissed or denied (unless the Administrative Agent waives such requirement), together with all extensions, modifications and amendments thereto satisfactory in form and substance to the Administrative Agent, which, among other matters but not by way of limitation, authorizes the Credit Parties to obtain credit, incur (or guaranty) Indebtedness, and grant Liens under this Agreement and the other Credit Documents, as the case may be, provides for the superpriority of the Administrative Agent’s and the Lenders’ claims, and provides protections to the Pre-Petition Lenders in exchange for their consent to the Credit Parties’ use of cash collateral.

“Funding Office”: the office specified from time to time by the Administrative Agent as its funding office by notice to the Borrower and the Lenders.

“GAAP”: generally accepted accounting principles in the United States of America as in effect from time to time.

“General Intangibles”: as defined in the Guarantee and Collateral Agreement.

“Governmental Authority”: any nation or government, any state or other political subdivision thereof and any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government (including, without limitation, the FCC and the Bankruptcy Court).



“Guarantee and Collateral Agreement”: the Guarantee and Collateral Agreement to be executed and delivered on the Closing Date by the Company, the Borrower and each Subsidiary Guarantor, substantially in the form of Exhibit A, as the same may be amended, restated, supplemented or otherwise modified from time to time.

“Guarantee Obligation”: as to any Person (the “guaranteeing person”), any obligation of (a) the guaranteeing person or (b) another Person (including, without limitation, any bank under any letter of credit) to induce the creation of which the guaranteeing person has issued a reimbursement, counterindemnity or similar obligation, in either case guaranteeing or in effect guaranteeing any Indebtedness, leases, dividends or other obligations (the “primary obligations”) of any other third Person (the “primary obligor”) in any manner, whether directly or indirectly, including, without limitation, any obligation of the guaranteeing person, whether or not contingent, (i) to purchase any such primary obligation or any Property constituting direct or indirect security therefor, (ii) to advance or supply funds (1) for the purchase or payment of any such primary obligation or (2) to maintain working capital or equity capital of the primary obligor or otherwise to maintain the net worth or solvency of the primary obligor, (iii) to purchase Property, securities or services primarily for the purpose of assuring the owner of any such primary obligation of the ability of the primary obligor to make payment of such primary obligation or (iv) otherwise to assure or hold harmless the owner of any such primary obligation against loss in respect thereof; *provided, however*, that the term Guarantee Obligation shall not include endorsements of instruments for deposit or collection in the ordinary course of business. The amount of any Guarantee Obligation of any guaranteeing person shall be deemed to be the lower of (a) an amount equal to the stated or determinable amount of the primary obligation in respect of which such Guarantee Obligation is made and (b) the maximum amount for which such guaranteeing person may be liable pursuant to the terms of the instrument embodying such Guarantee Obligation, unless such primary obligation and the maximum amount for which such guaranteeing person may be liable are not stated or determinable, in which case the amount of such Guarantee Obligation shall be such guaranteeing person’s maximum reasonably anticipated liability in respect thereof as determined by the Borrower in good faith.

“Guarantors”: the collective reference to the Company and the Subsidiary Guarantors.

“Hedge Agreements”: all interest rate swaps, caps or collar agreements or similar arrangements entered into by the Company or the Borrower providing for protection against fluctuations in interest rates or currency exchange rates or the exchange of nominal interest obligations, either generally or under specific contingencies.

“Incentive Plan”: the Company’s 2003 Equity Incentive Plan, which provides for the granting of incentive stock options, non-qualified stock options and restricted stock awards to certain directors, officers or employees of the Company.

“Incentive Plan Shares”: that number of shares of Capital Stock of the Company reserved for issuance pursuant to the Incentive Plan as of the Closing Date, not

to exceed 15% of the total number of outstanding shares of the Company's Capital Stock as determined on a fully-diluted basis.

"Indebtedness": of any Person at any date, without duplication, (a) all indebtedness of such Person for borrowed money, (b) all obligations of such Person for the deferred purchase price of Property or services, (c) all obligations of such Person evidenced by notes, bonds, debentures or other similar instruments, (d) all indebtedness created or arising under any conditional sale or other title retention agreement with respect to Property acquired by such Person (even though the rights and remedies of the seller or lender under such agreement in the event of default are limited to repossession or sale of such Property), (e) all Capital Lease Obligations of such Person, (f) all obligations of such Person, contingent or otherwise, as an account party under acceptance, letter of credit or similar facilities, (g) all obligations of such Person, contingent or otherwise, to purchase, redeem, retire or otherwise acquire for value any Capital Stock of such Person (other than obligations of such Person to purchase Capital Stock from present or former officers or employees of such Person upon the death, disability or termination of employment of such officer or employee) prior to the date that is 91 days after the final scheduled maturity date of the Revolving Credit Loans, (h) all Guarantee Obligations of such Person in respect of obligations of the kind referred to in clauses (a) through (g) above and (i) all obligations of the kind referred to in clauses (a) through (h) above secured by (or for which the holder of such obligation has an existing right, contingent or otherwise, to be secured by) any Lien on Property (including, without limitation, accounts and contract rights) owned by such Person, whether or not such Person has assumed or become liable for the payment of such obligation; *provided* that Indebtedness shall not include trade payables or accrued expenses incurred in the ordinary course of such Person's business.

"Indemnified Liabilities": as defined in Section 9.5.

"Indemnitee": as defined in Section 9.5.

"Initial Thirteen-Week Cash Forecasts": as defined in Section 5.1(e).

"Initial Weekly Forecast": as defined in Section 5.12.

"Insolvency": with respect to any Multiemployer Plan, the condition that such Plan is insolvent within the meaning of Section 4245 of ERISA.

"Insolvent": pertaining to a condition of Insolvency.

"Intellectual Property": the collective reference to all rights, priorities and privileges relating to intellectual property, whether arising under United States, multinational or foreign laws or otherwise, including, without limitation, copyrights, copyright licenses, patents, patent licenses, trademarks, trademark licenses, technology, know-how and processes, and all rights to sue at law or in equity for any infringement or other impairment thereof, including the right to receive all proceeds and damages therefrom.

“Interest Payment Date”: the first day of each calendar month to occur while Revolving Credit Loans are outstanding and the final maturity date of the Revolving Credit Loans.

“Interim Order”: collectively, the order of the Bankruptcy Court entered in the Chapter 11 Case after an interim hearing (assuming satisfaction of the standards prescribed in section 364 of the Bankruptcy Code and Bankruptcy Rule 4001 and other applicable law), together with all extensions, modifications, and amendments thereto, in form and substance satisfactory to the Administrative Agent which, among other matters but not by way of limitation, authorizes, on an interim basis, the Credit Parties to execute and perform under the terms of this Agreement and the other Credit Documents, substantially in the form of Exhibit J, and provides protections to the Pre-Petition Lenders in exchange for their consent to the Credit Parties’ use of cash collateral.

“Investments”: as defined in Section 6.7.

“Lenders”: as defined in the preamble hereto.

“Lien”: any mortgage, pledge, hypothecation, assignment in the nature of a security interest, deposit arrangement, lien (statutory or other), charge or other security interest or any similar encumbrance or other security agreement or similar arrangement of any kind or nature whatsoever (including, without limitation, any conditional sale or other title retention agreement and any capital lease having substantially the same economic effect as any of the foregoing).

“Line”: a line (whether switched, UNE-P or any other type) in service made available by the Company or any of its Subsidiaries to a bona fide customer for telecommunications services which have been provisioned and have been provided by the Company and its Subsidiaries.

“Material Adverse Effect”: a material adverse effect on (a) the business, properties, assets or financial condition of the Credit Parties taken as a whole, other than those which customarily occur as a result of events and circumstances following the commencement of a proceeding under Chapter 11 of the Bankruptcy Code and the commencement of a Chapter 11 Case and any defaults under agreements which arise solely from the commencement of a Chapter 11 Case, (b) the validity or enforceability of this Agreement and the other Credit Documents or the rights or remedies of the Administrative Agent or the Lenders hereunder or thereunder or (c) except as applicable to Section 3.2 of this Agreement, the prospects or projections of the Credit Parties taken as a whole, other than those which customarily occur as a result of events and circumstances following the commencement of a proceeding under Chapter 11 of the Bankruptcy Code and the commencement of a Chapter 11 Case and any defaults under agreements which arise solely from the commencement of a Chapter 11 Case.

“Materials of Environmental Concern”: any gasoline or petroleum (including crude oil or any fraction thereof) or petroleum products, polychlorinated biphenyls, urea-formaldehyde insulation, asbestos, pollutants, contaminants,

radioactivity, and any other substances or forces of any kind, whether or not any such substance or force is defined as hazardous or toxic under any Environmental Law, that is regulated pursuant to or could give rise to liability under any Environmental Law.

“Monthly Reporting Certificate” means a certificate to be executed and delivered from time to time by the Company and the Borrower in the form attached to the Agreement as Exhibit M.

“Mortgages”: each of the mortgages and deeds of trust made by any Credit Party in favor of, or for the benefit of, the Administrative Agent (and/or one or more trustees or other Persons designated therein) for the benefit of the Lenders, in form and substance satisfactory to the Administrative Agent, executed and delivered by the Borrower or one of its Subsidiaries pursuant to Section 5.9(b), as the same may be amended, supplemented or otherwise modified from time to time.

“Multiemployer Plan”: a Plan which is a multiemployer plan as defined in Section 4001(a)(3) of ERISA.

“Net Cash Proceeds”: in connection with any Asset Sale, any Recovery Event or any Deposit Return, the proceeds thereof in the form of cash and Cash Equivalents (including, without limitation, any such proceeds received by way of deferred payment of principal pursuant to a note or installment receivable, purchase price adjustment receivable, indemnification, or otherwise, but only as and when received) of such Asset Sale, Recovery Event or Deposit Return, net of attorneys’ fees, accountants’ fees, investment banking fees, amounts required to be applied to the repayment of Indebtedness as a result of such event, including Indebtedness secured by a Lien expressly permitted hereunder on any asset which is the subject of such Asset Sale, Recovery Event or Deposit Return (other than any Lien pursuant to a Security Document) and other customary fees and expenses actually incurred in connection therewith, in each case payable on the date of receipt thereof, and net of taxes paid or reasonably estimated to be payable as a result thereof (after taking into account any available tax credits or deductions and any tax sharing arrangements) payable on the date of receipt thereof.

“Network Facility”: the Switches and network of digital and analog facilities owned or leased by the Borrower, the Company or any of their respective Subsidiaries for use in the provision of CLEC telephony service or other voice or data transmission services.

“Non-Consenting Lender”: as defined in Section 9.1.

“Non-Excluded Taxes”: as defined in Section 2.13(a).

“Non-U.S. Lender”: as defined in Section 2.13(d).

“Notice of Borrowing”: a request by the Borrower that the Lenders make Revolving Credit Loans hereunder, substantially in the form of Exhibit H.

“Obligations”: the unpaid principal of and interest and fees on (including, without limitation, interest accruing after the maturity of the Revolving Credit Loans) the Revolving Credit Loans and all other obligations and liabilities of the Borrower and the other Credit Parties to the Administrative Agent or to any Lender (or, in the case of Hedge Agreements, any Affiliate of any Lender), whether direct or indirect, absolute or contingent, due or to become due, or now existing or hereafter incurred, which may arise under, out of, or in connection with, this Agreement, any other Credit Document, any Hedge Agreement entered into with any Lender or any Affiliate of any Lender or any other document made, delivered or given in connection herewith or therewith, whether on account of principal, interest, reimbursement obligations, fees, indemnities, costs, expenses (including, without limitation, all fees, charges and disbursements of counsel to the Administrative Agent or to any Lender that are required to be paid by the Borrower pursuant hereto or thereto) or otherwise.

“Other Taxes”: any and all present or future stamp or documentary taxes or any other excise or property taxes, charges or similar levies arising from any payment made hereunder or from the execution, delivery or enforcement of, or otherwise with respect to, this Agreement or any other Credit Document.

“Participant”: as defined in Section 9.6(b).

“Payment Office”: the office specified from time to time by the Administrative Agent as its payment office by notice to the Borrower and the Lenders.

“PBGC”: the Pension Benefit Guaranty Corporation established pursuant to Subtitle A of Title IV of ERISA (or any successor).

“Permitted Equipment Financing”: (A) the purchase money, vendor or similar equipment financing facilities (including leases) existing on the Closing Date, and (B) one or more purchase money, vendor or similar equipment financing facilities (including leases) entered into after the Closing Date: (i) in an aggregate principal amount not in excess of the amount allocated for such financing facilities in the Approved Thirteen-Week Cash Forecast most recently delivered pursuant to Section 5.1(e), (ii) pursuant to which the Company or any of its Subsidiaries may be advanced funds principally for, and substantially concurrent with, the purchase or lease of network equipment or services, or such type of financing existing in respect of such Property at the time of the acquisition thereof or any other Capital Expenditure, (iii) which may be secured only by the assets being financed thereby and (iv) the terms of which are reasonably satisfactory to the Administrative Agent (and not objected to by the Required Lenders within five Business Days after the Borrower notifies the Administrative Agent and the Lenders in writing of the terms thereof in reasonable detail).

“Permitted Investors”: (i) the Lenders and their respective Control Investment Affiliates, (ii) AEA, VSA, TGF, Gilbert and the Lucent Investors and their respective Permitted Transferees (as each such term is defined in that certain Stockholders’ Agreement, dated as of March 18, 2003, among the Company and certain of its stockholders) and (iii) each Person listed in Schedule 1.1 hereto.

"Permitted Pre-Petition Claim Payments": a payment (as adequate protection or otherwise) on account of any Pre-Petition Claim, which is made (i) pursuant to authority granted by a first day order described in Section 5.10(e) or a Financing Order, (ii) on account of claims in respect of the assumption of leases, (iii) with the consent of the Administrative Agent, (iv) to pay secured Indebtedness constituting Capital Lease Obligations or Permitted Equipment Financings with proceeds received from the sale of the specific assets securing such Indebtedness or (v) on account of reclamation claims permitted pursuant to Section 6.9; *provided*, that "Permitted Pre-Petition Claim Payments" shall not include any payments which are prohibited by the Bankruptcy Code or the Bankruptcy Court.

"Person": an individual, partnership, corporation, limited liability company, business trust, joint stock company, trust, unincorporated association, joint venture, Governmental Authority or other entity of whatever nature.

"Petition Date": as defined in the recitals to this Agreement.

"Plan": at a particular time, any employee benefit plan which is covered by ERISA and in respect of which the Company or a Commonly Controlled Entity is (or, if such plan were terminated at such time, would under Section 4069 of ERISA be deemed to be) an "employer" as defined in Section 3(5) of ERISA.

"Pledged Stock": all Capital Stock or other equity interests, now owned or hereafter acquired, upon which a Lien is purported to be created by a Security Document.

"Post-Petition": the time period beginning immediately upon the filing of the Chapter 11 Case.

"Pre-Petition": the time period ending immediately prior to the filing of the Chapter 11 Case.

"Pre-Petition Agent": Bank of America, N.A., as administrative agent for the Pre-Petition Lenders under the Pre-Petition Agreement.

"Pre-Petition Agreement": as defined in the recitals to this Agreement.

"Pre-Petition Borrower": the Borrower in its capacity as "Borrower" (as defined in the Pre-Petition Agreement).

"Pre-Petition Indebtedness": all Indebtedness of the Borrower outstanding on the Petition Date immediately prior to the filing of the Chapter 11 Case, other than Indebtedness under the Pre-Petition Agreement.

"Pre-Petition Lenders": the "Lenders" (as defined in the Pre-Petition Agreement).



“Pre-Petition Obligations”: all “Obligations” (as defined in the Pre-Petition Agreement) of any Credit Party and any of their Subsidiaries to the Pre-Petition Lenders and Pre-Petition Agent pursuant to the Pre-Petition Agreement, and all instruments and documents executed pursuant thereto or in connection therewith.

“Prime Rate”: as defined in the definition of “Base Rate” in this Section.

“Property”: any right or interest in or to property of any kind whatsoever, whether real, personal or mixed and whether tangible or intangible, including, without limitation, Capital Stock.

“Proposed Change”: as defined in Section 9.1.

“PUC”: any state, provincial or other local regulatory agency or body that exercises jurisdiction over the rates or services or the ownership, construction or operation of any Network Facility or CLEC telephony system or over Persons who own, construct or operate a Network Facility or any such system, in each case by reason of the nature or type of the business subject to regulation and not pursuant to laws and regulations of general applicability to Persons conducting business in any such jurisdiction.

“Recovery Event”: any settlement of or payment in respect of any property or casualty insurance claim or any condemnation proceeding relating to any asset of the Company or any of its Subsidiaries.

“Register”: as defined in Section 9.6(d).

“Regulation U”: Regulation U of the Board as in effect from time to time.

“Reorganization”: with respect to any Multiemployer Plan, the condition that such plan is in reorganization within the meaning of Section 4241 of ERISA.

“Reorganization Plan”: a joint plan of reorganization under Chapter 11 of the Bankruptcy Code filed in the Chapter 11 Case.

“Reportable Event”: any of the events set forth in Section 4043(c) of ERISA, other than those events as to which the thirty day notice period is waived under subsections .27, .28, .29, .30, .31, .32, .34 or .35 of PBGC Reg. § 4043.

“Required Lenders”: at any time, the holders of more than 50% of the Total Revolving Credit Commitment then in effect or, if the Revolving Credit Commitments have been terminated, the Total Revolving Extensions of Credit then outstanding.

“Requirement of Law”: as to any Person, the Certificate of Incorporation and By-Laws or other organizational or governing documents of such Person, and any law, treaty, rule or regulation or determination of an arbitrator or a court or other

Governmental Authority, in each case applicable to or binding upon such Person or any of its Property or to which such Person or any of its Property is subject.

"Responsible Officer": the chief executive officer, chief restructuring officer, president, senior vice president, chief financial officer or vice president and corporate controller of the Company and the Borrower, but in any event, with respect to financial matters, the chief financial officer of the Company and the Borrower or senior officer fulfilling equivalent duties.

"Restricted Account": account number 2337-03164 at Bank of America, maintained in the names of one or more of the Credit Parties, which shall be subject to a first priority security interest in favor of the Administrative Agent.

"Restricted Payments": as defined in Section 6.6.

"Revolving Credit Commitment": as to any Lender, the obligation of such Lender, if any, to make Revolving Credit Loans in an aggregate principal amount not to exceed the amount set forth under the heading "Revolving Credit Commitment" opposite such Lender's name on Schedule 1 hereto, or, as the case may be, in the Assignment and Acceptance pursuant to which such Lender became a party hereto, as the same may be changed from time to time pursuant to the terms hereof.

"Revolving Credit Commitment Period": the period from and including the Closing Date to and including the Revolving Credit Termination Date.

"Revolving Credit Loans": as defined in Section 2.1.

"Revolving Credit Note": any promissory note evidencing a Lender's Revolving Credit Commitment, and Revolving Credit Loans made thereunder, substantially in the form of Exhibit F.

"Revolving Credit Percentage": as to any Lender at any time, the percentage which such Lender's Revolving Credit Commitment then constitutes of the Total Revolving Credit Commitment (or, at any time after the Revolving Credit Commitments shall have expired or terminated, the percentage which the aggregate principal amount of such Lender's Revolving Credit Loans then outstanding constitutes of the Total Revolving Extensions of Credit).

"Revolving Credit Termination Date": the earliest of (a) the Stated Maturity Date, (b) the date of termination of the Revolving Credit Commitments or the date on which existing Revolving Credit Loans are no longer permitted to remain outstanding pursuant to the terms of this Agreement (including, without limitation, Sections 2.5 or 7), (c) the date of indefeasible payment in full by Borrower of the Revolving Credit Loans and the permanent reduction of the Revolving Credit Commitment to zero Dollars (\$0), (d) thirty-five (35) days following the Petition Date if the Final Order has not been entered by the Bankruptcy Court by such date, (e) the date upon which the Interim Order expires, unless the Final Order shall have been entered and become effective by such date, (f) the date of the filing of any motion or request for



approval of a sale of all or substantially all of any Credit Party's assets pursuant to section 363 of the Bankruptcy Code, a confirmed plan of reorganization or a liquidation pursuant to Chapter 7 of the Bankruptcy Code, other than any such filing which has been approved by the Administrative Agent and the Required Lenders, and (g) the effective date of a Reorganization Plan in the Chapter 11 Case.

"Revolving Extensions of Credit": as to any Lender at any time, an amount equal to the sum of the aggregate principal amount of all Revolving Credit Loans made by such Lender then outstanding.

"SEC": the Securities and Exchange Commission (or successors thereto or an analogous Governmental Authority).

"Security Documents": the collective reference to the Guarantee and Collateral Agreement, the Mortgages and all other security documents hereafter delivered to the Administrative Agent granting a Lien on any Property of any Person to secure the obligations and liabilities of any Credit Party under any Credit Document.

"Single Employer Plan": any Plan which is covered by Title IV of ERISA, but which is not a Multiemployer Plan.

"Stated Maturity Date": the date two hundred seventy (270) days after the Petition Date (which date may be extended pursuant to Section 9.1, in which case "Stated Maturity Date" shall mean the date as so extended).

"Strategic Advisor": CXO L.L.C. (or any strategic advisor engaged by the Administrative Agent's counsel as a successor of CXO L.L.C. at any time).

"Subsidiary": as to any Person, a corporation, partnership, limited liability company or other entity of which shares of stock or other ownership interests having ordinary voting power (other than stock or such other ownership interests having such power only by reason of the happening of a contingency) to elect a majority of the board of directors or other managers of such corporation, partnership or other entity are at the time owned, or the management of which is otherwise controlled, directly or indirectly through one or more intermediaries, or both, by such Person. Unless otherwise qualified, all references to a "Subsidiary" or to "Subsidiaries" in this Agreement shall refer to a Subsidiary or Subsidiaries of the Company.

"Subsidiary Guarantor": each Subsidiary of the Company other than the Borrower.

"Substantial Transaction": any one or more of the following: (i) any Asset Sale or Recovery Event the Net Cash Proceeds of which exceeds \$1,000,000, (ii) any Deposit Return the Net Cash Proceeds of which exceeds \$500,000 or (iii) the sale of all or substantially all the assets of the Company and its consolidated Subsidiaries in one or a series of transactions.

**“Supermajority Lenders”**: at any time, the holders of more than 66 $\frac{2}{3}$ % of the Total Revolving Credit Commitment then in effect or, if the Revolving Credit Commitments have been terminated, the Total Revolving Extensions of Credit then outstanding.

**“Switch”**: any Lucent 5-ESS Switch or other comparable switch for the provision of CLEC telephony service or a packet-based switch for the provision of DSL and/or voice services.

**“Thirteen-Week Cash Forecasts”**: as defined in Section 5.1(d).

**“Total Revolving Credit Commitment”**: the aggregate of the Revolving Credit Commitments of all Lenders, as such may be reduced from time to time in accordance with Section 2.5 hereof. From the Closing Date through but not including the date of the entry of the Final Order, the Total Revolving Credit Commitment is \$2,000,000 and from the date of the entry of the Final Order through the Revolving Credit Termination Date, the amount of the Total Revolving Credit Commitment is \$5,000,000.

**“Total Revolving Extensions of Credit”**: the aggregate principal amount of all Revolving Credit Loans made by all Lenders then outstanding.

**“Transferee”**: as defined in Section 9.14.

**“Weekly Forecast”**: a weekly forecast of the Company’s and its consolidated Subsidiaries projected cash receipts, cash expenditures, cash on hand and Revolving Credit Loan balances for the ensuing calendar week, as reflected in the first projected week of the corresponding Thirteen-Week Cash Forecasts, in the form set forth on Exhibit K hereto, which shall be prepared and delivered by the Company to the Administrative Agent and the Lenders in accordance with Section 5.12.

**“Wholly Owned Subsidiary”**: as to any Person, any other Person all of the Capital Stock of which (other than directors’ qualifying shares required by law) is owned by such Person directly and/or through other Wholly Owned Subsidiaries.

**1.2 Other Definitional Provisions.** (a) Unless otherwise specified therein, all terms defined in this Agreement shall have such defined meanings when used in the other Credit Documents or any certificate or other document made or delivered pursuant hereto or thereto.

(b) As used herein and in the other Credit Documents, and any certificate or other document made or delivered pursuant hereto or thereto, accounting terms relating to the Company and its Subsidiaries not defined in Section 1.1 and accounting terms partly defined in Section 1.1, to the extent not defined, shall have the respective meanings given to them under GAAP. As used herein, “fiscal quarter” or “fiscal year” shall refer to the relevant fiscal quarter or fiscal year, respectively, of the Company.

(c) The words “hereof”, “herein” and “hereunder” and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular

provision of this Agreement, and Section, Schedule and Exhibit references are to this Agreement unless otherwise specified.

(d) The meanings given to terms defined herein shall be equally applicable to both the singular and plural forms of such terms.

## SECTION 2. AMOUNT AND TERMS OF REVOLVING CREDIT LOANS AND REVOLVING CREDIT COMMITMENTS

2.1 Revolving Credit Commitments. (a) Generally. Subject to the terms and conditions hereof, each Lender severally (and not jointly and severally) agrees to make revolving credit loans ("Revolving Credit Loans") to the Borrower from time to time during the Revolving Credit Commitment Period in an aggregate principal amount at any one time outstanding which does not exceed the amount of such Lender's Revolving Credit Commitment (and at no time shall any Lender be required to provide or be liable for any amounts exceeding such Lender's Revolving Credit Commitment); *provided, however*, that, notwithstanding anything to the contrary in this Agreement, the Borrower may only request Revolving Credit Loans during each calendar week in an aggregate amount equal to or less than the difference between (i) \$2,000,000 *less* (ii) the amount (which may be a negative number) of projected cash on-hand on the Friday of the next succeeding calendar week as set forth in the Approved Weekly Forecast for such calendar week (it being understood that an aggregate amount may be available for borrowing pursuant to the calculation set forth in this proviso of up to (x) \$2,000,000, from the Closing Date through (but not including) the date of the entry of the Final Order, and (y) \$5,000,000, on the date of the entry of the Final Order through and including the Revolving Credit Termination Date). During the Revolving Credit Commitment Period the Borrower may use the Revolving Credit Commitments by borrowing, prepaying the Revolving Credit Loans in whole or in part, and reborrowing, all in accordance with the terms and conditions hereof. The Borrower shall repay all outstanding Revolving Credit Loans on the Revolving Credit Termination Date.

(b) Procedure for Revolving Credit Borrowing. The Borrower may borrow under the Revolving Credit Commitments during the Revolving Credit Commitment Period on any Business Day; *provided* that the Borrower shall give the Administrative Agent irrevocable notice (by delivering to the Administrative Agent a Notice of Borrowing, which Notice of Borrowing must be received by the Administrative Agent prior to 11:00 a.m., New York City time, on the requested Borrowing Date, specifying (i) the amount of Revolving Credit Loans to be borrowed and (ii) the requested Borrowing Date. Each borrowing under the Revolving Credit Commitments shall be in an amount equal to a whole multiple of \$100,000 (or, if the then aggregate Available Commitments are less than \$100,000, such lesser amount); *provided, that*, subject to the timely satisfaction of the conditions precedent set forth in Section 4.1, the Borrower may borrow Revolving Credit Loans under the Revolving Credit Commitments on the Closing Date so long as the Notice of Borrowing with respect thereto is delivered to the Administrative Agent prior to 11:00 a.m., New York time, on such date; *provided further* that the amount available for borrowing on the Closing Date shall be determined under the proviso set forth in Section 2.1(a) above by reference to the projection of cash on hand as set forth in the Initial Weekly Forecast. Upon receipt of any such notice from the Borrower, the Administrative Agent shall promptly notify each Lender thereof. Each Lender will make the amount of its pro rata share of each borrowing available to the Administrative Agent for the account of the

Borrower at the Funding Office prior to 2:00 p.m., New York City time, on the Borrowing Date requested by the Borrower in funds immediately available to the Administrative Agent. Such borrowing will then be made available to the Borrower, upon its instructions, by the Administrative Agent in like funds as received by the Administrative Agent.

2.2 Repayment of Revolving Credit Loans; Evidence of Debt. (a) The Borrower hereby unconditionally promises to pay to the Administrative Agent for the account of the appropriate Lender, the then unpaid principal amount of each Revolving Credit Loan of such Lender on the Revolving Credit Termination Date (or such earlier date on which the Revolving Credit Loans become due and payable pursuant to Section 7). The Borrower hereby further agrees to pay interest on the unpaid principal amount of the Revolving Credit Loans from time to time outstanding from the date hereof until payment in full thereof at the rates per annum, and on the dates, set forth in Section 2.8.

(b) Each Lender shall maintain in accordance with its usual practice an account or accounts evidencing indebtedness of the Borrower to such Lender resulting from each Revolving Credit Loan of such Lender from time to time, including the amounts of principal and interest payable and paid to such Lender from time to time under this Agreement.

(c) The Administrative Agent, on behalf of the Borrower, shall maintain the Register pursuant to Section 9.6(d), and a subaccount therein for each Lender, in which shall be recorded (i) the amount of each Revolving Credit Loan made hereunder and any Revolving Credit Note evidencing such Revolving Credit Loan, (ii) the amount of any principal or interest due and payable or to become due and payable from the Borrower to each Lender hereunder and (iii) both the amount of any sum received by the Administrative Agent hereunder from the Borrower and each Lender's share thereof.

(d) The entries made in the Register and the accounts of each Lender maintained pursuant to Section 2.2(b) shall, to the extent permitted by applicable law, be prima facie evidence of the existence and amounts of the obligations of the Borrower therein recorded; *provided, however*, that the failure of any Lender or the Administrative Agent to maintain the Register or any such account, or any error therein, shall not in any manner affect the obligation of the Borrower to repay (with applicable interest) the Revolving Credit Loans made to the Borrower by such Lender in accordance with the terms of this Agreement.

(e) The Borrower agrees that, upon the request to the Administrative Agent by any Lender, the Borrower will execute and deliver to such Lender a promissory note of the Borrower evidencing any Revolving Credit Loans of such Lender, substantially in the form of Exhibit F, with appropriate insertions as to date and principal amount.

### 2.3 Fees.

(a) On the Closing Date, the Borrower shall pay to the Administrative Agent, for the ratable benefit of the Lenders, an upfront fee of three percent (3.00%) of the Total Revolving Credit Commitment.

(b) The Borrower shall pay to the Administrative Agent, for the ratable benefit of the Lenders, a fee equal to one-half of one percent (0.50%) per annum times the actual daily

amount by which the Total Revolving Credit Commitment exceeds the Total Revolving Extensions of Credit. The commitment fee shall accrue at all times until the Revolving Credit Termination Date, including at any time during which one or more of the conditions in Section 4 has not been met, and shall be due and payable quarterly in arrears on the last Business Day of each fiscal quarter, commencing with the first such date to occur after the Closing Date, and on the Revolving Credit Termination Date.

(c) The Borrower shall pay to the Administrative Agent, for its own account, each of the fees, in the amounts and at such times, as are set forth in the Fee Letter.

**2.4 Optional Prepayments.** The Borrower may at any time and from time to time prepay the Revolving Credit Loans, in whole or in part, without premium or penalty, upon irrevocable notice delivered to the Administrative Agent at least one Business Day prior thereto, which notice shall specify the date and amount of prepayment. Upon receipt of any such notice the Administrative Agent shall promptly notify each relevant Lender thereof. If any such notice is given, the amount specified in such notice shall be due and payable on the date specified therein, together with accrued interest to such date on the amount prepaid. Partial prepayments of Revolving Credit Loans shall be in an aggregate principal amount of \$100,000 or a whole multiple thereof.

**2.5 Mandatory Prepayments and Mandatory Deposits.** (a) If on any date the Company or any of its Subsidiaries shall receive Net Cash Proceeds from any Asset Sale or Recovery Event then, such Net Cash Proceeds shall be applied on such date to the prepayment of the Revolving Credit Loans (other than Net Cash Proceeds from a Substantial Transaction, which proceeds from a Substantial Transaction shall instead be applied in accordance with the terms of the Financing Orders).

(b) If on the Friday of any calendar week:

(i) the Company and its consolidated Subsidiaries have Excess Cash On-Hand;  
and

(ii) the Adjusted Projected Cash On-Hand for the Company and its consolidated Subsidiaries as of the Friday of the next succeeding calendar week is greater than \$5,000,000,

then the Company shall promptly repay the Revolving Credit Loans in an amount equal to the lesser of (x) the Excess Cash On-Hand and (y) the difference between (i) Adjusted Projected Cash On-Hand minus (ii) \$5,000,000 ("Adjusted Excess Cash On-Hand").

(c) If on any day the conditions requiring prepayment of the Revolving Credit Loans described in clause (a) or (b) of this Section 2.5 exist, but no Revolving Credit Loans are outstanding (or cash remains after the Total Revolving Extensions of Credit have been paid as required by clause (a) or (b) of this Section 2.5), the Company shall, and shall cause each of its Subsidiaries to, deposit all Net Cash Proceeds (other than Net Cash Proceeds from a Substantial Transaction, which proceeds from a Substantial Transaction shall instead be applied in accordance with the terms of the Financing Orders) or Adjusted Excess Cash On-Hand as of such date into the Restricted Account to be held by the Administrative Agent as cash collateral

for the Obligations and the Pre-Petition Obligations. Each Credit Party hereby acknowledges and agrees that it shall not be permitted to withdraw funds deposited into the Restricted Account unless (i) it obtains the prior written consent of the Required Lenders, which consent shall not be unreasonably withheld or delayed, and (ii) no Default or Event of Default shall have occurred and be continuing immediately prior to the withdrawal of funds.

(d) Each prepayment of the Revolving Credit Loans under this Section 2.5 shall be accompanied by accrued interest to the date of such prepayment on the amount prepaid.

(e) The Borrower shall have the right, upon not less than three Business Days' notice to the Administrative Agent, to terminate the Total Revolving Credit Commitment or, from time to time, to reduce the amount of the Total Revolving Credit Commitment; *provided* that no such termination or reduction of Total Revolving Credit Commitment shall be permitted if, after giving effect thereto and to any prepayments of the Revolving Credit Loans made on the effective date thereof, the Total Revolving Extensions of Credit would exceed the Total Revolving Credit Commitment. Any such reduction shall be in an amount equal to \$100,000, or a whole multiple thereof, and shall reduce permanently the Revolving Credit Commitments then in effect.

(f) If at any time the Total Revolving Extensions of Credit exceed the Total Revolving Credit Commitment, the Borrower shall immediately repay the outstanding Revolving Credit Loans to the extent required to eliminate such excess. If at any time the Borrower obtains advances of Revolving Credit Loans during a calendar week (each such calendar week shall begin on a Monday) which causes the aggregate net amount of all Revolving Credit Loans made during such calendar week to exceed 110% of the aggregate net amount of Revolving Credit Loans contemplated by the Approved Weekly Forecast for such calendar week, then the Borrower shall immediately (and in any case within twenty-four hours) repay the outstanding Revolving Credit Loans to the extent required to eliminate such excess.

2.6 Use of Proceeds. The proceeds of the Revolving Credit Loans shall be used (a) to make adequate protection payments required by the Financing Orders, (b) for general corporate and other ordinary course purposes of the Credit Parties to the extent such expenditures are contemplated in the applicable Approved Weekly Forecasts (including any Permitted Pre-Petition Claim Payments which are contemplated in the applicable Approved Weekly Forecasts, Critical Vendor Payments permitted by Section 6.15, adequate assurance payments permitted by Section 6.18 and tax and other regulatory payments permitted by Section 6.20, but excluding in any event the making of any Restricted Payment not specifically permitted by Section 6.6), (c) to make interest and other payments provided for in this Agreement and (d) to pay related transaction costs, fees and expenses of the Credit Parties, including professional fees. Borrower shall not be permitted, and the Company and its other Subsidiaries shall not be permitted, to use the proceeds of the Revolving Credit Loans: (i) to finance in any way any adversary proceeding, suit, arbitration, action, application, motion or other litigation of any type relating to or in connection with the Pre-Petition Agreement or any of the "Credit Documents" or in instruments entered into in connection with the Pre-Petition Agreement, including, without limitation, any challenges to the Pre-Petition Obligations, or the validity, perfection, priority, extent or enforceability of any Lien securing such claims or any payment made thereunder, (ii) to finance in any way any adversary proceeding, suit, arbitration, action, application, motion or other

litigation of any type adverse to the interests of the Administrative Agent and Lenders or their rights and remedies under this Agreement, or the other Credit Documents, (iii) to make any distribution under a Reorganization Plan in the Chapter 11 Case and (iv) to make any payment in settlement of any claim, action or proceeding, before any court, arbitrator or other governmental body without the prior written consent of the Administrative Agent.

2.7 [Intentionally Omitted.]

2.8 Interest Rates and Payment Dates. (a) The Revolving Credit Loans shall bear interest at a rate per annum equal to the Base Rate plus seven percent (7.0%).

(b) During the continuance of a Default or an Event of Default, the principal of the Revolving Credit Loans whether or not overdue shall, until such Default or Event of Default has been cured or remedied or such Default or Event of Default has been waived pursuant to the terms of this Agreement, bear interest at a rate per annum which shall be equal to two percent (2.0%) above the rate set forth in clause (a) of this Section.

(c) Interest shall be payable in arrears on each Interest Payment Date; provided that interest accruing pursuant to paragraph (b) of this Section shall be payable from time to time.

2.9 Computation of Interest and Fees. Interest, fees and commissions payable pursuant hereto shall be calculated on the basis of a 360-day year for the actual days elapsed, except that, with respect to Base Rate Loans the rate of interest on which is calculated on the basis of the Prime Rate, the interest thereon shall be calculated on the basis of a 365- (or 366-, as the case may be) day year for the actual days elapsed. Any change in the interest rate on a Revolving Credit Loan resulting from a change in the Base Rate shall become effective as of the opening of business on the day on which such change becomes effective. The Administrative Agent shall as soon as practicable notify the Borrower and the relevant Lenders of the effective date and the amount of each such change in interest rate. Each determination of an interest rate by the Administrative Agent pursuant to any provision of this Agreement shall be conclusive and binding on the Borrower and the Lenders in the absence of manifest error.

2.10 [Intentionally Omitted.]

2.11 Pro Rata Treatment and Payments. (a) Each borrowing by the Borrower from the Lenders hereunder and any reduction of the Revolving Credit Commitments of the Lenders shall be made pro rata according to the respective Revolving Credit Percentages of the relevant Lenders. Each payment in respect of principal or interest in respect of the Revolving Credit Loans, each payment in respect of fees payable hereunder shall be applied to the amounts of such obligations owing to the Lenders pro rata according to the respective amounts then due and owing to the Lenders.

(b) Each payment (including each prepayment) by the Borrower on account of principal of and interest on the Revolving Credit Loans shall be made pro rata according to the respective outstanding principal amounts of the Revolving Credit Loans then held by the Revolving Credit Lenders.

(c) All payments (including prepayments) to be made by the Borrower hereunder, whether on account of principal, interest, fees or otherwise, shall be made without setoff or counterclaim and shall be made prior to 12:00 Noon, New York City time, on the due date thereof to the Administrative Agent, for the account of the respective Lenders, at the Payment Office, in Dollars and in immediately available funds. The Administrative Agent shall distribute such payments to the respective Lenders promptly upon receipt in like funds as received. If any payment hereunder becomes due and payable on a day other than a Business Day, such payment shall be extended to the next succeeding Business Day. In the case of any extension of any payment of principal pursuant to the preceding sentence, interest thereon shall be payable at the then applicable rate during such extension.

(d) Unless the Administrative Agent shall have been notified in writing by the Borrower prior to the date of any payment being made hereunder that the Borrower will not make such payment to the Administrative Agent, the Administrative Agent may assume that the Borrower is making such payment, and the Administrative Agent may, but shall not be required to, in reliance upon such assumption, make available to the Lenders their respective pro rata shares of a corresponding amount. If such payment is not made to the Administrative Agent by the Borrower within three Business Days of such required date, the Administrative Agent shall be entitled to recover, on demand, from each Lender to which any amount which was made available pursuant to the preceding sentence, such amount with interest thereon at the rate per annum equal to the daily average Federal Funds Effective Rate. Nothing herein shall be deemed to limit the rights of the Administrative Agent or any Lender against the Borrower.

(e) Unless the Administrative Agent shall have been notified in writing by any Lender prior to a borrowing that such Lender will not make the amount that would constitute its share of such borrowing available to the Administrative Agent, the Administrative Agent may assume that such Lender is making such amount available to the Administrative Agent, and the Administrative Agent may, in reliance upon such assumption, make available to the Borrower a corresponding amount. If such amount is not made available to the Administrative Agent by the required time on the Borrowing Date therefor, such Lender shall pay to the Administrative Agent, on demand, such amount with interest thereon at a rate equal to the daily average Federal Funds Effective Rate for the period until such Lender makes such amount immediately available to the Administrative Agent. A certificate of the Administrative Agent submitted to any Lender with respect to any amounts owing under this paragraph shall be conclusive in the absence of manifest error. If such Lender's share of such borrowing is not made available to the Administrative Agent by such Lender within three Business Days of such Borrowing Date, the Administrative Agent shall also be entitled to recover such amount with interest thereon at the rate per annum applicable to Base Rate Loans, on demand, from the Borrower.

## 2.12 Capital Adequacy.

(a) If any Lender shall have determined that the adoption of or any change in any Requirement of Law regarding capital adequacy or in the interpretation or application thereof or compliance by such Lender or any corporation controlling such Lender with any request or directive regarding capital adequacy (whether or not having the force of law) from any Governmental Authority, in each case occurring or made subsequent to the date hereof, shall have the effect of reducing the rate of return on such Lender's or such corporation's capital as a



consequence of its obligations hereunder, to a level below that which such Lender or such corporation could have achieved but for such adoption, change or compliance (taking into consideration such Lender's or such corporation's policies with respect to capital adequacy) by an amount deemed by such Lender to be material, then from time to time, after submission by such Lender to the Borrower (with a copy to the Administrative Agent) of a written request therefor, the Borrower shall pay to such Lender such additional amount or amounts as will compensate such Lender for such reduction; *provided* that the Borrower shall not be required to compensate a Lender pursuant to this paragraph for any increased costs or reductions incurred more than 120 days prior to the date that such Lender notifies the Borrower of the Requirement of Law giving rise to such increased costs or reductions and of such Lender's intention to claim compensation therefor; and *provided, further*, that, if the circumstances giving rise to such claim have a retroactive effect, then such 120 day period shall be extended to include the period of such retroactive effect.

(b) A certificate as to any additional amounts payable pursuant to this Section submitted by any Lender to the Borrower (with a copy to the Administrative Agent) shall be conclusive in the absence of manifest error. The obligations of the Borrower pursuant to this Section shall survive the termination of this Agreement and the payment of the Revolving Credit Loans and all other amounts payable hereunder.

2.13 Taxes. (a) All payments made by the Borrower under this Agreement shall be made free and clear of, and without deduction or withholding for or on account of, any present or future income, stamp or other taxes, levies, imposts, duties, charges, fees, deductions or withholdings, now or hereafter imposed, levied, collected, withheld or assessed by any Governmental Authority, excluding net income taxes and franchise taxes (imposed in lieu of net income taxes) imposed on the Administrative Agent or any Lender as a result of a present or former connection between the Administrative Agent or such Lender and the jurisdiction of the Governmental Authority imposing such tax or any political subdivision or taxing authority thereof or therein (other than any such connection arising solely from the Administrative Agent or such Lender having executed, delivered or performed its obligations or received a payment under, or enforced, this Agreement or any other Credit Document). If any such non-excluded taxes, levies, imposts, duties, charges, fees, deductions or withholdings ("Non-Excluded Taxes") or Other Taxes are required to be withheld from any amounts payable to the Administrative Agent or any Lender hereunder, the amounts so payable to the Administrative Agent or such Lender shall be increased to the extent necessary to yield to the Administrative Agent or such Lender (after payment of all Non-Excluded Taxes and Other Taxes) interest or any such other amounts payable hereunder at the rates or in the amounts specified in this Agreement; *provided, however*, that the Borrower shall not be required to increase any such amounts payable to any Lender with respect to any Non-Excluded Taxes (i) that are attributable to such Lender's failure to comply with the requirements of paragraph (d) or (e) of this Section or (ii) that are United States withholding taxes imposed on amounts payable to such Lender at the time the Lender becomes a party to this Agreement, except to the extent that such Lender's assignor (if any) was entitled, at the time of assignment, to receive additional amounts from the Borrower with respect to such Non-Excluded Taxes pursuant to Section 2.15(a).

(b) In addition, the Borrower shall pay any Other Taxes to the relevant Governmental Authority in accordance with applicable law.

(c) Whenever any Non-Excluded Taxes or Other Taxes are payable by the Borrower, as promptly as possible thereafter the Borrower shall send to the Administrative Agent for the account of the Administrative Agent or Lender, as the case may be, a certified copy of an original official receipt received by the Borrower showing payment thereof. If the Borrower fails to pay any Non-Excluded Taxes or Other Taxes when due to the appropriate taxing authority or fails to remit to the Administrative Agent the required receipts or other required documentary evidence, the Borrower shall indemnify the Administrative Agent and the Lenders for any incremental taxes, interest or penalties that may become payable by the Administrative Agent or any Lender as a result of any such failure. The agreements in this Section shall survive the termination of this Agreement and the payment of the Revolving Credit Loans and all other amounts payable hereunder.

(d) Each Lender (or Transferee) that is not a U.S. person as defined in Section 7701(a)(30) of the Code (a “Non-U.S. Lender”) shall deliver to the Borrower and the Administrative Agent (or, in the case of a Participant, to the Lender from which the related participation shall have been purchased) two copies of either U.S. Internal Revenue Service Form W-8 BEN or Form W-8 ECI, or, in the case of a Non-U.S. Lender claiming exemption from U.S. federal withholding tax under Section 871(h) or 881(c) of the Code with respect to payments of “portfolio interest” a statement substantially in the form of Exhibit G and a Form W-8 BEN, or any subsequent versions thereof or successors thereto properly completed and duly executed by such Non-U.S. Lender claiming complete exemption from, or a reduced rate of, U.S. federal withholding tax on all payments by the Borrower under this Agreement and the other Credit Documents. Such forms shall be delivered by each Non-U.S. Lender on or before the date it becomes a party to this Agreement (or, in the case of any Participant, on or before the date such Participant purchases the related participation). In addition, each Non-U.S. Lender shall deliver such forms promptly upon the obsolescence or invalidity of any form previously delivered by such Non-U.S. Lender. Each Non-U.S. Lender shall promptly notify the Borrower at any time it determines that it is no longer in a position to provide any previously delivered certificate to the Borrower (or any other form of certification adopted by the U.S. taxing authorities for such purpose). Notwithstanding any other provision of this paragraph, a Non-U.S. Lender shall not be required to deliver any form pursuant to this paragraph that such Non-U.S. Lender is not legally able to deliver.

(e) A Lender that is entitled to an exemption from or reduction of non-U.S. withholding tax, with respect to payments under this Agreement shall deliver to the Borrower (with a copy to the Administrative Agent), at the time or times reasonably requested by the Borrower, such properly completed and executed documentation prescribed by applicable law as will permit such payments to be made without withholding or at a reduced rate; *provided* that such Lender is legally entitled to complete, execute and deliver such documentation and in such Lender’s reasonable judgment such completion, execution or submission would not materially prejudice the legal position of such Lender.

2.14 [Intentionally Omitted.]

2.15 [Intentionally Omitted.]

2.16 Change of Lending Office. Each Lender agrees that, upon the occurrence of any event giving rise to the operation of Sections 2.12 and 2.13 with respect to such Lender, it will, if requested by the Borrower, use reasonable efforts (subject to overall policy considerations of such Lender) to designate another lending office for any Revolving Credit Loans affected by such event with the object of avoiding the consequences of such event; *provided* that such designation is made on terms that, in the sole judgment of such Lender, cause such Lender and its lending office(s) to suffer no economic, legal or regulatory disadvantage, and *provided, further*, that nothing in this Section shall affect or postpone any of the obligations of any Credit Party or the rights of any Lender pursuant to Section Sections 2.12 and 2.13.

2.17 Superpriority Nature of Obligations and Administrative Agent's Liens.

(a) After entry of the Interim Order and pursuant to and to the extent provided in the Financing Orders, the Liens and security interests granted to the Administrative Agent on the Collateral owned by the Borrower and the Guarantors shall have the priority and senior secured status afforded by sections 364(c)(2) and 364(d) of the Bankruptcy Code to the extent provided and as more fully set forth in the Financing Orders, subject as to priority, only to the Carve-Out and (i) any valid, perfected, enforceable and non-avoidable Liens in existence as of the Petition Date (other than the Liens securing the Pre-Petition Obligations), (ii) Liens permitted under Section 6.3(h) and (iii) Post-Petition Liens permitted under Section 6.3.

(b) After the entry of the Interim Order, all Obligations shall constitute administrative expenses of the Borrower and the Guarantors in the Chapter 11 Case, with administrative superpriority and senior secured status under section 364(c)(1) of the Bankruptcy Code and with priority over all other costs and expenses of the kinds specified in, or ordered pursuant to, sections 105, 326, 330, 331, 503(b), 506(c), 507(a), 507(b), 726 or any other provision of the Bankruptcy Code, subject, as to priority, to the Carve-Out.

2.18 Payment of Obligations. Subject to the provisions of Section 7, upon the maturity (whether by acceleration or otherwise) of any of the Obligations under this Agreement or any of the other Credit Documents, Lenders shall be entitled to immediate payment of such Obligations without further application to or order of the Bankruptcy Court.

2.19 No Discharge; Survival of Claims. The Borrower and the Guarantors agree that (a) the Obligations hereunder shall not be discharged by the entry of an order confirming a plan of reorganization in the Chapter 11 Case (and Borrower and Guarantors, pursuant to section 1141(d)(4) of the Bankruptcy Code, hereby waive any such discharge) and (b) the superpriority administrative claim granted to the Administrative Agent and Lenders pursuant to the Financing Orders and described in Section 2.17 and the Liens granted to the Administrative Agent pursuant to the Financing Orders and described in Section 2.17 shall not be affected in any manner by the entry of an order confirming a plan of reorganization in the Chapter 11 Case.

SECTION 3. REPRESENTATIONS AND WARRANTIES

To induce the Administrative Agent and the Lenders to enter into this Agreement and to make the Revolving Credit Loans, the Company and the Borrower hereby jointly and severally represent and warrant to the Administrative Agent and each Lender that:

**3.1 Financial Condition.** (a) The audited consolidated balance sheets of the Company and its consolidated Subsidiaries as of December 31, 2004 and the related consolidated statements of income and of cash flows for the fiscal years ended on such dates, reported on by and accompanied by a report from KPMG LLP present fairly the consolidated financial condition of the Company and its consolidated Subsidiaries as of each such date, and the consolidated results of its operations and its consolidated cash flows for the respective fiscal years then ended. The unaudited consolidated balance sheets of the Company and its consolidated Subsidiaries as of June 30, 2005, and the related unaudited consolidated statements of income and cash flows for the three-month period ended on such date, present fairly the consolidated financial condition of the Company and its consolidated Subsidiaries as of each such date, and the consolidated results of its operations and its consolidated cash flows for the three-month period then ended (subject to normal year-end audit adjustments). All such financial statements, including the related schedules and notes thereto, have been prepared in accordance with GAAP applied consistently throughout the periods involved (except as approved by the aforementioned firm of accountants and disclosed therein). The Company and its Subsidiaries do not have any material Guarantee Obligations, contingent liabilities and liabilities for taxes, or any material long-term leases or unusual forward or long-term commitments, including, without limitation, any interest rate or foreign currency swap or exchange transaction or other obligation in respect of derivatives, which are not reflected in the most recent financial statements referred to in this paragraph or set forth on Schedule 3.1(a). During the period from December 31, 2004 to and including the date hereof there has been no Disposition by the Company or any of its Subsidiaries of any material part of its business or Property.

**3.2 Material Adverse Effect.** Since the Petition Date, no event has occurred, that alone or together with other events, could reasonably be expected to have a Material Adverse Effect.

**3.3 Corporate Existence; Compliance with Law.** The Company and each of its Subsidiaries (a) is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization, (b) subject to the receipt of any necessary approvals of the Bankruptcy Court, has the corporate power and authority, and the legal right, to own and operate its Property, to lease the Property it operates as lessee and to conduct the business in which it is currently engaged, (c) is duly qualified as a foreign corporation and in good standing under the laws of each jurisdiction where its ownership, lease or operation of Property or the conduct of its business requires such qualification and (d) is in compliance with all Requirements of Law (including, without limitation, the obtaining and maintaining of all authorizations, licenses and permits from any Governmental Authority that are required or necessary for the conduct of the business of the Company and its Subsidiaries), except, in the case of clauses (c) and (d), to the extent that the failure to be so qualified or to comply therewith would not, in the aggregate, reasonably be expected to have a Material Adverse Effect.

**3.4 Corporate Power; Authorization; Enforceable Obligations.** Upon the entry by the Bankruptcy Court of the Interim Order (or the Final Order, when applicable), (a) each Credit Party has the corporate power and authority, and the legal right, to make, deliver and perform the Credit Documents to which it is a party and, in the case of the Borrower, to borrow hereunder, (b) each Credit Party has taken all necessary corporate action to authorize the execution, delivery



and performance of the Credit Documents to which it is a party and, in the case of the Borrower, to authorize the borrowings on the terms and conditions of this Agreement, and (c) no consent or authorization of, filing with, notice to or other act by or in respect of, any Governmental Authority or any other Person is required in connection with the borrowings hereunder or with the execution, delivery, performance, validity or enforceability of this Agreement or any of the Credit Documents, *except* (i) consents, authorizations, filings and notices described in Schedule 3.4, which consents, authorizations, filings and notices have been obtained or made and are in full force and effect and (ii) the filings referred to in Section 3.18. Each Credit Document has been duly executed and delivered on behalf of each Credit Party party thereto. Subject to the entry of the Interim Order (and the Final Order, when applicable), this Agreement constitutes, and each other Credit Document upon execution will constitute, a legal, valid and binding obligation of each Credit Party party thereto, enforceable against each such Credit Party in accordance with its terms.

3.5 No Legal Bar. Upon the entry by the Bankruptcy Court of the Interim Order (or the Final Order, when applicable), the execution, delivery and performance of this Agreement and the other Credit Documents, the Revolving Credit Loans and the use of the Revolving Credit Loans will not violate any Requirement of Law or any Contractual Obligation of the Company or any of its Subsidiaries and will not result in, or require, the creation or imposition of any Lien on any of their respective properties or revenues pursuant to any Requirement of Law or any such Contractual Obligation (other than the Liens created by the Security Documents). As of the Closing Date, no Requirement of Law or Contractual Obligation applicable to the Company or any of its Subsidiaries would reasonably be expected to have a Material Adverse Effect.

3.6 No Material Litigation. Other than the Chapter 11 Case, no litigation, investigation or proceeding of or before any arbitrator or Governmental Authority is pending or, to the knowledge of the Company or the Borrower, threatened by or against the Company or any of its Subsidiaries or against any of their respective properties or revenues (a) with respect to any of the Credit Documents or any of the transactions contemplated hereby or thereby or (b) that would reasonably be expected, individually or in the aggregate, to have a Material Adverse Effect.

3.7 No Default. No Default or Event of Default has occurred and is continuing.

3.8 Ownership of Property; Liens. Each of the Company and its Subsidiaries has title in fee simple to, or a valid leasehold interest in, all its real property, and good title to, or a valid leasehold interest in, all its other Property, and none of such Property is subject to any Lien except as permitted by Section 6.3, except for such defects in title which, individually or in the aggregate, would not reasonably be expected to have a Material Adverse Effect.

3.9 Intellectual Property. Each of the Company and its Subsidiaries owns, or is licensed to use, all Intellectual Property necessary for the conduct of its business as currently conducted. No material claim has been asserted and is pending by any Person challenging or questioning the use of any Intellectual Property or the validity or effectiveness of any Intellectual Property, nor does the Company or the Borrower know of any valid basis for any such claim. The use of Intellectual Property by the Company and its Subsidiaries does not infringe on the rights of any Person in any material respect.

3.10 Taxes. Each of the Company and its Subsidiaries has filed (except to the extent the Administrative Agent otherwise consents (such consent not to be unreasonably withheld) with respect to such returns to be filed Post-Petition) or caused to be filed all Federal, state and other material tax returns which are required to be filed and has paid all Post-Petition taxes shown to be due and payable on said returns or on any assessments made against it or any of its Property and all other taxes, fees or other charges imposed on it or any of its Property by any Governmental Authority (other than (x) those that arose Pre-Petition to the extent subject to the automatic stay and (y) any others, the amount or validity of which are currently being contested in good faith by appropriate proceedings and with respect to which any reserves necessary in accordance with GAAP have been provided on the books of the Company or its Subsidiaries, as the case may be); except as set forth on Schedule 6.3(g), no material tax Lien has been filed, and, to the knowledge of the Company and the Borrower, no material claim is being asserted, with respect to any such tax, fee or other charge.

3.11 Federal Regulations. No part of the proceeds of any Revolving Credit Loans will be used for "purchasing" or "carrying" any "margin stock" within the respective meanings of each of the quoted terms under Regulation U as now and from time to time hereafter in effect or for any purpose which violates the provisions of the Regulations of the Board.

3.12 ERISA. During the five-year period prior to the date on which this representation is made or deemed made with respect to any Plan, except as would not reasonably be expected to have a Material Adverse Effect, (i) none of (x) a Reportable Event, (y) an "accumulated funding deficiency" (within the meaning of Section 412 of the Code or Section 302 of ERISA) or (z) a termination of a Single Employer Plan has occurred, (ii) each Plan has complied in all material respects with the applicable provisions of ERISA and the Code and (iii) no Lien in favor of the PBGC or a Plan has arisen. The present value of all accrued benefits under each Single Employer Plan (based on those assumptions used to fund such Plans) did not, as of the last annual valuation date prior to the date on which this representation is made or deemed made, exceed the value of the assets of such Plan allocable to such accrued benefits by an amount that would not reasonably be expected to have a Material Adverse Effect. Neither the Company nor any Commonly Controlled Entity has had a complete or partial withdrawal from any Multiemployer Plan which has resulted or would reasonably be expected to result in a material liability under ERISA, and neither the Company nor any Commonly Controlled Entity would become subject to any liability under ERISA that would reasonably be expected to have a Material Adverse Effect if the Company or any such Commonly Controlled Entity were to withdraw completely from all Multiemployer Plans as of the valuation date most closely preceding the date on which this representation is made or deemed made. No such Multiemployer Plan is in Reorganization or Insolvent.

3.13 Investment Company Act; Public Utility Holding Company Act; Other Regulations. No Credit Party is (a) an "investment company" as defined in, or subject to regulation under, the Investment Company Act of 1940, as amended or (b) a "holding company" as defined in, or subject to regulation under, the Public Utility Holding Company Act of 1935, as amended.

3.14 Capitalization; Subsidiaries; Certain Investments. (a) As of the Closing Date, (i) Part A of Schedule 3.14 sets forth a complete and correct list of the authorized Capital

Stock of the Company, together with the number of such shares that are duly and validly issued and outstanding, and each of which shares is fully paid and nonassessable; (ii) the Company has no outstanding Capital Stock other than (x) that which has been duly and validly issued and outstanding, fully paid and nonassessable and (y) the Incentive Plan Shares; and (iii) Part B of Schedule 3.14 contains a complete and correct list of each of record and (to the extent known) beneficial owner of issued and outstanding Capital Stock of the Company, together with, for each such owner, the percentage of such Capital Stock owned by them.

(b) Set forth on Part C of Schedule 3.14 is a complete and correct list of all of the direct and indirect Subsidiaries of the Company as of the Closing Date, together with, for each such Subsidiary, the jurisdiction of incorporation of each such Subsidiary and the percentage of each class of Capital Stock owned by any Credit Party.

(c) Set forth on Part D of Schedule 3.14 is a complete and correct list of all Investments (other than Investments disclosed in Part C of Schedule 3.14 and other than Investments of the types referred to in Sections 6.7(a), (b), (c), (d) and (f)) held by the Company or any of its Subsidiaries in any Person as of the Closing Date, together with, for each such Investment, the identity of the Person or Persons holding such Investment and the nature of such Investment.

3.15 Purpose of Revolving Credit Loans. The proceeds of the Revolving Credit Loans have been and shall be used solely for the purposes described in the first two sentences of Section 2.6.

3.16 Environmental Matters. Other than exceptions to any of the following that would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect:

(a) The Company and its Subsidiaries: (i) are, and at all times have been, in compliance with all applicable Environmental Laws; (ii) hold all Environmental Permits (each of which is in full force and effect) required for any of their current or intended operations or for any property owned, leased, or otherwise operated by any of them; (iii) are, and at all times have been, in compliance with all of their Environmental Permits; and (iv) reasonably believe that: each of their Environmental Permits will be timely renewed and complied with, without material expense; any additional Environmental Permits that may be required of any of them will be timely obtained and complied with, without material expense; and compliance with any Environmental Law that is or is expected to become applicable to any of them will be timely attained and maintained, without material expense.

(b) Materials of Environmental Concern are not present at, on, under, in, or about any real property now or formerly owned, leased or operated by the Company or any of its Subsidiaries, or at any other location (including, without limitation, any location to which Materials of Environmental Concern have been sent for re-use or recycling or for treatment, storage, or disposal) which would reasonably be expected to (i) give rise to liability of the Company or any of its Subsidiaries under any applicable Environmental Law or otherwise result in costs to the Company or any of its Subsidiaries, or (ii) interfere with the Company's or any of

its Subsidiaries' continued operations, or (iii) impair the fair saleable value of any real property owned or leased by the Company or any of its Subsidiaries.

(c) There is no judicial, administrative, or arbitral proceeding (including any notice of violation or alleged violation) under or relating to any Environmental Law to which the Company or any of its Subsidiaries is, or to the knowledge of the Company or any of its Subsidiaries will be, named as a party that is pending or, to the knowledge of the Company or any of its Subsidiaries, threatened.

(d) Neither the Company nor any of its Subsidiaries has received any written request for information, or been notified that it is a potentially responsible party under or relating to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 or any similar Environmental Law, or with respect to any Materials of Environmental Concern.

(e) Neither the Company nor any of its Subsidiaries has entered into or agreed to any consent decree, order, or settlement or other agreement, or is subject to any judgment, decree, or order or other agreement, in any judicial, administrative, arbitral, or other forum for dispute resolution, relating to compliance with or liability under any Environmental Law.

(f) Neither the Company nor any of its Subsidiaries has assumed or retained, by contract or operation of law, any liabilities of any kind, fixed or contingent, known or unknown, under any Environmental Law, relating to noncompliance with any Environmental Law or with respect to any Material of Environmental Concern.

3.17 Accuracy of Information, etc. No statement or information contained in this Agreement, any other Credit Document or any other document, certificate or written statement (including, without limitation, any Disclosure Statement) furnished to the Administrative Agent or the Lenders or any of them, by or on behalf of any Credit Party for use in connection with the transactions contemplated by this Agreement or the other Credit Documents, contained, as of the date such statement, information, document or certificate was so furnished and when taken as a whole with other such statements and information theretofore so furnished, any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements contained herein or therein not misleading. The projections and *pro forma* financial information contained in the materials referenced above are based upon good faith estimates and assumptions believed by management of the Company to be reasonable at the time made, it being recognized by the Lenders that such financial information as it relates to future events is not to be viewed as fact and that actual results during the period or periods covered by such financial information may differ from the projected results set forth therein by a material amount. There is no fact known to any Credit Party that would reasonably be expected to have a Material Adverse Effect that has not been expressly disclosed herein, in the other Credit Documents or in any other documents, certificates and statements furnished to the Administrative Agent and the Lenders for use in connection with the transactions contemplated hereby and by the other Credit Documents.

3.18 Security Documents. Subject to the entry of the Financing Orders, the Guarantee and Collateral Agreement is effective to create in favor of the Administrative Agent, for the benefit of the Lenders, a legal, valid and enforceable security interest in the Collateral



described therein and proceeds thereof. To the extent provided in the Financing Orders, the Liens contemplated by the Guarantee and Collateral Agreement constitute fully perfected first priority Liens on, and security interests in, all right, title and interest of the Credit Parties in the Collateral and the proceeds thereof, as security for the Obligations (as defined in the Guarantee and Collateral Agreement), prior and superior in right to any other Person (subject, as to priority and, in the case of Collateral other than Pledged Stock, Liens permitted by Section 6.3).

3.19 Cash Management System. The cash management system of the Company is accurately described on Exhibit L hereto (which includes the Restricted Account) (the “Cash Management System”), and the Restricted Account is an active account maintained by the Borrower.

3.20 Real Property. Set forth on Schedule 3.20 is complete and correct list, as of the Closing Date, of all of the real property interests held by the Company and its Subsidiaries, indicating in each case whether the respective property is owned or leased, the identity of the owner or lessee and the location of the respective property, and the mortgagees, if any.

3.21 Reorganization Matters.

(a) The Chapter 11 Case was commenced on the Petition Date in accordance with applicable law and proper notice thereof and the proper notice for the hearing for the approval of the Interim Order has been given and proper notice for the hearing for the approval of the Final Order will be given.

(b) After the entry of the Interim Order, the Obligations will constitute allowed administrative expense claims in the Chapter 11 Case having priority over all other administrative expense claims and unsecured claims against the Credit Parties now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expense claims of the kind specified in sections 105, 326, 330, 331, 503(b), 506(c), 507(a), 507(b), 546(c), 726 or any other provision of the Bankruptcy Code, subject, as to priority only, to the Carve-Out.

(c) After the entry of the Interim Order and pursuant to and to the extent provided in the Financing Orders, the Obligations will be secured by a valid and perfected first priority Lien on all of the Collateral, subject only, as to priority, to (i) the Carve-Out, (ii) any valid, perfected, enforceable and non-avoidable Liens in existence as of the Petition Date (other than the Liens securing the Pre-Petition Obligations), (iii) Liens permitted under Section 6.3(h) and (iv) Post-Petition Liens permitted under Section 6.3.

(d) [Intentionally omitted.]

(e) Notwithstanding the provisions of section 362 of the Bankruptcy Code, upon the maturity (whether such maturity occurs because of the Revolving Credit Termination Date, by acceleration or otherwise) of any of the Obligations, the Administrative Agent and the Lenders shall be entitled to immediate payment of such Obligations and to enforce the remedies provided for hereunder, without further application to or order by the Bankruptcy Court, except as set forth in the Financing Orders.

3.22 Weekly Forecast. Each Weekly Forecast delivered pursuant to Section 5.12 and each Thirteen-Week Cash Forecast delivered pursuant to Section 5.1(d) reasonably presents, when delivered, in all material respects, on a pro forma basis, the projected financial operations of the Company and its Subsidiaries for the time period set forth therein (including any expenses which any Responsible Officer of the Company, the Borrower or any of their Subsidiaries has actual knowledge of and which have not yet been satisfied in full), such projections, in the judgment of the officers of the Company, are reasonably achievable based upon reasonable assumptions and other information available to the Company as of the date of the delivery thereof. The Company hereby confirms and agrees that it is solely responsible for the preparation, production and implementation of the Weekly Forecast and the Thirteen-Week Cash Forecast and the information contained therein and that neither the Administrative Agent, the Lenders nor any of their respective Affiliates, employees, agents, attorneys or other third parties (a) had any involvement in or responsibility for the preparation, production or implementation thereof or (b) shall be deemed to have made any representation or warranty in connection therewith.

#### SECTION 4. CONDITIONS PRECEDENT

4.1 Effectiveness. The effectiveness of this Agreement is subject to the condition precedent that the Administrative Agent shall have received evidence satisfactory to it that the Company and the Borrower shall have complied with Section 5.10.

4.2 Conditions to Each Extension of Credit. The agreement of each Lender to make any extension of credit requested to be made by it on any date (including, without limitation, its initial extension of credit) is subject to the satisfaction of the following conditions precedent:

(a) Representations and Warranties. Each of the representations and warranties made by any Credit Party in or pursuant to the Credit Documents shall be true and correct on and as of such date as if made on and as of such date (or if any such representation or warranty is expressly stated to have been made as of a specific date, as of such specific date).

(b) No Default. No Default or Event of Default shall have occurred and be continuing on such date or after giving effect to the extensions of credit requested to be made on such date.

(c) Outstanding Obligations. The extension of credit requested shall not cause the aggregate outstanding amount of the Revolving Credit Loans to exceed the amount then authorized by the Financing Orders.

(d) Fees and Expenses. The Borrower shall have paid to the Administrative Agent all accrued and unpaid fees due and payable under and pursuant to this Agreement and the Financing Orders and reasonable expenses of counsel to the Administrative Agent as to which invoices have been issued.

(e) Approved Weekly Forecast and Monthly Reporting Certificate. The Weekly Forecast for the week in which such extension of credit is requested shall have been delivered by

the Borrower and approved by the Required Lenders in accordance with the terms of Section 5.12 and the Monthly Reporting Certificate delivered in accordance with Section 5.1(e) for the month in which such extension of credit is requested shall have been delivered by the Company and the Borrower.

(f) Interim Order. Entry by the Bankruptcy Court of the Interim Order, by no later than five (5) Business Days after the Petition Date, in form and substance satisfactory to the Administrative Agent, approving the transactions contemplated hereby and granting a first priority perfected security interest in the Collateral subject, as to priority, to the Carve-Out.

Each borrowing by the Borrower hereunder shall constitute a representation and warranty by the Borrower as of the date of such extension of credit that the conditions contained in this Section have been satisfied.

## SECTION 5. AFFIRMATIVE COVENANTS

The Company and the Borrower hereby jointly and severally agree that, so long as the Revolving Credit Commitments remain in effect or any Revolving Credit Loan or other amount is owing to any Lender or the Administrative Agent hereunder, each of the Company and the Borrower shall and shall cause each of its Subsidiaries to:

5.1 Financial Statements. Furnish to the Administrative Agent and each Lender:

(a) as soon as available, but in any event within 90 days after the end of each subsequent fiscal year, a copy of the audited consolidated balance sheet of the Company and its consolidated Subsidiaries as of the end of such year and the related audited consolidated statements of income and of cash flows for such year, setting forth in each case in comparative form the figures for the previous year by KPMG LLP or other independent certified public accountants of nationally recognized standing, and contemporaneously with the delivery thereof, copies of all accountants' management letters, if any, delivered to Company or any of its Subsidiaries;

(b) (i) as soon as available, but in any event not later than 45 days after the end of each of the first three quarterly periods of each fiscal year (or in the case of the fiscal quarter ending June 30, 2005, not later than September 9, 2005), the unaudited consolidated balance sheet of the Company and its consolidated Subsidiaries as of the end of such quarter and the related unaudited consolidated statements of income and of cash flows for such quarter and the portion of the fiscal year through the end of such quarter, setting forth in each case in comparative form the figures for the previous year, and in each case in the form delivered to KPMG LLP or another independent certified public accountant of nationally recognized standing for such auditor's review, and (ii) as soon as available, but in any event not later than 75 days after the end of each of the first three quarterly periods of each fiscal year (commencing with the fiscal quarter ending September 30, 2005), the consolidated balance sheet of the Company and its consolidated Subsidiaries as of the end of such quarter and the related consolidated statements of income and of cash flows for such quarter and the portion of the fiscal year through the end of such quarter, setting forth in each case in comparative form the figures for the previous year, certified by a Responsible Officer as being fairly stated in all material respects (subject to normal

year-end audit adjustments), in each case which have been reviewed by KPMG LLP or another independent certified public accountant of nationally recognized standing;

(c) as soon as available and in any event within 30 days after the end of each calendar month, the unaudited consolidated balance sheet of the Company and its consolidated Subsidiaries as of the end of such month and the related unaudited consolidated statements of income and of cash flows for such month and the portion of the fiscal year through the end of such month, accompanied by operational data and management discussion and analysis (in narrative form) of such data as is required by the Administrative Agent, setting forth in each case in comparative form the figures for the previous month, certified by a Responsible Officer as being fairly stated in all material respects (subject to normal year-end audit adjustments);

(d) no later than the 3<sup>rd</sup> Business Day after the end of each completed calendar week, (i) cash flow projections for the Company and its consolidated Subsidiaries for the ensuing six-month period (the first 13 calendar weeks set forth in such cash flow projections shall be called the “Thirteen-Week Cash Forecast”), which cash flow projections shall include, on a weekly basis, the following, prepared in such format and detail as is reasonably required by the Administrative Agent or its financial advisors (it being understood and agreed by the Administrative Agent and such financial advisors that the format and level of detail of any such forecasts which are in substantially the same format and contain substantially the same level of detail as the Initial Thirteen-Week Cash Forecast shall be deemed to be satisfactory to the Administrative Agent and such financial advisors as to such form and level of detail): a statement of cash receipts, cash expenditures and cash on-hand for such completed calendar week and for such historical period as is reasonably required by the Administrative Agent or its financial advisors, in each case in comparative form against the Thirteen-Week Cash Forecast for the corresponding period required to be delivered under this clause (d) and (ii) a detailed aging of the accounts payable of the Company and its consolidated Subsidiaries prepared in such format and detail as is reasonably required by the Administrative Agent or its financial advisors, together with a summary specifying the name and balance due for each relevant payee or customer of the Company or any Subsidiary. All agings of accounts payable required hereunder may be prepared using the Salomon general ledger of the Company and its consolidated Subsidiaries; and

(e) on or before the Closing Date, the Company, shall deliver to the Administrative Agent and the Lenders the Thirteen-Week Cash Forecast for the thirteen-week period commencing on August 22, 2005 through and including November 20, 2005, which forecast shall be in form and substance acceptable to the Administrative Agent and the Required Lenders (the “Initial Thirteen-Week Cash Forecast”). Thereafter, on or before the date three Business Days prior to the last Business Day of each calendar month (with the first such delivery being required on or before August 29, 2005), the Company shall deliver a Thirteen-Week Cash Forecast for the thirteen-week period commencing on the Monday of the calendar week in which the first day of next ensuing calendar month falls and the Company shall obtain the approval of the Required Lenders of the form (it being understood and agreed by the Administrative Agent and such financial advisors that the format and level of detail of any such forecasts which are in substantially the same format and contain substantially the same level of detail as the Initial Thirteen-Week Cash Forecast shall be deemed to be satisfactory to the Administrative Agent and such financial advisors as to such format and level of detail) and substance of such Thirteen-

Week Cash Forecast within two Business Days of the delivery thereof (upon such approval, each such Thirteen-Week Cash Forecast shall be referred to herein as an “Approved Thirteen-Week Cash Forecast”; the Initial Thirteen-Week Cash Forecast shall constitute an Approved Thirteen-Week Cash Forecast); and

(f) within 7 days of the Closing Date and, thereafter within 3 Business Days of the last day of each calendar month, the Company and the Borrower shall deliver to the Administrative Agent a Monthly Reporting Certificate reasonably satisfactory to the Agent and in the form attached hereto as Exhibit M accompanied by such supporting detail and documentation as shall be requested by Administrative Agent in its reasonable discretion;

All such financial statements shall be complete and correct in all material respects and shall be prepared in reasonable detail and in accordance with GAAP applied consistently throughout the periods reflected therein and with the periods reflected in the financial statements referred to in Section 5.1(b) (except as approved by such accountants or officer, as the case may be, and disclosed therein).

5.2 Certificates; Other Information. Furnish to the Administrative Agent and each Lender, or, in the case of clause (g), to the relevant Lender:

(a) promptly after the same is available, copies of all pleadings, motions, applications or other documents filed by or on behalf of any Credit Party in the Chapter 11 Case with the Bankruptcy Court or delivered to the United States Trustee;

(b) concurrently with the delivery of any financial statements pursuant to Section 5.1, (i) a certificate of a Responsible Officer stating that, to the best of each such Responsible Officer's knowledge, each Credit Party during such period has observed or performed all of its covenants and other agreements, and satisfied every condition, contained in this Agreement and the other Credit Documents to which it is a party to be observed, performed or satisfied by it, and that such Responsible Officer has obtained no knowledge of any Default or Event of Default except as specified in such certificate, (ii) in the case of quarterly or annual financial statements, a Compliance Certificate certified as of the last day of the fiscal quarter or fiscal year, as the case may be (which Compliance Certificate shall contain a breakdown of the number of Lines by type of Line), and (iii) upon the request of the Administrative Agent, a listing of any county or state within the United States where any Credit Party keeps inventory or equipment and of any Intellectual Property acquired by any Credit Party since the date of the most recent list delivered pursuant to this clause (iii) (to the extent such information has not been previously disclosed to the Administrative Agent);

(c) [Intentionally Omitted.]

(d) (i) concurrently with the delivery of any financial statements pursuant to Section 5.1(a), a narrative discussion and analysis of the financial condition and results of operations of the Company and its Subsidiaries for such fiscal year and (ii) concurrently with the delivery of any financial statements pursuant to Section 5.1(b), a narrative discussion and analysis of the financial condition and results of operations of the Company and its Subsidiaries for such fiscal quarter, and for the period from the beginning of the then current fiscal year to the

end of such fiscal quarter (it being understood that delivery to the Administrative Agent and each Lender of the Company's Report on Form 10-K or 10-Q, as applicable, filed with the SEC, if any, shall satisfy the requirements of this Section so long as the information required to be contained in the "Management's Discussion and Analysis of Financial Condition and Results of Operations" section of such Report is substantially the same as that required under this Section);

(e) within five days after the same are sent or filed, copies of all financial statements and reports, if any, which the Company or the Borrower sends to the holders of any class of its debt securities or public equity securities and all periodic financial statements, final registration statements (excluding exhibits) and reports which the Company or the Borrower may make to, or file with, the SEC;

(f) as soon as possible and in any event within five days of obtaining knowledge thereof: (i) any development, event, or condition that, individually or in the aggregate with other developments, events or conditions, would reasonably be expected to result in the payment by the Company and its Subsidiaries, in the aggregate, of a Material Environmental Amount; and (ii) any notice that any governmental authority may deny any application for an Environmental Permit sought by, or revoke or refuse to renew any Environmental Permit held by, the Company or any of its Subsidiaries; and

(g) promptly, such additional financial and other information as any Lender may from time to time reasonably request.

5.3 Payment of Obligations. Pay, discharge or otherwise satisfy at or before maturity or before they become delinquent, as the case may be, all its material obligations of whatever nature, except to the extent the failure to do so would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect; *provided*, that none of the Company, the Borrower or any of their respective Subsidiaries shall be required to pay any obligation the non-payment of which is permitted by the Bankruptcy Code.

5.4 Conduct of Business and Maintenance of Existence, etc. (a) (i) Preserve, renew and keep in full force and effect its corporate existence and (ii) take all reasonable action to maintain all rights, privileges and franchises (including, without limitation, renewing and keeping in full force and effect all collocation and interconnection agreements) necessary or desirable in the normal conduct of its business, except, in each case, as otherwise permitted by Section 6.4 and except, in the case of clauses (i) (other than with respect to the Company and the Borrower) and (ii) above, to the extent that failure to do so would not reasonably be expected to have a Material Adverse Effect; and (b) comply with all Contractual Obligations and Requirements of Law, including the filing of tax returns and payment of taxes, except to the extent that failure to comply therewith would not, in the aggregate, reasonably be expected to have a Material Adverse Effect.

5.5 Maintenance of Property; Insurance. (a) Keep all Property and systems useful and necessary in its business in good working order and condition, ordinary wear and tear excepted, except to the extent failure to do so would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.



(b) Maintain with financially sound and reputable insurance companies insurance on all its Property in at least such amounts and against at least such risks (but including in any event public liability and business interruption) as are usually insured against in the same general area by companies engaged in the same or a similar business; and furnish to the Administrative Agent with copies for each Lender, upon written request, full information as to the insurance carried. The Administrative Agent and the Lenders shall be named as additional insureds in respect of all public liability insurance maintained by the Company or its Subsidiaries and the Administrative Agent shall be named as loss payee in respect of all property and casualty insurance maintained by the Company or its Subsidiaries on their respective Property. All insurance shall provide that no cancellation, material reduction in amount or material change in coverage thereof shall be effective until at least 30 days after receipt by the Administrative Agent of written notice thereof.

5.6 Inspection of Property; Books and Records; Discussions. (a) Keep proper books of records and account in which full, true and correct entries in conformity with GAAP and all Requirements of Law shall be made and (b) permit representatives of the Required Lenders or the Administrative Agent (or, upon the occurrence and during the continuation of any Default or Event of Default, any Lender) to visit and inspect any of its properties and examine and make abstracts from any of its books and records (except to the extent any such access is restricted by a Requirement of Law) at any reasonable time and as often as may reasonably be desired and to discuss the business, operations, properties and financial and other condition of the Company and its Subsidiaries with officers of the Company and its Subsidiaries and with its independent certified public accountants; *provided that* (x) the Borrower shall notify the Administrative Agent of any such visits, inspections or discussions by or with any Lender prior to the occurrence thereof and (y) any request by a Lender for any visit, inspection or discussion shall be made through the Administrative Agent.

5.7 Notices. Promptly after any Credit Party obtains knowledge thereof, give notice to the Administrative Agent and each Lender of:

(a) the occurrence of any Default or Event of Default;

(b) any (i) default or event of default (other than a default or event of default caused solely by commencement of the Chapter 11 Case) under any Contractual Obligation of the Company or any of its Subsidiaries that would reasonably be expected to have a Material Adverse Effect or (ii) litigation, investigation or proceeding which may exist at any time between the Company or any of its Subsidiaries and any Governmental Authority, which in either case, if not cured or if adversely determined, as the case may be, would reasonably be expected to have a Material Adverse Effect;

(c) any other litigation or proceeding affecting the Company or any of its Subsidiaries in which the amount involved is \$250,000 or more and not covered by insurance or in which injunctive or similar relief is sought;

(d) the following events, as soon as possible and in any event within 30 days after the Borrower knows or has reason to know thereof: (i) the occurrence of any Reportable Event with respect to any Plan, a failure to make any required contribution to a Plan, the creation of any

Lien in favor of the PBGC or a Plan or any withdrawal from, or the termination, Reorganization or Insolvency of, any Multiemployer Plan or (ii) the institution of proceedings or the taking of any other action by the PBGC or the Company or any Commonly Controlled Entity or any Multiemployer Plan with respect to the withdrawal from, or the termination, Reorganization or Insolvency of, any Plan;

(e) any development or event which has had or would reasonably be expected to have a Material Adverse Effect; and

(f) the Company shall inform the Administrative Agent and the Administrative Agent's financial advisors of any deposit requests in excess of \$10,000 or termination notices from any vendor or supplier to the Company or any Subsidiary within one Business Day of the Company's or any Subsidiary's receipt of such request or notice.

Each notice pursuant to this Section shall be accompanied by a statement of a Responsible Officer setting forth details of the occurrence referred to therein and stating what action the Company or the relevant Subsidiary proposes to take with respect thereto.

**5.8 Environmental Laws.** (a) Comply in all material respects with, and ensure compliance in all material respects by all tenants and subtenants, if any, with, all applicable Environmental Laws, and obtain and comply in all material respects with and maintain, and ensure that all tenants and subtenants obtain and comply in all material respects with and maintain, any and all Environmental Permits required by applicable Environmental Laws.

(b) Conduct and complete all investigations, studies, sampling and testing, and all remedial, removal and other actions required under Environmental Laws and, except as being challenged by appropriate legal proceedings, promptly comply in all material respects with all lawful orders and directives of all Governmental Authorities regarding Environmental Laws.

**5.9 Additional Collateral, etc.** (a) With respect to any Property of the type covered by the Security Documents acquired after the Closing Date by the Company or any of its Subsidiaries (other than any real property or the Capital Stock of any new Subsidiary) as to which the Administrative Agent, for the benefit of the Lenders, does not have a perfected Lien, promptly (but in any event within 30 days after the acquisition thereof) (i) execute and deliver to the Administrative Agent such Security Documents or such other documents as the Administrative Agent deems necessary or advisable to grant to the Administrative Agent, for the benefit of the Lenders, a security interest in such Property and (ii) take all actions necessary or advisable to grant to the Administrative Agent, for the benefit of the Lenders, a perfected first priority security interest in such Property, including without limitation, the filing of Uniform Commercial Code financing statements in such jurisdictions as may be required by such Security Documents or by law or as may be requested by the Administrative Agent.

(b) With respect to any fee interest in any real property owned by the Company or any of its Subsidiaries and having a value (together with improvements thereof) of at least \$250,000, existing on or acquired after the Closing Date by the Company or any of its Subsidiaries, shall if requested by the Administrative Agent, within 30 days of such request (i) execute and deliver a Mortgage in favor of the Administrative Agent, for the benefit of the



Lenders, covering such real property, subject only to any valid, enforceable, perfected and unavoidable Mortgage in effect on the Petition Date and (ii) provide the Lenders with (y) title and extended coverage insurance covering such real property in an amount at least equal to the purchase price of such real estate (or such other amount as shall be reasonably specified by the Administrative Agent) as well as a current ALTA survey thereof, together with a surveyor's certificate and (z) any consents or estoppels reasonably deemed necessary or advisable by the Administrative Agent in connection with such mortgage or deed of trust, each of the foregoing in form and substance reasonably satisfactory to the Administrative Agent.

(c) With respect to any new Subsidiary created or acquired after the Closing Date, by the Company or any of its Subsidiaries, promptly (but in any event within 30 days after the acquisition thereof) (i) execute and deliver to the Administrative Agent such Security Documents or such other documents as the Administrative Agent deems necessary or advisable to grant to the Administrative Agent, for the benefit of the Lenders, a perfected first priority security interest in the Capital Stock of such new Subsidiary which is owned by the Company or any of its Subsidiaries, (ii) deliver to the Administrative Agent the certificates representing such Capital Stock, together with undated stock powers, in blank, executed and delivered by a duly authorized officer of the Company or such Subsidiary, as the case may be and (iii) cause such new Subsidiary (A) to become a party to such Security Documents and (B) to take such actions necessary or advisable to grant to the Administrative Agent for the benefit of the Lenders a perfected first priority security interest in the Collateral described in such Security Documents with respect to such new Subsidiary, including, without limitation, the filing of Uniform Commercial Code financing statements in such jurisdictions as may be required by such Security Documents or by law or as may be requested by the Administrative Agent.

5.10 Closing Date Covenant. Cause each of the following events to have occurred on or prior to the Closing Date:

(a) Credit Documents. The Administrative Agent shall have received (i) this Agreement, executed and delivered by a duly authorized officer of the Company and the Borrower, (ii) the Guarantee and Collateral Agreement, executed and delivered by a duly authorized officer of the Company, the Borrower and each Subsidiary Guarantor, and (iii) for the account of each requesting Lender, Revolving Credit Notes conforming to the requirements hereof and executed and delivered by a duly authorized officer of the Borrower.

(b) Pro Forma Financial Statements; Financial Statements; Projections. The Lenders shall have received unaudited interim consolidated financial statements of the Company and its consolidated Subsidiaries as of June 30, 2005, and such financial statements shall not, in the reasonable judgment of the Lenders, reflect any material adverse change in the consolidated financial condition of the Company and its consolidated Subsidiaries since December 31, 2004.

(c) Approvals. All authorizations and approvals referred to in Section 3.4, and all material governmental and third party approvals (including landlords' and other consents) necessary in connection with the continuing operations of the Company and its Subsidiaries, shall have been obtained and be in full force and effect.

(d) Cash Management System. The Cash Management System of the Company and its Subsidiaries shall be acceptable to the Administrative Agent.

(e) First Day Orders. The “first day” orders described on Schedule 5.10(e) in form and substance reasonably satisfactory to the Administrative Agent shall have been entered in the Chapter 11 Case.

(f) Closing Certificate. The Administrative Agent shall have received a certificate of each Credit Party, dated the Closing Date, substantially in the form of Exhibit C, with appropriate insertions and attachments.

(g) Legal Opinions. The Administrative Agent shall have received the following executed legal opinions:

(i) the legal opinion of Skadden, Arps, Slate, Meagher & Flom LLP, special counsel to the Company and its Subsidiaries, substantially in the form of Exhibit E-1; and

(ii) the legal opinion of the General Counsel of the Company, substantially in the form of Exhibit E-2.

Each such legal opinion shall cover such other matters incident to the transactions contemplated by this Agreement as the Administrative Agent may reasonably require.

(h) Filings, Registrations and Recordings. Each document (including, without limitation, any Uniform Commercial Code financing statement) required by the Security Documents or under law or reasonably requested by the Administrative Agent to be filed, registered or recorded in order to create in favor of the Administrative Agent, for the benefit of the Lenders, a perfected Lien on the Collateral described therein, prior and superior in right to any other Person (other than with respect to Liens expressly permitted by Section 6.3), shall be in proper form for filing, registration or recordation.

(i) [Intentionally Omitted.]

(j) Fees and Expenses. The Administrative Agent shall have received payment in full of all reasonable fees, including, without limitation, the closing fee set forth in Section 2.3(a), and other amounts due and payable on or prior to the Closing Date, including, to the extent invoiced, reimbursement or payment of all out of pocket expenses required to be reimbursed or paid by the Borrower hereunder.

(k) [Intentionally Omitted.]

(l) Litigation Matters. No litigation shall have been commenced against any Credit Party, the Administrative Agent or any Lender which (i) has not been stayed by the Bankruptcy Court and (ii)(A) if successful, could have a Material Adverse Effect on the Company, the Borrower and their respective Subsidiaries taken as a whole, or (B) challenges all or part of the transactions contemplated by this Agreement or any of the Credit Documents.

(m) No Material Adverse Change. There shall have been no event or set of events since the Petition Date which, individually or in the aggregate, has caused, or could reasonably be expected to cause, a Material Adverse Effect.

(n) [Intentionally Omitted.]

(o) Lien Searches. The Administrative Agent shall have received, with results satisfactory to the Administrative Agent, all lien search reports and related lien perfection documentation with respect to the Collateral as reasonably requested by the Administrative Agent.

(p) Other Documents, etc. The Administrative Agent shall have received such other certificates, legal opinions and documents as the Administrative Agent or any Lender may reasonably request, including, without limitation, as set forth in the List of Closing Documents attached as Exhibit I hereto.

5.11 Further Assurances. From time to time execute and deliver, or cause to be executed and delivered, such additional instruments, certificates or documents, and take all such actions, as the Administrative Agent may reasonably request, for the purposes of more fully perfecting or renewing the rights of the Administrative Agent and the Lenders with respect to the Collateral (or with respect to any additions thereto or replacements or proceeds thereof or with respect to any other property or assets hereafter acquired by the Borrower which may be deemed to be part of the Collateral) pursuant hereto or thereto. Upon the exercise by the Administrative Agent or any Lender of any power, right, privilege or remedy pursuant to this Agreement or the other Credit Documents which requires any consent, approval, recording, qualification or authorization of any Governmental Authority, the Borrower will execute and deliver, or will cause the execution and delivery of, all applications, certifications, instruments and other documents and papers that the Administrative Agent or such Lender may be required to obtain from the Company or any of its Subsidiaries for such governmental consent, approval, recording, qualification or authorization.

5.12 Weekly Forecast. On the Closing Date, the Borrower shall deliver to the Administrative Agent and the Lenders the Weekly Forecast for the one-week period commencing on August 22, 2005 through and including August 28, 2005, which Weekly Forecast shall be contained in the Initial Thirteen-Week Cash Forecasts and shall be in form and substance satisfactory to the Required Lenders and the Administrative Agent (the "Initial Weekly Forecast", which Initial Weekly Forecast shall constitute a Weekly Forecast). Thereafter, not later than the 3<sup>rd</sup> Business Day after the end of each completed calendar week, the Borrower shall deliver to the Administrative Agent and the Lenders the Weekly Forecast for the one-week period commencing with the Monday of the next calendar week, which Weekly Forecast shall be contained in the corresponding Thirteen-Week Cash Forecasts. The Company shall obtain the approval of the Required Lenders (which shall not be unreasonably withheld or delayed) of the form and substance of such Weekly Forecast within two Business Days of the delivery thereof (such Weekly Forecast, once so approved, the "Approved Weekly Forecast").

5.13 Bank Accounts. The Company and the Borrower shall, and shall cause each of their Subsidiaries to, deposit all Net Cash Proceeds (other than Net Cash Proceeds from a

Substantial Transaction, which proceeds from a Substantial Transaction shall instead be applied in accordance with the terms of the Financing Orders) other and Adjusted Excess Cash On-Hand into the Restricted Account to the extent required, and on the dates and times as set forth in, Section 2.5(c). The Company and the Borrower shall not, and shall not permit any of their Subsidiaries to, establish any bank or securities account which is not disclosed in the Cash Management System set forth on Exhibit L without 15 days prior written notice to the Administrative Agent. Except with respect to payroll, zero balance and trust fund accounts, the Company shall, and shall cause each of its Subsidiaries to, deliver within twenty-one (21) days of the Administrative Agent's request therefor, all bank and securities accounts (including, without limitation, the Restricted Account) to be subject to tri-party agreement account control in form and substance reasonably satisfactory to the Administrative Agent with each depository institution at which the Company or any of its Subsidiaries maintains any concentration, lockbox or other deposit accounts; *provided that* (i) notwithstanding the control by the Administrative Agent over such account, the Administrative Agent shall, and does hereby agree to, give instructions to the depository institution to release funds for the Company's or its Subsidiaries' use in connection with the payment of employee wages and salaries and trust fund taxes or for the funding of accounts set up solely to hold funds to be used for such purposes, as directed from time to time by the Company or such Subsidiaries and (ii) there shall be no requirement to obtain account control agreements in respect of zero balance disbursement accounts holding funds which are to be used solely for the payment of employee wages and salaries and trust fund taxes.

5.14 Weekly Status Update Call. The Company shall arrange for the Chief Restructuring Officer, and one other representative of the management of the Company to participate in a status conference call no less frequently than once per week regarding the restructuring of the company among the Administrative Agent, the Administrative Agent's professional advisors (including attorneys), the Company's professional advisors (including attorneys and the Strategic Advisor), and one or more representatives of the Lenders.

5.15 Strategic Advisors. At all times while the Administrative Agent's counsel has engaged a Strategic Advisor, each of the Borrower and the Company shall, and shall cause each of its Subsidiaries to, (x) cooperate with and provide such Strategic Advisor with all information reasonably requested in order for it to perform its functions as Strategic Advisor, including, without limitation, contracts, models and analyses, performance and operating matrix, market studies and marketing plans and product development analyses, (y) provide such Strategic Advisor with access to all of the Company's retained advisors and professionals (other than attorneys) and non-privileged information and reports prepared by any of them, and (z) timely provide such Strategic Advisor with notice of, documentation relating to and access to attend all functional group meetings in which the senior management participates (other than meetings in which the primary focus is legal strategy) and timely provide the Strategic Advisor with all material documents surrounding key management decisions (other than material documents relating to legal decisions).

## SECTION 6. NEGATIVE COVENANTS

The Company and the Borrower hereby jointly and severally agree that, so long as the Revolving Credit Commitments remain in effect or any Revolving Credit Loan or other

amount is owing to any Lender or the Administrative Agent hereunder, each of the Company and the Borrower shall not, and shall not permit any of its Subsidiaries to, directly or indirectly:

6.1 Financial Condition Covenants.

(a) Minimum Cash On-Hand. Permit for more than three consecutive Business Days the minimum amount of the actual cash on-hand (including, without limitation, all cash in the Restricted Account or any other account subject to a control agreement in favor of the Administrative Agent) of the Company and its Subsidiaries in the aggregate as of the close of each Business Day to be less than \$1,500,000.

(b) Minimum Consolidated EBITDAR. Permit Consolidated EBITDAR for any calendar month (measured on the last calendar day of such calendar month as set forth in monthly financial statements delivered pursuant to 5.1(c), tested as of the date of the delivery of such monthly statement) to be less than \$1,000,000.

(c) Eligible Accounts. At any time permit the aggregate amount of Eligible Accounts as set forth in the most recent Monthly Reporting Certificate delivered in accordance with Section 5.1(e) to be less than an amount equal to one and one-half times the then Total Revolving Extensions of Credit.

6.2 Limitation on Indebtedness. Create, incur, assume or suffer to exist any Indebtedness, except:

(a) Indebtedness of any Credit Party pursuant to any Credit Document or pursuant to any "Credit Document" under the Pre-Petition Agreement;

(b) Indebtedness of the Borrower to the Company or any Subsidiary and of any Subsidiary Guarantor to the Company, the Borrower or any other Subsidiary;

(c) Permitted Equipment Financing;

(d) unsecured Indebtedness outstanding on the Closing Date, and Indebtedness outstanding on the Closing Date and listed on Schedule 6.2(d) and any refinancings, refundings, renewals or extensions of the Indebtedness listed on Schedule 6.2(d) (without any increase in the principal amount thereof or any shortening of the maturity of any principal amount thereof);

(e) Guarantee Obligations made by the Company or any of its Subsidiaries of obligations of the Borrower or any Subsidiary Guarantor;

(f) Indebtedness in respect of (i) any bankers' acceptance, warehouse receipt or similar facilities (excluding letters of credit) entered into in the ordinary course of business in an aggregate principal amount not to exceed \$250,000 and (ii) any letters of credit entered into in the ordinary course of business in an aggregate principal amount not to exceed \$750,000;

(g) Indebtedness in respect of the Carve-Out.



6.3 Limitation on Liens. Create, incur, assume or suffer to exist any Lien upon any of its Property, whether now owned or hereafter acquired, except for:

(a) Liens for taxes not yet due or which are being contested in good faith by appropriate proceedings or to the extent that nonpayment thereof is permitted under the Bankruptcy Code; *provided* that adequate reserves with respect thereto are maintained on the books of the Company or any of its Subsidiaries, as the case may be, in conformity with GAAP;

(b) carriers', warehousemen's, mechanics', materialmen's, repairmen's or other like Liens arising in the ordinary course of business which are not overdue for a period of more than 60 days or which are being contested in good faith by appropriate proceedings;

(c) pledges or deposits in connection with workers' compensation, unemployment insurance and other social security legislation and deposits securing liability to insurance carriers under insurance or self-insurance arrangements;

(d) deposits to secure the performance of bids, trade contracts (other than for borrowed money), leases (other than Capital Lease Obligations), statutory obligations, surety and appeal bonds, performance bonds and other obligations of a like nature incurred in the ordinary course of business;

(e) cash deposits to secure letter of credit obligations to the extent permitted by Section 6.2(f)(ii);

(f) easements, rights-of-way, zoning restrictions, other restrictions and other similar encumbrances incurred in the ordinary course of business which, in the aggregate, are not substantial in amount and which do not in any case materially detract from the value of the Property subject thereto or materially interfere with the ordinary conduct of the business of the Subsidiaries or which are set forth in any title insurance policy delivered to the Administrative Agent pursuant to the terms of this Agreement;

(g) Liens in existence on the Closing Date and listed on Schedule 6.3(g), securing Indebtedness permitted by Section 6.2(d);

(h) Liens securing Indebtedness of the Borrower or any other Subsidiary permitted by Section 6.2(c); *provided* that (i) such Liens shall be created within 90 days of the acquisition of such fixed or capital assets, (ii) such Liens do not at any time encumber any Property other than the Property financed by such Indebtedness (other than after acquired title in or on such Property and proceeds of the existing collateral in accordance with the instrument creating such Lien) and (iii) the principal amount of Indebtedness secured by any such Lien shall at no time exceed 100% of the original purchase price of such Property at the time it was acquired;

(i) Liens created pursuant to this Agreement, the Security Documents, the Pre-Petition Agreement or the "Security Documents" under the Pre-Petition Agreement;

(j) any interest or title of a lessor under any lease entered into by the Borrower or any other Subsidiary in the ordinary course of its business and covering only the assets so leased;

(k) so long as no Default or Event of Default shall have occurred and be continuing under clause (h) of Section 7, Liens arising from judgments or decrees in respect of which judgments or decrees that have been satisfied, vacated, discharged, stayed or bonded pending appeal within 60 days from the entry thereof or Liens arising from judgments or decrees in an aggregate amount outstanding at any one time not in excess of \$250,000 (to the extent not paid or fully covered by insurance as to which the relevant insurance company has not denied in writing coverage above applicable deductibles);

(l) Liens in respect of the Carve-Out; and

(m) Liens granted in favor of the Pre-Petition Agent and Pre-Petition Lenders under the Financing Orders.

6.4 Limitation on Fundamental Changes. Enter into any merger, consolidation or amalgamation, or liquidate, wind up or dissolve itself (or suffer any liquidation or dissolution), or Dispose of all or substantially all of its Property or business, except that:

(a) any Subsidiary of the Company may be merged or consolidated with or into the Company (*provided* that the Company shall be the continuing or surviving corporation) or with or into any Subsidiary Guarantor (*provided* that a Subsidiary Guarantor shall be the continuing or surviving corporation);

(b) any Subsidiary of the Company may Dispose of any or all of its assets (upon voluntary liquidation or otherwise) to the Company, the Borrower or any Subsidiary Guarantor; and

(c) any transaction permitted by Sections 6.5, 6.7 or 6.8 may be consummated as contemplated thereby.

6.5 Limitation on Disposition of Property. Dispose of any of its Property (including, without limitation, receivables and leasehold interests), whether now owned or hereafter acquired, or, in the case of any Subsidiary, issue or sell any shares of such Subsidiary's Capital Stock to any Person, except:

(a) the Disposition of obsolete or worn out property in the ordinary course of business;

(b) the sale of inventory or Cash Equivalents, in each case in the ordinary course of business;

(c) Dispositions permitted by Sections 6.4(a) and (b);

(d) the sale or issuance of any Subsidiary's Capital Stock to the Company, the Borrower or any Subsidiary Guarantor provided that such Capital Stock has been pledged to the Administrative Agent pursuant to the Guarantee and Collateral Agreement;

(e) the Disposition in the ordinary course of business of other assets having a fair market value not to exceed \$1,000,000 in any fiscal year of the Company; and

(f) Dispositions listed on Schedule 6.5;

*provided*, that the foregoing limitations are not intended to prevent the Borrower, the Company or any of their Subsidiaries from rejecting unexpired leases or executory contracts pursuant to section 365 of the Bankruptcy Code in connection with the Chapter 11 Case.

6.6 Limitation on Restricted Payments. Declare or pay any dividend (other than dividends payable solely in common stock of the Person making such dividend) on, or make any payment on account of, or set apart assets for a sinking or other analogous fund for, the purchase, redemption, defeasance, retirement or other acquisition of, any Capital Stock of the Company or any Subsidiary, whether now or hereafter outstanding, or make any other distribution in respect thereof, either directly or indirectly, whether in cash or property or in obligations of the Company or any Subsidiary (collectively, "Restricted Payments"), except that:

(a) any Subsidiary may make Restricted Payments to the Borrower or any Subsidiary Guarantor;

(b) [Intentionally Omitted.]

(c) the Borrower or any other Subsidiary may pay dividends to the Company to permit the Company to (i) pay executive salaries and audit expenses, filing costs, operating expenses and other costs and expenses incurred in the ordinary course of business (and other similar corporate overhead costs and expenses) not to exceed \$250,000 in any fiscal year and (ii) pay any taxes which are due and payable by the Company as part of a consolidated group;

(d) so long as no Event of Default specified in clause (i), (ii), (iv) or (v) of Section 7(f) with respect to the Company shall have occurred and be continuing, any Subsidiary may pay dividends to the Company; *provided* that the amount of such dividend is, immediately upon receipt by the Company, contributed as cash equity to the Borrower or any Subsidiary Guarantor; and

(e) the Company and its Subsidiaries may make Investments permitted by Section 6.7.

6.7 Limitation on Investments. Make any advance, loan, extension of credit (by way of guaranty or otherwise) or capital contribution to, or purchase any Capital Stock, bonds, notes, debentures or other debt securities of, or any assets constituting an ongoing business from, or make any other investment in, any other Person (all of the foregoing, "Investments"), except:

(a) extensions of trade credit in the ordinary course of business;

(b) Investments in Cash Equivalents;

(c) Investments arising in connection with the incurrence of Indebtedness permitted by Section 6.2(b) or Guarantee Obligations permitted by Section 6.2(e);

(d) loans and advances to employees of the Company or any Subsidiaries in the ordinary course of business (including, without limitation, for travel, entertainment and



relocation expenses) in an aggregate amount for the Company and its Subsidiaries not to exceed \$250,000 at any one time outstanding;

(e) Investments (other than those relating to the incurrence of Indebtedness permitted by Section 6.7(c)) by the Company or any of its Subsidiaries in the Borrower or any Person that, prior to such investment, is a Subsidiary Guarantor;

(f) Investments in existence on the Closing Date set forth in Part D of Schedule 3.14 and extensions, renewals, modifications, restatements or replacements thereof; provided that no such extension, renewal, modification or replacement shall increase the original amount of such Investment;

(g) Investments received in connection with the bankruptcy or reorganization of suppliers or customers and in settlement of delinquent obligations of, and other disputes with, customers arising in the ordinary course of business; and

(h) Investments constituting non-cash proceeds of sales, transfers and other Dispositions of Property to the extent permitted by Section 6.5.

6.8 Limitation on Modifications of Instruments and Agreements, etc. Amend its certificate of incorporation in any manner except (i) changes and amendments which are not reasonably expected to adversely affect the rights of the Lenders under the Credit Documents or their ability to enforce such rights and (ii) changes pursuant to the Reorganization Plan.

6.9 Limitation on Transactions with Affiliates. Enter into any transaction, including, without limitation, any purchase, sale, lease or exchange of Property, the rendering of any service or the payment of any management, advisory or similar fees, with any Affiliate (other than the Company, the Borrower, any Subsidiary Guarantor or any Lender) unless such transaction is (a) otherwise permitted under this Agreement, including the transactions described on Schedule 6.9, (b) in the ordinary course of business of the Company or such Subsidiary, as the case may be, and (c) upon fair and reasonable terms no less favorable to the Company or such Subsidiary, as the case may be, than it would obtain in a comparable arm's length transaction with a Person which is not an Affiliate.

6.10 Limitation on Sales and Leasebacks. Enter into any arrangement with any Person providing for the leasing by the Company or any Subsidiary of real or personal property which has been or is to be sold or transferred by the Company or such Subsidiary to such Person or to any other Person to whom funds have been or are to be advanced by such Person on the security of such property or rental obligations of the Company or such Subsidiary.

6.11 Limitation on Changes in Fiscal Periods. Permit the fiscal year of the Company or any of its Subsidiaries to end on a day other than December 31 or change the Company's or any such Subsidiary's method of determining fiscal quarters; *provided* that the Company and its Subsidiaries may change their respective fiscal year ends if the Borrower enters into such amendments to this Agreement as the Administrative Agent and the Borrower shall reasonably agree as necessary to reflect such change such that the covenants affected by such change shall have the same effect (or, in any case, be substantively no less favorable to the Lenders, in the determination of the Administrative Agent) after giving effect thereto as if such

change were not made. The Lenders hereby authorize the Administrative Agent to enter into such amendments to effect such modifications, if any, in accordance with the provisions of this Section.

6.12 Limitation on Negative Pledge Clauses. Enter into or suffer to exist or become effective any agreement which prohibits or limits the ability of the Company or any of its Subsidiaries to create, incur, assume or suffer to exist any Lien upon any of its Property or revenues, whether now owned or hereafter acquired, to secure the Obligations or, in the case of any Guarantor, its obligations under the Guarantee and Collateral Agreement, other than (a) this Agreement and the other Credit Documents and the Pre-Petition Agreement and the "Credit Documents" as defined in the Pre-Petition Agreement, (b) any agreements governing any purchase money Liens or Capital Lease Obligations otherwise permitted hereby (in which case, any prohibition or limitation shall only be effective against the assets financed thereby), (c) agreements relating to the Disposition, acquisition or lease of Property, in each case otherwise permitted under this Agreement, so long as such restrictions relate only to the assets subject to such transaction, (d) agreements relating to Liens permitted by this Agreement or Liens on Property not purported to be covered by the Security Documents or required by this Agreement to be so covered and (e) agreements entered into in the ordinary course of business containing restrictions customary for such agreements that do not materially affect the rights or remedies of the Administrative Agent or the Lenders under the Credit Documents with respect to the Collateral or otherwise.

6.13 Limitation on Restrictions on Subsidiary Distributions. Enter into or suffer to exist or become effective any consensual encumbrance or restriction on the ability of any Subsidiary of the Company to make Restricted Payments in respect of any Capital Stock of such Subsidiary held by, or pay any Indebtedness owed to, the Borrower or any other Subsidiary, except for such encumbrances or restrictions existing under or by reason of (i) any restrictions existing under the Credit Documents and the Pre-Petition Agreement and the "Credit Documents" as defined in the Pre-Petition Agreement and (ii) any restrictions with respect to a Subsidiary imposed pursuant to an agreement which has been entered into in connection with the Disposition of all or substantially all of the Capital Stock or assets of such Subsidiary.

6.14 Limitation on Lines of Business. Enter into any business, either directly or through any Subsidiary, except for those businesses in which the Company and its Subsidiaries are engaged on the date of this Agreement, the data or telecommunications business or any businesses which are reasonably related to any of the foregoing.

6.15 Critical Vendor Payments. Notwithstanding anything to the contrary in this Agreement, make any Critical Vendor Payment in excess of \$100,000 to any single vendor unless the Company has received the prior consent of the Administrative Agent in its sole discretion. Requests for a consent to make Critical Vendor Payments which are received by the Administrative Agent by 2 p.m. Central Time (which requests shall be submitted telephonically, followed by an email to the Administrative Agent and its counsel containing all supporting information necessary for the Administrative Agent to review such request) shall be either consented to or rejected by the Administrative Agent by 11:00 a.m. Central Time on the following Business Day (which consent or rejection may be provided to the Company by email or another writing). If such consent or rejection is not provided by the Administrative Agent by

such time, the Administrative Agent shall have been deemed to have consented to the Company's request to make the particular Critical Vendor Payment.

6.16 Hedge Agreements; Equity Forward Agreements. Enter into or suffer to exist or become effective (a) any Hedge Agreement or (b) any equity exchange or forward agreement or similar derivative contract or any option to enter into any such agreement or contract.

6.17 Limitation on Activities of the Company. In the case of the Company, notwithstanding anything to the contrary in this Agreement or any other Credit Document, (a) conduct, transact or otherwise engage in, or commit to conduct, transact or otherwise engage in, any business or operations other than those incidental to its ownership of the Capital Stock of the Borrower and the other Subsidiaries of the Company, (b) incur, create, assume or suffer to exist any Indebtedness or other liabilities or financial obligations, except (i) nonconsensual obligations imposed by operation of law, (ii) pursuant to the Credit Documents to which it is a party, (iii) Indebtedness permitted under Section 6.2 and (iv) obligations with respect to its Capital Stock, or (c) own, lease, manage or otherwise operate any properties or assets (including cash (other than cash received in connection with dividends made by the Borrower and the other Subsidiaries of the Company in accordance with Section 6.6 pending application in the manner contemplated by said Section) and Cash Equivalents) other than the ownership of shares of Capital Stock of the Borrower and the other Subsidiaries of the Company.

6.18 Adequate Assurance. Without the consent of the Administrative Agent, enter into any agreement or arrangement with any entity to provide adequate assurance of payment, within the meaning of section 366 of the Bankruptcy Code, that requires payment, deposit or restriction on the use of cash in excess of \$250,000.

6.19 Reclamation Claims. No Credit Party shall enter into any agreement to return any of its inventory to any of its creditors for application against any Pre-Petition Indebtedness, Pre-Petition trade payables or other Pre-Petition claims under section 546(g) of the Bankruptcy Code or allow any creditor to take any setoff or recoupment against any of its Pre-Petition Indebtedness, Pre-Petition trade payables or other Pre-Petition claims based upon any such return pursuant to section 553(b)(1) of the Bankruptcy Code or otherwise if, after giving effect to any such agreement, setoff or recoupment, the aggregate amount of Pre-Petition Indebtedness, Pre-Petition trade payables and other Pre-Petition claims subject to all such agreements, setoffs and recoupments since the Petition Date would exceed \$100,000 in the aggregate.

6.20 Tax Payment. Without the consent of the Administrative Agent, make a payment or agree to make a payment on account of any Pre-Petition tax or Pre-Petition regulatory fee the payment of which is subject to the automatic stay, other than (i) taxes withheld or collected by the Company and its Subsidiaries that are trust funds to be remitted to a taxing authority; (ii) a tax described in section 507(a)(8) of the Bankruptcy Code and for which the Post-Petition officers or directors of the Company or any Subsidiary would be personally liable if not paid; and (iii) regulatory fees or contributions to a federal or state regulatory agency which has statutory authority to terminate the operating telecommunications license of the Company or any Subsidiary without seeking relief from the automatic stay provided by section 362 of the

Bankruptcy Code; *provided*, no tax, regulatory fee or contribution shall be deemed to be a trust fund tax solely due to the Company or any Subsidiary having collected charges or revenues from customers designed to recover all or a portion of the cost of such tax, regulatory fee or contribution.

## SECTION 7. EVENTS OF DEFAULT

If any of the following events shall occur and be continuing:

(a) the Borrower shall fail to pay any principal of any Revolving Credit Loan when due in accordance with the terms hereof; or the Borrower shall fail to pay any interest on any Revolving Credit Loan, or any other amount payable hereunder or under any other Credit Document, within five days after any such interest or other amount becomes due in accordance with the terms hereof (including, without limitation, payments required to be made under Section 2.5 with respect to the Revolving Credit Loans); or

(b) any representation or warranty made or deemed made by any Credit Party herein or in any other Credit Document or which is contained in any certificate, document or financial or other statement furnished by it at any time under or in connection with this Agreement or any other Credit Document shall prove to have been inaccurate in any material respect on or as of the date made or deemed made; or

(c) (i) any Credit Party shall default in the observance or performance of any agreement contained in Section 2.6, clause (i) of Section 5.4(a) (with respect to the Company and the Borrower only), Section 5.7(a), Section 5.10, Section 6 (other than Section 6.10, Section 6.16 and Section 6.17) or Section 2 of the Guarantee and Collateral Agreement or (ii) any Credit Party shall default in the observance or performance of any agreement contained in Section 5.1(d), (e) or (f), clause (ii) of Section 5.4(a), or Sections 5.12, 5.13, 5.14 or 5.15, and such default shall continue unremedied for a period of 3 Business Days; or

(d) any Credit Party shall default in the observance or performance of any other agreement contained in this Agreement or any other Credit Document (other than as provided in paragraphs (a) through (c) of this Section), and such default shall continue unremedied for a period of 30 days; or

(e) except for defaults occasioned by the filing of the Chapter 11 Case, a default or breach occurs under any other agreement, document or instrument entered into either (x) Pre-Petition and which is assumed after the Petition Date or (y) Post-Petition, to which the Company or any of its Subsidiaries is a party, and such default or breach is a (i) default in making any payment of any principal of any Indebtedness (including, without limitation, any Guarantee Obligation, but excluding the Revolving Credit Loans) on the scheduled or original due date with respect thereto; or (ii) default in making any payment of any interest on any such Indebtedness beyond the period of grace, if any, provided in the instrument or agreement under which such Indebtedness was created; or (iii) default in the observance or performance of any other agreement or condition relating to any such Indebtedness or contained in any instrument or agreement evidencing, securing or relating thereto, or any other event shall occur or condition exist, the effect of which default or other event or condition is to cause, or to permit the holder or

beneficiary of such Indebtedness (or a trustee or agent on behalf of such holder or beneficiary) to cause, with the giving of notice if required, such Indebtedness to become due prior to its stated maturity or (in the case of any such Indebtedness constituting a Guarantee Obligation) to become payable; *provided* that a default, event or condition described in clause (i), (ii) or (iii) of this paragraph (e) shall not at any time constitute a Default or an Event of Default unless, at such time, one or more defaults, events or conditions of the type described in clauses (i), (ii) and (iii) of this paragraph (e) shall have occurred and be continuing with respect to Indebtedness the outstanding principal amount of which exceeds in the aggregate \$250,000; or

(f) (i) any Person shall engage in any “prohibited transaction” (as defined in Section 406 of ERISA or Section 4975 of the Code) involving any Plan, (ii) any “accumulated funding deficiency” (as defined in Section 302 of ERISA), whether or not waived, shall exist with respect to any Plan or any Lien in favor of the PBGC or a Plan shall arise on the assets of the Borrower or any Commonly Controlled Entity, (iii) a Reportable Event shall occur with respect to, or proceedings shall commence to have a trustee appointed, or a trustee shall be appointed, to administer or to terminate, any Single Employer Plan, which Reportable Event or commencement of proceedings or appointment of a trustee is, in the reasonable opinion of the Required Lenders, likely to result in the termination of such Plan for purposes of Title IV of ERISA, (iv) any Single Employer Plan shall terminate for purposes of Title IV of ERISA, (v) the Borrower or any Commonly Controlled Entity shall, or in the reasonable opinion of the Required Lenders is likely to, incur any liability in connection with a withdrawal from, or the Insolvency or Reorganization of, a Multiemployer Plan or (vi) any other event or condition shall occur or exist with respect to a Plan; and in each case in clauses (i) through (vi) above, such event or condition, together with all other such events or conditions, if any, could, in the sole judgment of the Required Lenders, reasonably be expected to have a Material Adverse Effect; or

(g) one or more judgments or decrees as to Post-Petition liability shall be entered against the Company or any of its Subsidiaries involving for the Company and its Subsidiaries taken as a whole a liability (to the extent not paid or fully covered by insurance as to which the relevant insurance company has not denied in writing coverage) of \$250,000 or more, and all such judgments or decrees shall not have been satisfied, vacated, discharged, stayed or bonded pending appeal within 60 days from the entry thereof; or

(h) (i) any provision of the Security Documents shall cease, for any reason, to be in full force and effect (unless released by the Administrative Agent at the direction of the Required Lenders or as otherwise permitted under this Agreement or the other Credit Documents), or any Credit Party or any Affiliate of any Credit Party shall so assert, or (ii) any Lien created by any of the Security Documents shall cease (with respect to Collateral having a value, in the reasonable judgment of the Administrative Agent, of at least \$250,000) to be enforceable and of the same effect and priority provided pursuant to the Financing Orders (unless released by the Administrative Agent at the direction of the Required Lenders or as otherwise permitted under this Agreement or the other Credit Documents); or

(i) the guarantee of any Credit Party contained in Section 2 of the Guarantee and Collateral Agreement shall cease, for any reason, to be in full force and effect or any Credit Party or any Affiliate of any Credit Party shall deny or disaffirm its obligation in respect of such guarantee; or



(j) a Change in Control shall occur; or

(k) all or substantially all of the Property of any Credit Party is attached, seized, levied upon or subjected to a writ or distress warrant, or come within the possession of any receiver, trustee, custodian or assignee for the benefit of creditors of any Credit Party; or

(l) any Credit Party is enjoined, restrained or in any way prevented by the order of any Governmental Authority from conducting all or any material part of the business which could reasonably be expected to cause a Material Adverse Effect and such order continues for 30 days or more; or

(m) the occurrence of the loss, suspension or revocation of, or failure to renew, any Communications License or other license or permit now held or hereafter acquired by any Credit Party, if such loss, suspension, revocation or failure to renew could reasonably be expected to have a Material Adverse Effect; or

(n) the occurrence of any of the following in the Chapter 11 Case:

(i) the entry of an order amending, supplementing, staying, vacating or otherwise modifying any of the Credit Documents or the Interim Order or the Final Order without the written consent of the Administrative Agent (other than the replacement of the Interim Order with the Final Order) which order is not vacated within 10 days of its entry, provided, that during such 10-day period (or until such order is vacated if such event occurs prior to such 10-day period) the Lenders' commitment to advance Revolving Credit Loans shall be automatically suspended without any other action on the part of the Lenders or the Administrative Agent;

(ii) the filing of a motion for reconsideration with respect to the Interim Order or the Final Order, and in the event any such motion is filed by a party other than the Company, the Required Lenders have determined that such motion has a reasonable likelihood of success and such motion is not withdrawn, dismissed or denied by order of a court of competent jurisdiction within 30 days of the date on which it was filed, provided that, during such 30-day period (or until such motion is so withdrawn, dismissed or denied, if such event occurs prior to the expiration to such 30-day period) the Lenders commitment to advance Revolving Credit Loans shall be automatically suspended without any other action on the part of the Lenders or the Administrative Agent;

(iii) the Final Order is not entered into prior to the earlier of (x) the date 35 days after the Petition Date or (y) the expiration of the Interim Order; or

(iv) the Final Order, or, prior to the entry of the Final Order, the Interim Order, ceases to be in full force and effect; or

(v) the failure of any Credit Party to comply with the terms of the Interim Order or the Final Order in any material respect; or

(vi) the exclusive period that the Credit Parties have to file a Reorganization Plan under the Chapter 11 Cases shall terminate or be otherwise lifted without the Credit Parties

having filed such a Reorganization Plan which is acceptable to the Administrative Agent and the Required Lenders and a third party files a plan which is not acceptable to the Administrative Agent and the Required Lenders; or

(vii) a Reorganization Plan acceptable to the Administrative Agent and the Required Lenders is not filed by the Credit Parties with the Bankruptcy Court within 120 days of the Petition Date; or

(viii) the entry of an order in the Chapter 11 Case confirming one or more Reorganization Plans that does not contain a provision for termination of the Revolving Credit Commitments and repayment in full in cash of all of the Obligations under this Agreement on or before the consummation of such Reorganization Plan(s); or

(ix) unless otherwise permitted under this Agreement (including, without limitation, under Section 2.6), the payment of, or application by a Credit Party for authority to pay, any Pre-Petition Claim without the Required Lenders' prior written consent or pursuant to an order of the Bankruptcy Court after notice and hearing; or

(x) the allowance of any claim or claims under section 506(c) of the Bankruptcy Code against or with respect to any of the Collateral; or

(xi) the application by any Credit Party for, or the entry of an order in the Chapter 11 Case granting, any other superpriority administrative claim or Lien equal or superior to that granted to the Administrative Agent, on behalf of itself and the Lenders (other than the Carve-Out or as set forth in Section 2.17); or

(xii) the entry of an order in the Chapter 11 Case avoiding or requiring repayment of any portion of the payments made on account of the Obligations owing under this Agreement; or

(xiii) the entry of an order by the Bankruptcy Court granting relief from or modifying the automatic stay of section 362 of the Bankruptcy Code to allow one or more creditors to execute upon or enforce a Lien on any Collateral or collateral securing the Pre-Petition Obligations with a fair market value in excess of \$250,000 in the aggregate without the prior written consent of the Administrative Agent and Required Lenders; or

(xiv) the appointment of an interim or permanent trustee in the Chapter 11 Case or the appointment of a receiver or an examiner in the Chapter 11 Case, in either case, with expanded powers beyond those set forth in Section 1106(a)(3) and (4) of the Bankruptcy Code to operate or manage the financial affairs, the business, or reorganization of the Company or any of its Subsidiaries; or the sale without the Administrative Agent and Required Lenders' consent, of all or substantially all of the assets of the Company or any of its Subsidiaries either through a sale under section 363 of the Bankruptcy Code, through a confirmed plan of reorganization in the Chapter 11 Case, or otherwise that does not provide for payment in full of the Obligations and termination of all of the Revolving Credit Commitments, and the order appointing such trustee, receiver or examiner shall not be reversed or vacated within thirty (30) days after the entry thereof; or

(xv) the dismissal of the Chapter 11 Case, or the conversion of the Chapter 11 Case from one under Chapter 11 to one under Chapter 7 of the Bankruptcy Code, or any Credit Party shall file a motion or other pleading seeking the dismissal of the Chapter 11 Case under section 1112 of the Bankruptcy Code or otherwise; or

(xvi) the bringing of a motion, taking of any action or the filing of any Reorganization Plan or Disclosure Statement attendant thereto by the Borrower, the Company or any of their respective Subsidiaries in the Chapter 11 Case: (w) unless the Administrative Agent and the Lenders consent, to obtain additional financing under section 364(c) or (d) of the Bankruptcy Code not otherwise permitted pursuant to this Agreement; (x) except as provided in the Interim or Final Order, as the case may be, to use cash collateral of the Pre-Petition Agent under Section 363(c) of the Bankruptcy Code without the prior written consent of the Pre-Petition Agent; (y) which seeks to reduce, set-off or subordinate the Obligations or the Pre-Petition Obligations or to challenge the Administrative Agent's Lien in any of the Collateral or the Pre-Petition Agent's Lien in any of the collateral security securing the payment of the Pre-Petition Obligations, respectively, other than the subordination of the Pre-Petition Obligations and the Liens securing such Pre-Petition Obligations to any Lien of a lender providing exit financing under a Reorganization Plan acceptable to the Administrative Agent; or (z) the successful prosecution of which would have a Material Adverse Effect; or

(xvii) after entry of the Final Order, the commencement of any suit or action (other than those covered by subclause (n)(ii) of this Section 7) against the Administrative Agent or any Lender by any party other than a Credit Party that seeks in any way to reduce, set off or subordinate the Obligations or challenge the Lien of the Administrative Agent in the Collateral, which in the reasonable judgment of the Administrative Agent, such suit has a reasonable possibility of success, and if successful, would be reasonably likely to have a Material Adverse Effect; or

(o) the Company and its Subsidiaries pay expenses (without the prior consent of the Administrative Agent) during any calendar week (each such calendar week shall begin on a Monday) which would cause the aggregate amount of expenses paid during such week by the Company and its Subsidiaries to exceed 110% of the aggregate amount of all such expenses contemplated by the Approved Weekly Forecast for such calendar week; *provided, however*, that no Event of Default shall occur under this clause (o) if the Company and its Subsidiaries have not complied with this clause (o) solely as a result of the Company and its Subsidiaries making of Critical Vendor Payments permitted by Section 6.15 or tax and other regulatory payments permitted by Section 6.20;

then, and in any such event, notwithstanding the provisions of section 362 of the Bankruptcy Code but subject to the terms of the Financing Orders, without any application, motion or notice to, or order from, the Bankruptcy Court: (i) with the consent of the Required Lenders, the Administrative Agent may, or upon the request of the Required Lenders, the Administrative Agent shall, by notice to the Borrower declare the Revolving Credit Commitments to be terminated forthwith, whereupon the Revolving Credit Commitments shall immediately terminate; (ii) with the consent of the Required Lenders, the Administrative Agent may, or upon the request of the Required Lenders, the Administrative Agent shall, by notice to the Borrower, declare the Revolving Credit Loans hereunder (with accrued interest thereon) and



all other amounts owing under this Agreement and the other Credit Documents to be due and payable forthwith, whereupon the same shall immediately become due and payable; or (iii) with the consent of the Required Lenders, the Administrative Agent may, or upon the request of the Required Lenders, the Administrative Agent shall, increase the rate of interest applicable to the Revolving Credit Loans as provided in Section 2.8(b); and pursuant to and on the terms set forth in the Financing Orders, the automatic stay of section 362 of the Bankruptcy Code shall be modified and vacated to permit the Lenders to exercise their remedies under this Agreement and the Credit Documents, without further application or motion to, or order from, the Bankruptcy Court, provided, however, notwithstanding anything to the contrary contained herein, the Administrative Agent shall be permitted to exercise any remedy, whether provided for herein, otherwise available to it, or provided to secured parties under the UCC (whether or not the UCC applies to the affected Collateral) in the nature of a sale, liquidation or other disposition (including disposition by merger) of, or foreclosure on, any interest of any Credit Party in the Collateral only upon 5 Business Days' prior written notice to the Company, counsel approved by the Bankruptcy Court for the Committee, if any, the United States Trustee. Upon the occurrence of an Event of Default and the exercise by Lenders of their rights and remedies under this Agreement and the other Credit Documents, the Borrower and the Company shall assist, and shall use commercially reasonable efforts to cause their respective Subsidiaries to assist, Lenders in effecting a sale or other disposition of the Collateral upon such terms as are designed to maximize the proceeds obtainable from such sale or other disposition and shall cooperate with the Administrative Agent and the Lenders in obtaining any FCC approvals (consistent with the rules, regulations and published policies of the FCC) that the Administrative Agent deems reasonably necessary in connection with the exercise of any remedies by the Administrative Agent or the Lenders.

## SECTION 8. THE ADMINISTRATIVE AGENT

8.1 Appointment. Each Lender hereby irrevocably designates and appoints the Administrative Agent as the agent of such Lender under this Agreement and the other Credit Documents, and each such Lender irrevocably authorizes the Administrative Agent, in such capacity, to take such action on its behalf under the provisions of this Agreement and the other Credit Documents and to exercise such powers and perform such duties as are expressly delegated to the Administrative Agent by the terms of this Agreement and the other Credit Documents, together with such other powers as are reasonably incidental thereto. Notwithstanding any provision to the contrary elsewhere in this Agreement, the Administrative Agent shall not have any duties or responsibilities, except those expressly set forth herein, or any fiduciary relationship with any Lender, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement or any other Credit Document or otherwise exist against the Administrative Agent. Without limiting the generality of the foregoing, each Lender hereby authorizes the Administrative Agent to consent, on behalf of each Lender, to an Interim Order substantially in the form attached as Exhibit J hereto and a Final Order to be negotiated among the Credit Parties, the Required Lenders and the Committee.

8.2 Delegation of Duties. The Administrative Agent may execute any of its duties under this Agreement and the other Credit Documents by or through agents or attorneys-in-fact and shall be entitled to advice of counsel concerning all matters pertaining to such duties.

The Administrative Agent shall not be responsible for the negligence or misconduct of any agents or attorneys in-fact selected by it with reasonable care.

8.3 Exculpatory Provisions. Neither the Administrative Agent nor any of its respective officers, directors, employees, agents, attorneys-in-fact or affiliates shall be (i) liable for any action lawfully taken or omitted to be taken by it or such Person under or in connection with this Agreement or any other Credit Document (except to the extent that any of the foregoing are found by a final and nonappealable decision of a court of competent jurisdiction to have resulted from its or such Person's own gross negligence or willful misconduct) or (ii) responsible in any manner to any of the Lenders for any recitals, statements, representations or warranties made by any Credit Party or any officer thereof contained in this Agreement or any other Credit Document or in any certificate, report, statement or other document referred to or provided for in, or received by the Administrative Agent under or in connection with, this Agreement or any other Credit Document or for the value, validity, effectiveness, genuineness, enforceability or sufficiency of this Agreement or any other Credit Document or for any failure of any Credit Party a party thereto to perform its obligations hereunder or thereunder. The Administrative Agent shall not be under any obligation to any Lender to ascertain or to inquire as to the observance or performance of any of the agreements contained in, or conditions of, this Agreement or any other Credit Document, or to inspect the properties, books or records of any Credit Party.

8.4 Reliance by Administrative Agent. The Administrative Agent shall be entitled to rely, and shall be fully protected in relying, upon any instrument, writing, resolution, notice, consent, certificate, affidavit, letter, telecopy, telex or teletype message, statement, order or other document or conversation believed by it to be genuine and correct and to have been signed, sent or made by the proper Person or Persons and upon advice and statements of legal counsel (including, without limitation, counsel to any of the Credit Parties), independent accountants and other experts selected by the Administrative Agent. The Administrative Agent may deem and treat the payee of any Revolving Credit Note as the owner thereof for all purposes unless a written notice of assignment, negotiation or transfer thereof shall have been filed with the Administrative Agent. The Administrative Agent shall be fully justified in failing or refusing to take any action under this Agreement or any other Credit Document unless it shall first receive such advice or concurrence of the Required Lenders (or, if so specified by this Agreement, all Lenders) as it deems appropriate or it shall first be indemnified to its satisfaction by the Lenders against any and all liability and expense which may be incurred by it by reason of taking or continuing to take any such action. The Administrative Agent shall in all cases be fully protected in acting, or in refraining from acting, under this Agreement and the other Credit Documents in accordance with a request of the Required Lenders (or, if so specified by this Agreement, all Lenders), and such request and any action taken or failure to act pursuant thereto shall be binding upon all the Lenders and all future holders of the Revolving Credit Loans.

8.5 Notice of Default. The Administrative Agent shall not be deemed to have knowledge or notice of the occurrence of any Default or Event of Default hereunder unless the Administrative Agent has received notice from a Lender, the Company or the Borrower referring to this Agreement, describing such Default or Event of Default and stating that such notice is a "notice of default". In the event that the Administrative Agent receives such a notice, the Administrative Agent shall give notice thereof to the Lenders. The Administrative Agent shall

take such action with respect to such Default or Event of Default as shall be reasonably directed by the Required Lenders (or, if so specified by this Agreement, all Lenders); *provided* that unless and until the Administrative Agent shall have received such directions, the Administrative Agent may (but shall not be obligated to) take such action, or refrain from taking such action, with respect to such Default or Event of Default as it shall deem advisable in the best interests of the Lenders.

**8.6 Non-Reliance on Administrative Agent and Other Lenders.** Each Lender expressly acknowledges that neither the Administrative Agent nor any of its respective officers, directors, employees, agents, attorneys-in-fact or affiliates have made any representations or warranties to it and that no act by the Administrative Agent hereinafter taken, including any review of the affairs of a Credit Party or any affiliate of a Credit Party, shall be deemed to constitute any representation or warranty by the Administrative Agent to any Lender. Each Lender represents to the Administrative Agent that it has, independently and without reliance upon the Administrative Agent or any other Lender, and based on such documents and information as it has deemed appropriate, made its own appraisal of and investigation into the business, operations, property, financial and other condition and creditworthiness of the Credit Parties and their affiliates and made its own decision to make its Revolving Credit Loans hereunder and enter into this Agreement. Each Lender also represents that it will, independently and without reliance upon the Administrative Agent or any other Lender, and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit analysis, appraisals and decisions in taking or not taking action under this Agreement and the other Credit Documents, and to make such investigation as it deems necessary to inform itself as to the business, operations, property, financial and other condition and creditworthiness of the Credit Parties and their affiliates. Except for notices, reports and other documents expressly required to be furnished to the Lenders by the Administrative Agent hereunder, the Administrative Agent shall not have any duty or responsibility to provide any Lender with any credit or other information concerning the business, operations, property, condition (financial or otherwise), prospects or creditworthiness of any Credit Party or any affiliate of a Credit Party which may come into the possession of the Administrative Agent or any of its officers, directors, employees, agents, attorneys-in-fact or affiliates.

**8.7 Indemnification.** The Lenders agree to indemnify the Administrative Agent in its capacity as such (to the extent not reimbursed by the Company or the Borrower and without limiting the obligation of the Company or the Borrower to do so), ratably according to their respective Aggregate Exposure Percentages in effect on the date on which indemnification is sought under this Section (or, if indemnification is sought after the date upon which the Revolving Credit Commitments shall have terminated and the Revolving Credit Loans shall have been paid in full, ratably in accordance with such Aggregate Exposure Percentages immediately prior to such date), from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind whatsoever which may at any time (including, without limitation, at any time following the payment of the Revolving Credit Loans) be imposed on, incurred by or asserted against the Administrative Agent in any way relating to or arising out of, the Revolving Credit Commitments, the Revolving Credit Loans, this Agreement, any of the other Credit Documents or any documents contemplated by or referred to herein or therein or the transactions contemplated hereby or thereby or any action taken or omitted by the Administrative Agent under or in connection with

any of the foregoing; *provided* that no Lender shall be liable for the payment of any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements which are found by a final and nonappealable decision of a court of competent jurisdiction to have resulted from the Administrative Agent's gross negligence or willful misconduct. The agreements in this Section shall survive the payment of the Revolving Credit Loans and all other amounts payable hereunder.

8.8 Administrative Agent in Its Individual Capacity. The Administrative Agent and its affiliates may make loans to, accept deposits from and generally engage in any kind of business with any Credit Party as though the Administrative Agent was not the Administrative Agent. With respect to its Revolving Credit Loans made or renewed by it, the Administrative Agent shall have the same rights and powers under this Agreement and the other Credit Documents as any Lender and may exercise the same as though it were not the Administrative Agent, and the terms "Lender" and "Lenders" shall include the Administrative Agent in its individual capacity.

8.9 Successor Administrative Agent. The Administrative Agent may resign as Administrative Agent upon 10 days' notice to the Lenders and the Borrower. If the Administrative Agent shall resign as Administrative Agent under this Agreement and the other Credit Documents, then the Required Lenders shall appoint from among the Lenders a successor agent for the Lenders, whereupon such successor agent shall succeed to the rights, powers and duties of the Administrative Agent, and the term "Administrative Agent" shall mean such successor agent effective upon such appointment and approval, and the former Administrative Agent's rights, powers and duties as Administrative Agent shall be terminated, without any other or further act or deed on the part of such former Administrative Agent or any of the parties to this Agreement or any holders of the Revolving Credit Loans. If no successor agent has accepted appointment as Administrative Agent by the date that is 10 days following a retiring Administrative Agent's notice of resignation, the retiring Administrative Agent's resignation shall nevertheless thereupon become effective, and the Lenders shall assume and perform all of the duties of the Administrative Agent hereunder until such time, if any, as the Required Lenders appoint a successor agent as provided for above. After the retiring Administrative Agent's resignation as Administrative Agent, the provisions of this Section 8 shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Administrative Agent under this Agreement and the other Credit Documents.

8.10 Authorization to Release Liens. The Administrative Agent is hereby irrevocably authorized by each of the Lenders to release any Lien covering any Property of the Borrower or any of its Subsidiaries that is the subject of a Disposition which is permitted by this Agreement or which has been consented to in accordance with Section 9.1.

## SECTION 9. MISCELLANEOUS

9.1 Amendments and Waivers. (a) Neither this Agreement or any other Credit Document, nor any terms hereof or thereof may be amended, supplemented or modified except in accordance with the provisions of this Section. The Required Lenders and each Credit Party party to the relevant Credit Document may, or (with the written consent of the Required Lenders) the Administrative Agent and each Credit Party party to the relevant Credit Document may, from

time to time, (a) enter into written amendments, supplements or modifications hereto and to the other Credit Documents (including amendments and restatements hereof or thereof) for the purpose of adding any provisions to this Agreement or the other Credit Documents or changing in any manner the rights of the Lenders or of the Credit Parties hereunder or thereunder or (b) waive, on such terms and conditions as may be specified in the instrument of waiver, any of the requirements of this Agreement or the other Credit Documents or any Default or Event of Default and its consequences; *provided, however*, that no such waiver and no such amendment, supplement or modification shall

(i) forgive the principal amount or extend the final scheduled date of maturity of any Revolving Credit Loan, extend the scheduled date of any payment in respect of any Revolving Credit Loan (other than any mandatory prepayment under Section 2.5 hereof), reduce the stated rate of any interest or fee payable hereunder or extend the scheduled date of any payment thereof, in each case without the consent of each Lender directly and adversely affected thereby, or increase the amount or extend the expiration date of any Revolving Credit Commitment of any Lender, without the consent of such Lender, *provided, however*, that notwithstanding the foregoing, the Required Lenders may extend the Stated Maturity Date up to ninety (90) days (so that, in any case, the latest Stated Maturity Date after giving effect to any such extension shall be 360 days after the Petition Date);

(ii) amend, modify or waive any provision of this Section 9.1 or reduce any percentage specified in the definition of Required Lenders, or consent to the assignment or transfer by the Company or the Borrower of any of its rights and obligations under this Agreement or any other Credit Document, in each case without the consent of all Lenders;

(iii) release the Administrative Agent's liens or security interests in all or substantially all of the Collateral or modify the superpriority status of such Liens or security interests or release any Credit Party from its obligations under the Credit Documents (except as otherwise expressly permitted under any Credit Document), in each case without the consent of all Lenders;

(iv) amend, modify or waive any provision of Section 8 without the consent of the Administrative Agent or

(v) amend, modify or waive any provision of Sections 9.6(b) and 9.6(c) without the consent of the Supermajority Lenders.

Notwithstanding anything to the contrary contained herein or in any Security Document, upon request of the Borrower, the Administrative Agent shall (without notice to or vote or consent of any Lender) take action having the effect of releasing any Collateral and/or guarantee obligations provided for in such Security Document to the extent necessary to permit consummation, by the relevant Person in accordance with the terms of this Agreement and the other Credit Documents, of any transaction not prohibited hereunder. Any waiver and any amendment, supplement or modification of a type referred to above shall apply equally to each of the Lenders and shall be binding upon the Credit Parties, the Lenders, the Administrative

Agent and all future holders of the Revolving Credit Loans. In the case of any waiver, the Credit Parties, the Lenders and the Administrative Agent shall be restored to their former position and rights hereunder and under the other Credit Documents, and any Default or Event of Default waived shall be deemed to be cured and not continuing; but no such waiver shall extend to any subsequent or other Default or Event of Default, or impair any right consequent thereon. Any such waiver, amendment, supplement or modification shall be effected by a written instrument signed by the parties required to sign pursuant to the foregoing provisions of this Section; *provided* that delivery of an executed signature page of any such instrument by facsimile transmission shall be effective as delivery of a manually executed counterpart thereof.

(b) If, in connection with any proposed amendment, modification, waiver or termination (a "Proposed Change"), requiring the consent of all affected Lenders, the consent of Required Lenders is obtained, but the consent of any other Lender whose consent is required is not obtained (any such Lender whose consent is not obtained as described in this Section 9.1 being referred to as a "Non-Consenting Lender"), then, at Borrower's request, the Required Lenders shall have the right to purchase from such Non-Consenting Lender, and each Non-Consenting Lender agrees that it shall, upon the Required Lenders' request, sell and assign to one or more of the Required Lenders, all of the Revolving Credit Commitment of such Non-Consenting Lender for an amount equal to the principal balance of all Revolving Credit Loans held by such Non-Consenting Lender and all accrued interest and fees with respect thereto through the date of sale, such purchase and sale to be consummated pursuant to an executed Assignment and Acceptance.

9.2 Notices. All notices, requests and demands to or upon the respective parties hereto to be effective shall be in writing and delivered (including by telecopy), and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when received and which shall be addressed (a) in the case of the Company, the Borrower and the Administrative Agent, as follows and (b) in the case of each Lender, as set forth on its signature page hereto or, in the case of a Lender which becomes a party to this Agreement pursuant to an Assignment and Acceptance, as set forth in such Assignment and Acceptance or (c) in the case of any party, to such other address as such party may hereafter notify to the other parties hereto:

The Company:

Birch Telecom, Inc.  
2300 Main Street, Two Pershing Square  
6<sup>th</sup> Floor  
Kansas City, MO 64108  
Attention: General Counsel  
Telecopy: (816) 300-3247  
Telephone: (816) 300-3000

The Borrower:

Birch Telecom Finance, Inc.  
2300 Main Street, Two Pershing Square  
6<sup>th</sup> Floor  
Kansas City, MO 64108  
Attention: General Counsel  
Telecopy: (816) 300-3247  
Telephone: (816) 300-3000



The Administrative Agent: Bank of America, N.A.  
901 Main Street  
TX1-492-14-11  
Dallas, TX 75202  
Attention: Maurice E. Washington  
Telecopy: (214) 290-9544  
Telephone: (214) 209-4128

with a copy to: Sidley Austin Brown & Wood LLP  
787 Seventh Avenue  
New York, NY 10019  
Attention: Lee S. Attanasio, Esq.  
Telecopy: (212) 839-5599  
Telephone: (212) 839-5342

provided that any notice, request or demand to or upon the Administrative Agent or any Lender shall not be effective until received.

9.3 No Waiver; Cumulative Remedies. No failure to exercise and no delay in exercising, on the part of the Administrative Agent or any Lender, any right, remedy, power or privilege hereunder or under the other Credit Documents shall operate as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. The rights, remedies, powers and privileges herein provided are cumulative and not exclusive of any rights, remedies, powers and privileges provided by law.

9.4 Survival of Representations and Warranties. All representations and warranties made hereunder, in the other Credit Documents and in any document, certificate or statement delivered pursuant hereto or in connection herewith shall survive the execution and delivery of this Agreement and the making of the Revolving Credit Loans and other extensions of credit hereunder.

9.5 Payment of Expenses. The Borrower agrees, subject, with respect to cost and expenses, to invoices received with respect to such costs and expenses: (a) to pay or reimburse the Administrative Agent for all its reasonable out-of-pocket costs and expenses incurred in connection with the development, preparation and execution of this Agreement and the other Credit Documents, and any amendment, supplement or modification to, this Agreement and the other Credit Documents and any other documents prepared in connection herewith or therewith, whether or not the transactions contemplated hereby are actually consummated, and the consummation and administration of the transactions contemplated hereby and thereby, including the obtaining of approval of the Credit Documents by the Bankruptcy Court, the preparation and review of the pleadings, documents and reports related to the Chapter 11 Case and any subsequent case under Chapter 7 of the Bankruptcy Code, attendance at meetings, court hearings or conferences related to the transaction contemplated by this Agreement, the Chapter 11 Case and any subsequent case under Chapter 7 of the Bankruptcy Code, and general

monitoring of the Chapter 11 Case and any subsequent case under Chapter 7 of the Bankruptcy Code, including, without limitation, the reasonable fees and disbursements and other charges of counsel to the Administrative Agent, (b) to pay or reimburse each Lender and the Administrative Agent for all of its reasonable costs and expenses incurred in connection with the enforcement or preservation of any rights under this Agreement, the other Credit Documents and any such other documents, including, without limitation, the fees and disbursements of counsel to each Lender and of counsel to the Administrative Agent, and including efforts to monitor the Revolving Credit Loans or other Obligations, evaluate, observe or assess any of the Credit Parties or their respective affairs, and verify, protect, evaluate, assess, appraise, collect, sell, liquidate or otherwise dispose of any of the Collateral, (c) to pay, indemnify, and hold each Lender and the Administrative Agent harmless from, any and all recording and filing fees and any and all liabilities with respect to, or resulting from any delay in paying, stamp, excise and other taxes, if any, which may be payable or determined to be payable in connection with the execution and delivery of, or consummation or administration of any of the transactions contemplated by, or any amendment, supplement or modification of, or any waiver or consent under or in respect of, this Agreement, the other Credit Documents and any such other documents, and (d) to pay, indemnify, and hold each Lender and the Administrative Agent and their respective officers, directors, trustees, employees, affiliates, agents, controlling persons, attorneys and advisers (each, an "Indemnitee") harmless from and against any and all other liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs (including travel costs), expenses or disbursements of any kind or nature whatsoever with respect to the execution, delivery, enforcement, performance and administration of this Agreement, the other Credit Documents and any such other documents, including, without limitation, any of the foregoing relating to the use of proceeds of the Revolving Credit Loans or the violation of, noncompliance with or liability under, any Environmental Law applicable to the operations of the Company or any of its Subsidiaries or any of the Properties and the fees and disbursements and other charges of legal counsel in connection with claims, actions or proceedings by any Indemnitee against the Borrower hereunder (all the foregoing in this clause (d), collectively, the "Indemnified Liabilities"); *provided* that the Borrower shall have no obligation hereunder to any Indemnitee with respect to Indemnified Liabilities to the extent such Indemnified Liabilities are found by a final and nonappealable decision of a court of competent jurisdiction to have resulted from the gross negligence or willful misconduct of such Indemnitee. Without limiting the foregoing, and to the extent permitted by applicable law, the Company agrees not to assert and to cause its Subsidiaries not to assert, and hereby waives and agrees to cause its Subsidiaries so to waive, all rights for contribution or any other rights of recovery with respect to all claims, demands, penalties, fines, liabilities, settlements, damages, costs and expenses of whatever kind or nature, under or related to Environmental Laws, that any of them might have by statute or otherwise against any indemnitee. The agreements in this Section shall survive repayment of the Revolving Credit Loans and all other amounts payable hereunder.

9.6 Successors and Assigns; Participations and Assignments. (a) This Agreement shall be binding upon and inure to the benefit of the Company, the Borrower, the Lenders, the Administrative Agent, all future holders of the Revolving Credit Loans and their respective successors and assigns, except that neither the Company nor the Borrower may assign or transfer any of its respective rights or obligations under this Agreement without the prior written consent of the Administrative Agent and each Lender.



(b) Any Lender may, without the consent of the Borrower, in accordance with applicable law, at any time sell to one or more banks, financial institutions or other entities (each, a "Participant") participating interests in any Revolving Credit Loan owing to such Lender or any other interest of such Lender hereunder and under the other Credit Documents; *provided*, that no such participating interest sold to a participant shall be in an aggregate amount of less than \$1,000,000. In the event of any such sale by a Lender of a participating interest to a Participant, such Lender's obligations under this Agreement to the other parties to this Agreement shall remain unchanged, such Lender shall remain solely responsible for the performance thereof, such Lender shall remain the holder of any such Revolving Credit Loan for all purposes under this Agreement and the other Credit Documents, and the Borrower and the Administrative Agent shall continue to deal solely and directly with such Lender in connection with such Lender's rights and obligations under this Agreement and the other Credit Documents. In no event shall any Participant under any such participation have any right to approve any amendment or waiver of any provision of any Credit Document, or any consent to any departure by any Credit Party therefrom, except for those matters specified in clauses (i), (ii) and (iii) of the proviso in Section 9.1. The Borrower agrees that if amounts outstanding under this Agreement and the Revolving Credit Loans are due or unpaid, or shall have been declared or shall have become due and payable upon the occurrence of an Event of Default, each Participant shall, to the maximum extent permitted by applicable law, be deemed to have the right of setoff in respect of its participating interest in amounts owing under this Agreement to the same extent as if the amount of its participating interest were owing directly to it as a Lender under this Agreement; *provided that*, in purchasing such participating interest, such Participant shall be deemed to have agreed to share with the Lenders the proceeds thereof as provided in Section 9.7(a) as fully as if it were a Lender hereunder. The Borrower also agrees that each Participant shall be entitled to the benefits of Sections 2.12 and 2.13 with respect to its participation in the Revolving Credit Loans outstanding from time to time as if it was a Lender; *provided that*, in the case of Section 2.13, such Participant shall have complied with the requirements of Section 2.13 and *provided, further*, that no Participant shall be entitled to receive any greater amount pursuant to any such Section than the transferor Lender would have been entitled to receive in respect of the amount of the participation transferred by such transferor Lender to such Participant had no such transfer occurred.

(c) Any Lender (an "Assignor") may, in accordance with applicable law and upon written notice to the Administrative Agent, at any time and from time to time assign to any Lender or any Affiliate thereof or to an Eligible Assignee (an "Assignee") pursuant to an Assignment and Acceptance, substantially in the form of Exhibit D, executed by such Assignee and such Assignor (and, where the consent of the Administrative Agent is required, the Administrative Agent) and delivered to the Administrative Agent for its acceptance and recording in the Register (an "Assignment and Acceptance"); *provided that* (i) no such assignment to an Assignee (other than any Lender or any Affiliate thereof, including, without limitation, in the case of any Lender that is an investment fund which is regularly engaged in making, purchasing or investing in loans or securities, any other such fund which is under common (or affiliated) management with such Lender) shall (other than in the case of an assignment of all of a Lender's rights under this Agreement) be in an aggregate principal amount of less than \$1,000,000 (or such lesser amount as may be agreed to by the Administrative Agent) and (ii) each partial assignment of any Revolving Credit Commitment and/or Revolving Credit Loans shall be made as an assignment or a proportionate part of all the assigning Lender's rights

and obligations of such Revolving Credit Commitments and Revolving Credit Loans under this Agreement; *provided further* that no such assignment to an Assignee shall be effective without a concurrent sale or disposition by such Assignor to the same Assignee of such Assignor's interest in the "Term Loans" under, and as defined in, the Pre-Petition Agreement, which sale or disposition shall be of the same percentage of such Assignor's "Term Loans" as the percentage of such Assignor's "Term Loans" as the percentage of such Assignor's Revolving Credit Loans being assigned under such assignment. Upon such execution, delivery, acceptance and recording, from and after the effective date determined pursuant to such Assignment and Acceptance, (x) the Assignee thereunder shall be a party hereto and, to the extent provided in such Assignment and Acceptance, have the rights and obligations of a Lender hereunder with a Revolving Credit Commitment and/or Revolving Credit Loans as set forth therein, and (y) the Assignor thereunder shall, to the extent provided in such Assignment and Acceptance, be released from its obligations under this Agreement (and, in the case of an Assignment and Acceptance covering all of an Assignor's rights and obligations under this Agreement, such Assignor shall cease to be a party hereto).

(d) The Administrative Agent shall, on behalf of the Borrower, maintain at its address referred to in Section 9.2 a copy of each Assignment and Acceptance delivered to it and a register (the "Register") for the recordation of the names and addresses of the Lenders and the Revolving Credit Commitment of, and principal amount of the Revolving Credit Loans owing to, each Lender from time to time. The entries in the Register shall be conclusive, in the absence of manifest error, and the Borrower, the Administrative Agent and the Lenders shall treat each Person whose name is recorded in the Register as the owner of the Revolving Credit Loans and any Revolving Credit Notes evidencing such Revolving Credit Loans recorded therein for all purposes of this Agreement. Any assignment of any Revolving Credit Loan, whether or not evidenced by a Revolving Credit Note, shall be effective only upon appropriate entries with respect thereto being made in the Register (and each Revolving Credit Note shall expressly so provide). Any assignment or transfer of all or part of a Revolving Credit Loan evidenced by a Revolving Credit Note shall be registered on the Register only upon surrender for registration of assignment or transfer of the Revolving Credit Note evidencing such Revolving Credit Loan, accompanied by a duly executed Assignment and Acceptance; thereupon one or more new Revolving Credit Notes in the same aggregate principal amount shall be issued to the designated Assignee, and the old Revolving Credit Notes shall be returned by the Administrative Agent to the Borrower marked "cancelled". The Register shall be available for inspection by the Borrower or any Lender at any reasonable time and from time to time upon reasonable prior notice.

(e) Upon its receipt of an Assignment and Acceptance executed by an Assignor and an Assignee (and, in any case where the consent of any other Person is required by Section 9.6(c), by each such other Person) together with payment to the Administrative Agent from the Assignor or Assignee of a registration and processing fee, in the amount, if any, set forth on Schedule 9.6 (except that no such registration and processing fee shall be payable (y) in connection with an assignment by or to the Administrative Agent in its individual capacity or any of its Affiliates or (z) in the case of an Assignee which is already a Lender or is an Affiliate of a Lender (including, without limitation in the case of any Lender that is an investment fund which is regularly engaged in making, purchasing or investing in loans or securities, any other such fund which is under common (or affiliated) management with such Lender), the

Administrative Agent shall (i) promptly accept such Assignment and Acceptance and (ii) on the effective date determined pursuant thereto record the information contained therein in the Register and give notice of such acceptance and recordation to the Lenders and the Borrower. On or prior to such effective date, the Borrower, at its own expense, upon request, shall execute and deliver to the Administrative Agent one or more new Revolving Credit Notes to the order of such Assignee in an amount equal to the Revolving Credit Commitment, assumed or acquired by it pursuant to such Assignment and Acceptance and, if the Assignor has retained a Revolving Credit Commitment, upon request, one or more new Revolving Credit Notes to the order of the Assignor in an amount equal to the Revolving Credit Commitment retained by it hereunder. Such new Revolving Credit Note(s) shall be dated the Closing Date and shall otherwise be in the form of the Revolving Credit Note(s) replaced thereby.

(f) For avoidance of doubt, the parties to this Agreement acknowledge that the provisions of this Section concerning assignments of Revolving Credit Loans and Revolving Credit Notes relate only to absolute assignments and that such provisions do not prohibit assignments creating security interests, including, without limitation, any pledge or assignment by a Lender of any Revolving Credit Loan or Revolving Credit Note to any Person including, without limitation, any Federal Reserve Bank in accordance with applicable law.

9.7 Adjustments; Set-off. (a) Except to the extent that this Agreement provides for payments to be allocated to a particular Lender or to the Lenders, if any Lender (a "Benefited Lender") shall at any time receive any payment of all or part of the Obligations owing to it, or receive any collateral in respect thereof (whether voluntarily or involuntarily, by set-off, pursuant to events or proceedings of the nature referred to in Section 7, or otherwise), in a greater proportion than any such payment to or collateral received by any other Lender, if any, in respect of such other Lender's Obligations, such Benefited Lender shall purchase for cash from the other Lenders a participating interest in such portion of each such other Lender's Obligations, or shall provide such other Lenders with the benefits of any such collateral, as shall be necessary to cause such Benefited Lender to share the excess payment or benefits of such collateral ratably with each of the Lenders; *provided, however*, that if all or any portion of such excess payment or benefits is thereafter recovered from such Benefited Lender, such purchase shall be rescinded, and the purchase price and benefits returned, to the extent of such recovery, but without interest.

(b) In addition to any rights and remedies of the Lenders provided by law, each Lender shall have the right, without prior notice to the Company or the Borrower, any such notice being expressly waived by the Company and the Borrower to the extent permitted by applicable law, subject to the terms of the Financing Orders, without any application, motion or notice to, or order from, the Bankruptcy Court, upon any amount becoming due and payable by the Company or the Borrower hereunder (whether at the stated maturity, by acceleration or otherwise), to set off and appropriate and apply against such amount any and all deposits (general or special, time or demand, provisional or final), in any currency, and any other credits, indebtedness or claims, in any currency, in each case whether direct or indirect, absolute or contingent, matured or unmatured, at any time held or owing by such Lender or any branch or agency thereof to or for the credit or the account of the Company or the Borrower, as the case may be. Each Lender agrees promptly to notify the Borrower and the Administrative Agent after any such setoff and application made by such Lender; *provided* that the failure to give such notice shall not affect the validity of such setoff and application.

9.8 Counterparts. This Agreement may be executed by one or more of the parties to this Agreement on any number of separate counterparts, and all of said counterparts taken together shall be deemed to constitute one and the same instrument. Delivery of an executed signature page of this Agreement by facsimile transmission shall be effective as delivery of a manually executed counterpart hereof. A set of the copies of this Agreement signed by all the parties shall be lodged with the Borrower and the Administrative Agent.

9.9 Severability. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

9.10 Integration. This Agreement and the other Credit Documents represent the agreement of the Company, the Borrower, the Administrative Agent and the Lenders with respect to the subject matter hereof, and there are no promises, undertakings, representations or warranties by the Administrative Agent or any Lender relative to subject matter hereof not expressly set forth or referred to herein or in the other Credit Documents.

9.11 GOVERNING LAW. THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK AND (TO THE EXTENT APPLICABLE) THE BANKRUPTCY CODE.

9.12 Submission to Jurisdiction; Waivers. Each of the Company and the Borrower hereby irrevocably and unconditionally:

(a) submits for itself and its Property in any legal action or proceeding relating to this Agreement and the other Credit Documents to which it is a party, or for recognition and enforcement of any judgment in respect thereof, to the exclusive general jurisdiction of the Bankruptcy Court; *provided*, that the parties hereto acknowledge that any appeals from the Bankruptcy Court may have to be heard by a court other than the Bankruptcy Court;

(b) consents that any such action or proceeding may be brought in such court and waives any objection that it may now or hereafter have to the venue of any such action or proceeding in such court or that such action or proceeding was brought in an inconvenient court and agrees not to plead or claim the same;

(c) agrees that service of process in any such action or proceeding may be effected by mailing a copy thereof by registered or certified mail (or any substantially similar form of mail), postage prepaid, to the Company or the Borrower, as the case may be, at its address set forth in Section 9.2 or at such other address of which the Administrative Agent shall have been notified pursuant thereto;

(d) agrees that nothing herein shall affect the right to effect service of process in any other manner permitted by law or shall limit the right to sue in any other jurisdiction; and



(e) waives, to the maximum extent not prohibited by law, any right it may have to claim or recover in any legal action or proceeding referred to in this Section any special, exemplary, punitive or consequential damages.

9.13 Acknowledgements. Each of the Company and the Borrower hereby acknowledges that:

(a) it has been advised by counsel in the negotiation, execution and delivery of this Agreement and the other Credit Documents;

(b) neither the Administrative Agent nor any Lender has any fiduciary relationship with or duty to the Company or the Borrower arising out of or in connection with this Agreement or any of the other Credit Documents, and the relationship between the Administrative Agent and Lenders, on one hand, and the Company and the Borrower, on the other hand, in connection herewith or therewith is solely that of debtor and creditor; and

(c) no joint venture is created hereby or by the other Credit Documents or otherwise exists by virtue of the transactions contemplated hereby among the Lenders or among the Company, the Borrower and the Lenders.

9.14 Confidentiality. Each of the Administrative Agent and the Lenders agrees to keep confidential all non-public information provided to it by any Credit Party pursuant to this Agreement that is designated by such Credit Party as confidential (including any such information already in the possession of such Lender or provided to such Lender by a third party not in violation of this Agreement which, in either case, is not, to the knowledge of such Lender, subject to a confidentiality agreement); *provided* that nothing herein shall prevent the Administrative Agent or any Lender from disclosing any such information (a) to the Administrative Agent or any other Lender or any of its Affiliates, (b) to any Participant or Assignee (each, a "Transferee") or prospective Transferee or to any direct or indirect contractual counterparties in swap agreements or such contractual counterparties' professional advisors which receives such information and agrees to comply with the provisions of this Section, (c) any of its employees, directors, agents, attorneys, accountants and other professional advisors, (d) upon the request or demand of any Governmental Authority having jurisdiction over it, (e) in response to any order of any court or other Governmental Authority or as may otherwise be required pursuant to any Requirement of Law, (f) if requested or required to do so in connection with any litigation or similar proceeding, (g) which has been publicly disclosed other than in breach of this Section, (h) to the National Association of Insurance Commissioners or any similar organization or any nationally recognized rating agency that requires access to information about a Lender's investment portfolio in connection with ratings issued with respect to such Lender or (i) in connection with the exercise of any remedy hereunder or under any other Credit Document.

9.15 Accounting Changes. In the event that any "Accounting Changes" (as defined below) shall occur and such changes result in a change in the method of calculation of financial covenants, standards or terms in this Agreement, then the Company, the Borrower and the Administrative Agent agree to enter into negotiations in order to amend such provisions of this Agreement so as to equitably reflect such Accounting Changes with the desired result that

the criteria for evaluating the Company's and the Borrower's financial condition shall be the same after such Accounting Changes as if such Accounting Changes had not been made. Until such time as such an amendment shall have been executed and delivered by the Company, the Borrower, the Administrative Agent and the Required Lenders, all financial covenants, standards and terms in this Agreement shall continue to be calculated or construed as if such Accounting Changes had not occurred. "Accounting Changes" refers to changes in accounting principles required by the promulgation of any rule, regulation, pronouncement or opinion by the Financial Accounting Standards Board of the American Institute of Certified Public Accountants or, if applicable, the SEC.

9.16 WAIVERS OF JURY TRIAL. THE COMPANY, THE BORROWER, THE ADMINISTRATIVE AGENT AND THE LENDERS HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVE TRIAL BY JURY IN ANY LEGAL ACTION OR PROCEEDING RELATING TO THIS AGREEMENT OR ANY OTHER CREDIT DOCUMENT AND FOR ANY COUNTERCLAIM THEREIN.

9.17 Parties Including Trustees; Bankruptcy Court Proceedings. This Agreement, the other Credit Documents, and all Liens created hereby or pursuant hereto or to any other Credit Document shall be binding upon each Credit Party, the estate of the Company and each other Credit Party, and any trustee or successor in interest of any Credit Party in the Chapter 11 Case or any subsequent case commenced under Chapter 7 of the Bankruptcy Code, and shall not be subject to section 365 of the Bankruptcy Code. This Agreement and the other Credit Documents shall be binding upon, and inure to the benefit of, the successors of the Administrative Agent and Lenders and their respective assigns, transferees and endorsees. The Liens created by this Agreement and the other Credit Documents shall be and remain valid and perfected in the event of the substantive consolidation or conversion of the Chapter 11 Case or any other bankruptcy case of any Credit Party to a case under Chapter 7 of the Bankruptcy Code or in the event of dismissal of the Chapter 11 Case or the release of any Collateral from the jurisdiction of the Bankruptcy Court for any reason, without the necessity that Lenders file financing statements or otherwise perfect their security interests or Liens under applicable law.

9.18 Pre-Petition Agreement. Borrower and Company hereby agree that (i) this Agreement is separate and distinct from the Pre-Petition Agreement and (ii) the Pre-Petition Agreement is in full force and effect. Borrower and Company further agree that entering into this Agreement does not serve as a waiver of any Default or Event of Default under the Pre-Petition Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered by their proper and duly authorized officers as of the day and year first above written.

BIRCH TELECOM, INC., as Borrower

By: \_\_\_\_\_  
Name:  
Title:

BIRCH TELECOM FINANCE, INC., as  
Company

By: \_\_\_\_\_  
Name:  
Title:

AMERICAN LOCAL TELECOMMUNICATIONS  
LLC, as a Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH EQUIPMENT, INC., as a Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH INTERNET SERVICES, INC., as a Credit  
Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH TELECOM OF THE WEST, INC., as a  
Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary



BIRCH TELECOM OF ARKANSAS, INC., as a  
Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH TELECOM OF KANSAS, INC., as a  
Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH TELECOM OF NEBRASKA, INC., as a  
Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH TELECOM OF OKLAHOMA, INC., as a  
Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH TELECOM OF TEXAS LTD., L.L.P., as a  
Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH TEXAS HOLDINGS, INC., as a Credit  
Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

CAPITAL COMMUNICATIONS  
CORPORATION, as a Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

DUNN & ASSOCIATES, INC., as a Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

G.B.S. COMMUNICATIONS, INC., as a Credit  
Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

I.S. ADVERTISING, INC., as a Credit Party

By: \_\_\_\_\_

Name: Gregory C. Lawhon

Title: Senior Vice President Public Policy,  
General Counsel and Secretary

M.B.S. LEASING, INC., as a Credit Party

By: \_\_\_\_\_

Name: Gregory C. Lawhon

Title: Senior Vice President Public Policy,  
General Counsel and Secretary

TELESOURCE COMMUNICATIONS, INC., as a  
Credit Party

By: \_\_\_\_\_

Name: Gregory C. Lawhon

Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH TELECOM OF MISSOURI, INC., as a  
Credit Party

By: \_\_\_\_\_

Name: Gregory C. Lawhon

Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH KANSAS HOLDINGS, INC., as a Credit  
Party

By: \_\_\_\_\_

Name: Gregory C. Lawhon

Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH MANAGEMENT CORPORATION, as a  
Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH TELECOM OF THE GREAT LAKES,  
INC., as a Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH TELECOM OF THE SOUTH, INC., as a  
Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BIRCH TELECOM 1996, INC., as a Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

IONEX COMMUNICATIONS, INC., as a Credit  
Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

IONEX COMMUNICATIONS NORTH, INC., as a  
Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

IONEX COMMUNICATIONS SOUTH, INC., as a  
Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

IONEX TELECOMMUNICATIONS LEASING  
INC., as a Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

TELECOM RESOURCES, INC., as a Credit Party

By: \_\_\_\_\_  
Name: Gregory C. Lawhon  
Title: Senior Vice President Public Policy,  
General Counsel and Secretary

BANK OF AMERICA, N.A., in its capacity as  
Administrative Agent

By: \_\_\_\_\_

Name:

Title:

BANC OF AMERICA STRATEGIC SOLUTIONS,  
INC., as a Lender

By \_\_\_\_\_  
Name:  
Title:

BEAR STEARNS CORPORATE LENDING INC.,  
as a Lender

By \_\_\_\_\_  
Name:  
Title:



MAN MAC 3 LIMITED, as a Lender

By \_\_\_\_\_  
Name:  
Title:

MERRILL LYNCH CREDIT PRODUCTS, LLC,  
as a Lender

By \_\_\_\_\_  
Name:  
Title:

UBS WILLOW FUND, LLC, as a Lender

By \_\_\_\_\_  
Name:  
Title:

STRATEGIC VALUE CREDIT OPPORTUNITIES  
MASTER FUND L.P. , as a Lender

By \_\_\_\_\_  
Name:  
Title:

STRATEGIC VALUE MASTER FUND LTD., as a  
Lender

By \_\_\_\_\_  
Name:  
Title:

RITCHIE SPECIAL CREDIT INVESTMENTS,  
LTD., as a Lender

By \_\_\_\_\_

Name:

Title:

## SCHEDULE 1

<b>Lenders</b>	<b>\$ 2,000,000.00</b>	<b>\$ 5,000,000.00</b>
BANC OF AMERICA STRATEGIC SOLUTIONS, INC	\$ 205,128.21	\$ 512,820.52
RITCHIE SPECIAL CREDIT INVESTMENTS, LTD.	\$ 180,000.00	\$ 450,000.00
BEAR STEARNS CORPORATE LENDING INC.	\$ 86,410.25	\$ 216,025.63
MERRILL LYNCH CREDIT PRODUCTS, LLC	\$ 186,410.25	\$ 466,025.63
STRATEGIC VALUE CREDIT OPPORTUNITIES MASTER FUND L.P.	\$ 100,000.00	\$ 250,000.00
STRATEGIC VALUE MASTER FUND LTD.	\$ 524,297.97	\$ 1,310,744.93
MAN MAC 3 LIMITED	\$ 130,061.01	\$ 325,152.52
UBS WILLOW FUND, LLC	\$ 587,692.31	\$ 1,469,230.77
<b>Total</b>	<b>\$ 2,000,000.00</b>	<b>\$ 5,000,000.00</b>

# Exhibit C



UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

_____	)	
In re	)	Chapter 11
	)	
BIRCH TELECOM, INC., et al.,	)	Case No. 05-12237 (PJW)
	)	
Debtors.	)	Jointly Administered
_____	)	<i>re: docket #14</i>

**INTERIM ORDER (I) AUTHORIZING DEBTORS (A) TO OBTAIN  
POST-PETITION FINANCING PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 364(c)(1),  
364(c)(2), 364(c)(3), 364(d)(1) AND 364(e) AND (B) TO UTILIZE CASH  
COLLATERAL PURSUANT TO 11 U.S.C. § 363, (II) GRANTING ADEQUATE  
PROTECTION TO PRE-PETITION SECURED PARTIES PURSUANT TO 11 U.S.C.  
§§ 361, 362, 363 AND 364 AND (III) SCHEDULING FINAL HEARING PURSUANT  
TO BANKRUPTCY RULES 2002, 4001 AND 9014**

Upon the motion (the "Motion"), dated August 12, 2005, of Birch Telecom, Inc. (the "Company") and its affiliated debtors, each as a debtor and debtor-in-possession (collectively, the "Debtors") in the above-captioned cases (the "Cases"), pursuant to sections 105, 361, 362, 363(c)(2), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code"), and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), seeking, among other things:

(1) authorization for Birch Telecom Finance, Inc. (the "Borrower") to obtain post-petition financing (the "Financing"), and for all of the other Debtors (the "Guarantors") to guaranty the Borrower's obligations in connection with the Financing, up to the aggregate principal amount of \$5,000,000 (the actual available principal amount at any time being subject to those conditions set forth in the DIP Documents (as defined below)), pursuant to the Senior Secured Superpriority Debtor-in-Possession Credit Agreement among the Company, the Borrower, Bank of America, N.A. ("Bank of

America"), acting as Administrative Agent (in such capacity, the "Agent") for itself and the other lenders from time to time party thereto, and such lenders (together with Bank of America, the "DIP Lenders"), substantially in the form attached as Exhibit A to the Motion (the "DIP Agreement");

(2) authorization for the Debtors to execute and enter into the DIP Documents (as defined below) and to perform such other and further acts as may be required in connection with the DIP Documents;

(3) the granting of adequate protection of the security interests and liens (provided that such security interests and liens are valid, perfected and indefeasible as of the date on which the Debtors filed the Cases (the "Petition Date")) of Bank of America, as administrative agent (in such capacity, the "Pre-Petition Agent") under the Second Amended and Restated Credit Agreement, dated as of September 30, 2004 (as heretofore amended, supplemented or otherwise modified, the "Pre-Petition Agreement"), among the Company, the Borrower, the Pre-Petition Agent and the other lenders from time to time party thereto (together with Bank of America, the "Pre-Petition Lenders"). All of the Borrower's indebtedness to the Pre-Petition Lenders in respect of loans made by the Pre-Petition Lenders pursuant to, and in accordance with the terms of, the Pre-Petition Agreement, plus, in each case, interest thereon and fees, expenses (including any attorneys', accountants', appraisers' and financial advisors' fees that are chargeable or reimbursable under the Pre-Petition Agreement), charges and other obligations incurred in connection therewith as provided in the Pre-Petition Agreement hereinafter referred to as the "Pre-Petition Obligations"), whose liens and security interests are being primed by the Financing;

(4) authorization for the Debtors to use cash collateral (as such term is defined in the Bankruptcy Code) in which the Pre-Petition Lenders have an interest, and the granting of adequate protection to the Pre-Petition Lenders with respect to, inter alia, such use of their cash collateral and all use and diminution in the value of the liens and security interests (the "Pre-Petition Liens") in the personal and real property (the "Pre-Petition Collateral") described in the Security Documents (as defined in the Pre-Petition Agreement);

(5) the granting of superpriority claims to the DIP Agent and the DIP Lenders payable from, and having recourse to, all pre-petition and post-petition property of the Debtors' estates and all proceeds thereof, subject to the Carve-Out (as defined below);

(6) effective upon entry of the Final Order (as defined below) granting such relief, the limitation of the Debtors' and their estates' right to surcharge against collateral pursuant to section 506(c) of the Bankruptcy Code;

(7) pursuant to Bankruptcy Rule 4001, that an interim hearing (the "Interim Hearing") on the Motion be held before this Court to consider entry of the proposed interim order annexed to the Motion (the "Interim Order") (a) authorizing the Borrower, on an interim basis, to forthwith borrow from the DIP Lenders under the DIP Documents up to an aggregate principal amount not to exceed \$2,000,000 (subject to any limitations of extensions of credit under the DIP Documents), (b) authorizing the Debtors' use of cash collateral, and (c) granting the adequate protection described herein; and

(8) that this Court schedule a final hearing (the "Final Hearing") to be held within 35 days of the Petition Date to consider entry of a final order authorizing the balance of the borrowings under the DIP Documents on a final basis, as set forth in the

Motion and the DIP Documents filed with this Court (the "Final Order").

Notice of the Motion, the relief requested therein and the Interim Hearing has been served by the Debtors in accordance with Rules 4001(b) and (c) on the thirty (30) largest unsecured creditors of the Debtors, on the DIP Agent, the DIP Lenders, the Pre-Petition Agent, the Pre-Petition Lenders and on the United States Trustee for the District of Delaware.

The Interim Hearing having been held by this Court on August 15, 2005.

Upon the record made by the Debtors at the Interim Hearing and after due deliberation and consideration and sufficient cause appearing therefor;

IT IS FOUND, DETERMINED, ORDERED AND ADJUDGED, that:

1. *Jurisdiction.* This Court has core jurisdiction over the Cases, this Motion, and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(b) and 1334. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
2. *Notice.* The notice given by the Debtors of the Motion and the Interim Hearing complies with Bankruptcy Rules 4001(b) and (c).
3. *Findings Regarding the Financing and Use of Cash Collateral.*
  - (a) Good cause has been shown for the entry of this Interim Order.
  - (b) The Debtors have an immediate need to authorize the Financing and use of Cash Collateral (as defined below) in order to permit, among other things, the orderly continuation of the operation of their businesses, to maintain business relationships with vendors, suppliers and customers, to make payroll and to satisfy other working capital and operational needs. The ability of the Debtors to obtain sufficient working capital and liquidity through the use of Cash Collateral (as defined below), incurrence of new indebtedness for borrowed money and other financial accommodations is vital to the preservation and maintenance of the going

concern values of the Debtors and to a successful reorganization of the Debtors.

(c) The Debtors have been unable to obtain financing from sources other than the DIP Lenders on more favorable terms than under the DIP Documents and are unable to obtain adequate unsecured credit allowable under section 503(b)(i) of the Bankruptcy Code as an administrative expense. The Debtors are also unable to obtain secured credit allowable under sections 364(c)(1), 364(c)(2) and 364(c)(3) of the Bankruptcy Code without the Debtors granting to the DIP Agent and the DIP Lenders, subject to the Carve-Out as provided for herein, the DIP Liens and the Superpriority Claims (each as defined below) under the terms and conditions set forth in this Order and in the DIP Documents. The terms of the Financing and the use of Cash Collateral appear to be fair and reasonable, reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duties and constitute reasonably equivalent value and fair consideration.

(d) Based on the record presented to the Court by the Debtors, it appears that the Financing has been negotiated in good faith and at arm's length between the Debtors, the DIP Agent and the DIP Lenders, and all of the Debtors' obligations and indebtedness arising under, in respect of or in connection with the Financing and the DIP Documents, including without limitation, (i) all loans made to the Debtors pursuant to the DIP Agreement, and (ii) any Obligations (as defined in the DIP Agreement), including credit extended in respect of overdrafts and related liabilities arising from depository, treasury, and cash management services or in connection with any automated clearing house transfer of funds provided by Bank of America, or any other DIP Lender or any of their respective affiliates (or any person that was a DIP Lender or an affiliate of a DIP Lender at the time so provided) (all of the foregoing in clauses (i) and (ii) collectively, the "DIP Obligations"), have been extended by the DIP Agent, the DIP Lenders and

their respective affiliates in good faith, as that term is used in section 364(e) of the Bankruptcy Code and in express reliance upon the protections offered by section 364(e) of the Bankruptcy Code, and shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise.

(e) Subject to paragraph 17(b), below, the Debtors (for themselves, but not for their estates or other parties in interest) stipulate and agree (i) to the validity of the Pre-Petition Obligations, without defense, offset or counterclaim of any kind, in an amount no less than \$100,000,000, plus accrued interest, fees, costs, and expenses incurred in connection therewith as provided under the Pre-Petition Agreement; (ii) to the validity, perfection and priority of the Pre-Petition Liens; (iii) that the Debtors waive any right to challenge or contest the Pre-Petition Obligations and Pre-Petition Liens; (iv) that the Debtors have no valid claims or causes of action against the Pre-Petition Agent or any Pre-Petition Lender with respect to the Pre-Petition Agreement or any related documents or transactions; (v) that pursuant to the Second Amended and Restated Guarantee and Collateral Agreement, dated as of September 30, 2002 (the "Guarantee"), entered into by the Company, the Borrower and the Guarantors, the Guarantors have unconditionally guaranteed all the Pre-Petition Obligations owed by the Borrower to the Pre-Petition Agent and the Pre-Petition Lenders; and (vi) that the Guarantee continues in full force and effect notwithstanding any use of Cash Collateral permitted under this Order or any financing and financial accommodations extended by the DIP Agent or DIP Lenders to the Debtors pursuant to the terms of this Order or the DIP Documents.

(f) Pre-Petition Lenders holding more than 50% of the aggregate unpaid principal amount of the Pre-Petition Obligations outstanding under the Pre-Petition Agreement

(the "Required Pre-Petition Lenders") have consented to the Debtors' entering into the financing arrangements contemplated by this Order and the DIP Documents and to the Debtors' use of Cash Collateral in which the Pre-Petition Agent and the Pre-Petition Lenders have an interest, on the terms and conditions set forth in this Order (the "Consent"). The Consent is expressly limited to the post-petition financing being provided by the DIP Lenders as contemplated by this Order and the DIP Agreement. The protections provided in this Order to the Pre-Petition Agent and the Pre-Petition Lenders are in exchange for the Consent and are consistent with and authorized by the Bankruptcy Code.

(g) The Debtors have requested entry of this Order pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2). Absent entry of this Order, the Debtors' estates will be immediately and irreparably harmed. Consummation of the Financing and the use of Cash Collateral in accordance with this Order and the DIP Documents is therefore in the best interest of the Debtors' estates.

4. *Authorization of the Financing and the DIP Documents.*

(a) The Debtors are hereby authorized to enter into the DIP Documents. The Borrower is hereby authorized on an interim basis to borrow money pursuant to the DIP Agreement, and the Guarantors are hereby authorized to guaranty such borrowings, up to an aggregate principal or face amount of \$2,000,000 (plus interest, fees and other expenses provided for in the DIP Documents), subject to any limitations to extensions of credit under the DIP Documents, until entry of the Final Order with respect to the Motion and thereafter in such amounts as may be permitted by such Final Order, all in accordance with the terms of this Order and the DIP Documents, which shall be used for all purposes permitted under the DIP Documents. In addition to such amounts and obligations, the Debtors are authorized to incur

overdrafts and related liabilities arising from treasury, depository and cash management services or in connection with any automated clearing house fund transfers provided to or for the benefit of the Debtors by Bank of America, or any other DIP Lender or any of their respective affiliates; *provided, however*, that nothing herein shall require Bank of America or any other party to incur overdrafts or to provide any such services or functions to the Debtors.

(b) In furtherance of the foregoing and without further approval of this Court, each Debtor is authorized to do <sup>and</sup> perform all acts, to make, execute and deliver all instruments and documents (including, without limitation, the execution or recordation of security agreements, mortgages and financing statements), and to pay all fees, that may be reasonably required or necessary for the Debtors' performance of their obligations under the DIP Documents, including, without limitation:

(i) the execution, delivery and performance of the Credit Documents (as defined in the DIP Agreement) and any exhibits attached thereto, including, without limitation, the DIP Agreement and the Guaranty and Collateral Agreement (as defined in the DIP Agreement) (collectively, and together with the letter agreements referred to in clause (iii) below, the "DIP Documents"),

(ii) the execution, delivery and performance of one or more amendments to the DIP Agreement for, among other things, the purpose of (w) adding additional financial institutions as DIP Lenders, (x) reallocating the commitments for the Financing among the DIP Lenders, (y) putting in place limitations on extensions of credit or (z) at any time prior to the entry of the Final Order, changing the structure, terms or pricing of the Financing, in each case of (w), (x), (y) and (z), in such form as the Debtors, the DIP Agent and the DIP



Lenders may agree; *provided* that the Debtors shall provide such notice as is practicable of any proposed amendments in advance of the Final Hearing to the United States Trustee for the District of Delaware and counsel for any statutory committee of unsecured creditors appointed in the Cases (each, a "Committee"), *provided, further*, that the failure to provide such notice shall have no impact on the effectiveness of any such amendment, and (B) it is understood that no further approval of this Court shall be required for amendments to the DIP Agreement that do not shorten the maturity of the extensions of credit thereunder, do not increase the commitments, do not increase the maximum aggregate amount of indebtedness that may be incurred thereunder, or do not increase the rate of interest or fees payable thereunder,

(iii) the non-refundable payment to the DIP Agent or the DIP Lenders, as the case may be, of the fees referred to in the DIP Agreement (and in the separate letter agreements between one or more of the DIP Agent and the DIP Lenders in connection with the Financing) and reasonable costs and expenses as may be due from time to time, including, without limitation, reimbursable fees and reasonable and documented expenses of the professionals retained as provided for in the DIP Documents, and

(iv) the performance of all other acts required or advisable under or in connection with the DIP Documents.

(c) Upon execution and delivery of the DIP Documents and the entry of the Interim Order, the DIP Documents shall constitute valid and binding obligations of the Debtors, enforceable against each Debtor party thereto in accordance with the terms of the DIP

Documents. No obligation, payment, transfer or grant of security under the DIP Documents or this Order shall be stayed, restrained, voidable, or recoverable under the Bankruptcy Code or under any applicable law (including without limitation, under section 502(d) of the Bankruptcy Code), or subject to any defense, reduction, setoff, recoupment or counterclaim.

5. *Superpriority Claims.*

(a) Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP Obligations shall constitute allowed claims against the Debtors with priority over any and all administrative expenses, diminution claims (including all Adequate Protection Obligations (as defined below)) and all other claims against the Debtors, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, and over any and all administrative expenses or other claims arising under sections 105, 326, 328, 330, 331, 503(b), 507(a), 507(b), 726, 1113, 1114 or any other provisions of the Bankruptcy Code (the "Superpriority Claims"), whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed claims shall be payable from and have recourse to all pre- and post-petition property of the Debtors and all proceeds thereof, subject only to the payment of the Carve-Out to the extent specifically provided for herein.

(b) For purposes hereof, the "Carve-Out" means (A) all allowed professional fees and disbursements incurred by the professionals retained pursuant to Bankruptcy Code §§ 327 or 1103(a) by the Debtors and any statutory committee of unsecured creditors appointed in the Chapter 11 Cases (and any disbursements of any member of such committee) (i) in an aggregate allowed amount not to exceed \$1,000,000 (the "Post-Default Carve-Out Amount") on account of such professional fees and disbursements incurred following the "Default Point" (as

defined below), plus (ii) the aggregate allowed amount (the "Pre-Default Carve-Out Amount") of all unpaid professional fees and disbursements incurred, accrued or invoiced from the Petition Date until the Default Point; *provided*, that all such professional fees and disbursements to the extent allowed shall be paid pursuant to interim compensation procedures established in an order of the Bankruptcy Court and shall be subject to final allowance by order of the Bankruptcy Court under sections 330 and 331 of the Bankruptcy Code; and (B) all fees required to be paid to the Clerk of the Bankruptcy Court and to the United States Trustee under section 1930(a) of title 28 of the United States Code. Notwithstanding anything in this Interim Order to the contrary, no loans, Cash Collateral or any portion of the Carve-Out may be used to object to or contest in any manner, or raise any defense to, the validity, perfection, priority or enforceability of the Pre-Petition Obligations, the DIP Obligations, the Pre-Petition Liens, the DIP Liens, the Adequate Protection Liens, or to assert any claims or causes of action against the Pre-Petition Lenders, the Pre-Petition Agent, the DIP Lenders or the DIP Agent, whether through an adversary proceeding, contested matter or otherwise, *provided, however*, that up to \$50,000 of the Carve-Out may be used to pay for professional fees and disbursements incurred in connection with the investigation of the matters described above. None of the DIP Agent, the DIP Lenders, the Pre-Petition Agent or the Pre-Petition Lenders shall be responsible for the direct payment or reimbursement of any professional fees or disbursements incurred in connection with the Debtors' cases under any chapter of the Bankruptcy Code, and nothing in this Order or otherwise shall be construed to obligate the DIP Agent, the DIP Lenders, the Pre-Petition Agent or the Pre-Petition Lenders in any way to pay professional fees or disbursements, or to ensure that the Debtors have sufficient funds to pay such professional fees or disbursements. As used herein, "Default Point" means that date when (x) an unwaived event of Default (as defined in the DIP Agreement) shall have

occurred and is continuing; (y) the DIP Agent and the DIP Lenders have permanently ceased making advances or extensions of credit to the Debtors under the DIP Agreement; and (z) (i) either the DIP Agreement and the other DIP Documents or the Debtors' rights to use Cash Collateral are permanently terminated (or both) and (ii) the DIP Agent or the Pre-Petition Agent shall have provided at least five (5) business days' notice to the affected professionals of a date certain on which a Default Point shall occur.

6. *DIP Liens.* As security for the DIP Obligations, effective and perfected upon the date of this Order and without the necessity of the execution, recordation of filings by the Debtors of mortgages, security agreements, control agreements, pledge agreements, financing statements or other similar documents, the following security interests and liens are hereby granted to the DIP Agent for its own benefit and the benefit of the DIP Lenders (all property identified in clauses (a), (b) and (c) below being collectively referred to as the "Collateral"), subject to the payment of the Carve-Out (all such liens and security interests granted to the DIP Agent, for its benefit and for the benefit of the DIP Lenders, pursuant to this Order and the DIP Documents, the "DIP Liens"):

(a) First Lien on Unencumbered Property. Pursuant to section 364(c)(2) of the Bankruptcy Code, the DIP Agent is hereby granted (for the benefit of itself and the DIP Lenders) a valid, binding, continuing, enforceable, fully-perfected first priority senior security interest in and lien upon all pre- and post-petition property of the Debtors, whether existing on the Petition Date or thereafter acquired, that, on or as of the Petition Date is not subject to valid, perfected and non-avoidable liens (collectively, "Unencumbered Property"), including without limitation, all cash and cash collateral of the Debtors (whether maintained with the DIP Agent or otherwise) and any investment of such cash and cash collateral, inventory, accounts receivable,

intercompany notes, tax refund claims, insurance proceeds and tort claims whether arising before or after the Petition Date, contracts, properties, plants, equipment, general intangibles, documents, instruments, interests in leaseholds, real properties, chattel paper, fixtures, deposit and other accounts (including the Restricted Account as defined below), patents, copyrights, trademarks, trade names, rights under Federal Communications Commission or other license agreements, and other intellectual property and capital stock of subsidiaries of the Borrower and the Guarantors and the proceeds of all the foregoing. Unencumbered Property shall exclude the Debtors' claims and causes of action under sections 544, 545, 547, 548 and 550 of the Bankruptcy Code, or any other avoidance actions under the Bankruptcy Code (collectively, "Avoidance Actions") and any proceeds or property recovered, unencumbered or otherwise the subject of successful Avoidance Actions).

(b) Liens Priming Pre-Petition Lenders' Liens. Pursuant to section 364(d)(1) of the Bankruptcy Code, the DIP Agent (for the benefit of itself and the DIP Lenders) is hereby granted a valid, binding, continuing, enforceable, fully-perfected first priority senior priming security interest in and lien upon all pre-petition and post-petition property of the Debtors, including, without limitation, all cash and cash collateral of the Debtors (whether maintained with the DIP Agent or otherwise) and any investment of such cash and cash collateral, inventory, accounts receivable, intercompany notes, tax refund claims, insurance proceeds and tort claims whether arising before or after the Petition Date, contracts, properties, plants, equipment, general intangibles, documents, instruments, interests in leaseholds, real properties, chattel paper, fixtures, deposit accounts, patents, copyrights, trademarks, trade names, rights under Federal Communications Commission or other license agreements, and other intellectual property and capital stock of subsidiaries of the Borrower and the Guarantors and the proceeds of all the

foregoing, whether now existing or hereafter acquired, that is subject to the existing liens presently securing the Pre-Petition Obligations (collectively, the "Primed Liens"). Such security interests and liens shall be senior in all respects to the Primed Liens and any other interests in such property of the Pre-Petition Lenders arising from current and future liens of the Pre-Petition Lenders (including, without limitation, adequate protection liens granted hereunder), but shall not be senior to any valid, perfected and unavoidable interests of other parties arising out of liens, if any, on such property existing immediately prior to the Petition Date, or to any valid, perfected and unavoidable interests in such property arising out of liens to which the liens of the Pre-Petition Lenders become subject subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code.

(c) Liens Junior to Certain Other Liens. Pursuant to section 364(c)(3) of the Bankruptcy Code, the DIP Agent (for the benefit of itself and the DIP Lenders) is hereby granted valid, binding, continuing, enforceable, fully-perfected security interests in and liens upon all pre-petition and post-petition property of the Debtors (other than the property described in clauses (a) or (b) of this paragraph 6, as to which the liens and security interests in favor of the DIP Agent will be as described in such clauses), whether now existing or hereafter acquired, that is subject to valid, perfected and unavoidable liens in existence immediately prior to the Petition Date or to valid and unavoidable liens in existence immediately prior to the Petition Date that are perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code, which security interests and liens in favor of the DIP Agent are junior to such valid, perfected and unavoidable liens.

(d) Liens Senior to Certain Other Liens. The DIP Liens and the Adequate Protection Liens (as defined below) shall not be subject or subordinate to (i) any lien or security

interest that is avoided and preserved for the benefit of the Debtors and their estates under section 551 of the Bankruptcy Code or (ii) any liens arising after the Petition Date including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other governmental unit, commission, board or court for any liability of the Debtors.

7. *Protection of DIP Lenders' Rights.*

(a) So long as there are any borrowings or other amounts (other than contingent indemnity obligations as to which no claim has been asserted when all other amounts have been paid) outstanding, or the DIP Lenders have any commitment under the DIP Agreement, the Pre-Petition Agent and Pre-Petition Lenders shall (i) take no action to foreclose upon or recover in connection with the liens granted pursuant to the Pre-Petition Agreement or this Order, or otherwise exercise remedies against any Collateral or seek additional adequate protection or other relief and (ii) not file any further financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments, or otherwise take any action to perfect their security interests in the Collateral unless required by applicable state law to continue the perfection of valid and unavoidable liens or security interests as of the Petition Date.

(b) The automatic stay provisions of section 362 of the Bankruptcy Code are modified to the extent necessary to permit the DIP Agent and the Required DIP Lenders to exercise, (i) upon the occurrence of an Event of Default, all rights and remedies under the DIP Documents other than those rights and remedies against the Collateral as provided in clause (ii) below, including, without limitation, (x) terminating the commitments under the DIP Agreement, (y) declaring the DIP Obligations due and payable or (z) charging the default interest rate provided for in section 2.8(b) of the DIP Agreement and (ii) upon the occurrence and during the continuance of an Event of Default, to the extent provided for in the DIP Agreement and after the

giving of five business days' prior written notice to counsel to the Debtors, counsel to the Committee, counsel to the Pre-Petition Agent and the United States Trustee for the District of Delaware, all rights and remedies against the Collateral provided for in the DIP Documents (including, without limitation, the right to setoff monies of the Debtors in accounts maintained with the DIP Agent or any DIP Lender). In any hearing regarding any exercise of rights or remedies, the only issue that may be raised by any party in opposition thereto shall be whether, in fact, an Event of Default has occurred and is continuing, and the Debtors and the Pre-Petition Lenders hereby waive their right to seek relief, including, without limitation, under section 105 of the Bankruptcy Code, to the extent such relief would in any way impair or restrict the rights and remedies of the DIP Agent or the DIP Lenders set forth in this Order or the DIP Documents. In no event shall the DIP Agent or the DIP Lenders be subject to the equitable doctrine of "marshalling" or any similar doctrine with respect to the Collateral.

8. *Limitation on Charging Expenses Against Collateral.* Subject to and effective upon entry of the Final Order granting such relief, except to the extent of the Carve-Out, no expenses of administration of the Cases or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the Collateral securing the DIP Obligations or the Pre-Petition Obligations pursuant to section 506(c) of the Bankruptcy Code or any similar principle of law, without the prior written consent of DIP Lenders holding at least a majority of the commitments under the DIP Agreement (the "Required DIP Lenders") or the Required Pre-Petition Lenders, and no such consent shall be implied from any other action, inaction, or acquiescence by the DIP Agent, the DIP Lenders, the Pre-Petition Agent or the Pre-Petition Lenders.

9. *The Cash Collateral.* For purposes of this Order, the term "Cash Collateral" shall



mean and include all "cash collateral" as defined by section 363 of the Bankruptcy Code, deposits subject to setoff, and cash arising from the collection, sale, lease or other disposition, use or conversion to cash of any property of the Debtors in which the Pre-Petition Agent or Pre-Petition Lenders have any lien or security interest, whether such liens or security interests (including, without limitation, any adequate protection liens or security interests) existed at the commencement of the Chapter 11 Cases or arise thereafter pursuant to this Order, the Final Order or any other order of the Court, applicable law or otherwise.

10. *Use of Cash Collateral.* Based on the Consent of the Required Pre-Petition Lenders on the terms set forth in this Order, including, without limitation, in paragraphs 3, 7, 8, 11, 12, 13, 14, 15, 16 and 17 hereof, the Debtors are hereby authorized to use all Cash Collateral of the Pre-Petition Lenders as contemplated by the Approved Weekly Forecasts (as defined in the DIP Agreement) and the Pre-Petition Lenders are directed promptly to turn over to the Debtors all Cash Collateral received or held by them; *provided*, that the Pre-Petition Lenders are granted adequate protection as hereinafter set forth. The Debtors' right to use the Cash Collateral shall terminate automatically upon the earlier of the Revolving Credit Termination Date (as defined in the DIP Agreement) or the date on which the Debtors fail to comply with the adequate protection provisions specified in paragraph 11 or 12 of this Order, after the giving of five business days' prior written notice to counsel to the Debtors, counsel to the Committee, counsel to the Pre-Petition Agent and the United States Trustee for the District of Delaware.

11. *Adequate Protection.* The Pre-Petition Lenders are entitled, pursuant to sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code, to adequate protection of their interest in the Pre-Petition Collateral, including the Cash Collateral, to the extent that their interests in the Pre-Petition Collateral constitute valid, perfected and indefeasible security

interests and liens as of the Petition Date, for and equal in amount to the aggregate diminution in value, if any, of the Pre-Petition Lenders' interests in the Debtors' interests in the Pre-Petition Collateral, including, without limitation, any such diminution resulting from the sale, lease or use by the Debtors (or other decline in value) of Cash Collateral and any other Pre-Petition Collateral, the priming of the Pre-Petition Agent's security interests and liens in the Pre-Petition Collateral by the DIP Agent and the DIP Lenders pursuant to the DIP Documents and this Order, and the imposition of the automatic stay pursuant to section 362 of the Bankruptcy Code (collectively, the "Adequate Protection Obligations"). The Pre-Petition Agent and the Pre-Petition Lenders consent to and are hereby granted the following:

(i) Adequate Protection Liens. As security for the payment of the Adequate Protection Obligations, the Pre-Petition Agent (for itself and for the benefit of the Pre-Petition Lenders) is hereby granted (effective and perfected upon the date of this Order and without the necessity of the execution by the Debtors of mortgages, security agreements, pledge agreements, financing statements or other agreements) a replacement security interest in and lien upon all Collateral other than Avoidance Actions, subject and subordinate only to (A) the security interests and liens granted to the DIP Agent for the benefit of the DIP Lenders in this Order and pursuant to the DIP Documents and any liens on the Collateral to which such liens so granted to the DIP Agent are junior and (B) the Carve-Out (the "Adequate Protection Liens"),

(ii) Section 507(b) Claim. The Pre-Petition Agent and the Pre-Petition Lenders are hereby granted, subject to the payment of the Carve-Out, a superpriority claim in the amount of the Adequate Protection Obligations as

provided for in section 507(b) of the Bankruptcy Code, immediately junior to the claims under section 364(c)(1) of the Bankruptcy Code held by the DIP Agent and the DIP Lenders (the "Section 507(b) Claim"), *provided, however*, that the Pre-Petition Agent and the Pre-Petition Lenders shall not receive or retain any payments, property or other amounts in respect of the Section 507(b) Claim granted hereunder or under the Pre-Petition Agreement unless and until the DIP Obligations have been indefeasibly paid in cash in full (other than contingent indemnity obligations as to which no claim has been asserted when all other amounts have been paid);

(iii) Fees and Expenses. Subject to section 506(b) of the Bankruptcy Code, the Pre-Petition Agent shall receive from the Debtors current cash payments of all reasonable and documented fees and expenses payable to them under the Pre-Petition Agreement, including, but not limited to, their reasonable fees and disbursements of one external counsel, one local counsel, financial and other consultants, and shall be entitled to the payment of such additional fees and expenses as they may accrue.

(iv) Reporting Requirements. The Pre-Petition Agent shall receive the same reports and other information required to be provided to the DIP Agent under the DIP Documents, regardless of whether or not the Revolving Credit Termination Date has occurred.

12. Net Cash Proceeds. All Net Cash Proceeds of a Substantial Transaction (as each such term is defined in the DIP Agreement) shall be first deposited in a segregated account maintained by the DIP Agent (the "DIP Collateral Account") as collateral securing the DIP

Obligations, until the amount in the DIP Collateral Account equals the commitment under the DIP Agreement, and second remitted to the Pre-Petition Agent, for application to any and all Pre-Petition Obligations in accordance with the terms of the Pre-Petition Agreement; *provided*, that the Net Cash Proceeds of a sale of all or substantially all of the assets of the Debtors in a Substantial Transaction, as set forth in clause (iii) thereof, (x) shall be applied first to repay in full the Revolving Credit Loans and all other Obligations under the DIP Agreement, at which time the commitment under the DIP Agreement shall be reduced to zero (\$0), and second remitted to the Pre-Petition Agent, for application to any and all Pre-Petition Obligations in accordance with the terms of the Pre-Petition Agreement, and (y) shall be subject to the Carve-Out to the extent provided in any order governing the relevant sale. Neither the Debtors nor their estates shall have any interest in the DIP Collateral Account.

13. *Debtors' Waiver of Rights.* The Debtors (for themselves, but not their estates or any other parties in interest) hereby irrevocably waive, and are barred from asserting or exercising any right, (a) without Agents' and Lenders' prior written consent (which may be withheld in their sole discretion), or (b) without prior indefeasible payment and satisfaction in full in cash of the DIP Obligations and the termination of the DIP Lenders' commitments under the DIP Agreement: (i) to grant or impose, or request that the Court grant or impose, under section 364 of the Bankruptcy Code or otherwise, liens on or security interests in any Post-Petition Collateral, which are pari passu with, equal to or superior to the DIP Agents' or Lenders' liens on and security interests in such Post-Petition Collateral granted under this Order; (ii) to grant or impose, or request that the Court grant or impose, under section 364 of the Bankruptcy Code or otherwise, claims or expenses against the Debtors, which are pari passu with, equal to or superior to the DIP Agents' or Lenders' claims and expenses granted under this Order; (iii) to

request that the Court authorize the use of Cash Collateral in which Agents or Lenders have an interest or the sale, lease, or other disposition of any property of Debtors' estates in which Agents or Lenders have a lien or security interest, except as expressly permitted hereunder or under the DIP Agreement; or (iv) to modify or affect any of the rights of Agents or Lenders under this Order or any DIP Documents by any order entered in any of the Chapter 11 Cases or any Successor Case.

14. *Restricted Account.* If, on any Friday, no amounts are outstanding under the Financing, the Debtors shall deposit Adjusted Excess Cash On Hand or Net Cash Proceeds, each as defined in the DIP Agreement, into a restricted account maintained at Bank of America (the "Restricted Account"). The Debtors may not withdraw funds from the Restricted Account (i) without the written consent of the Required DIP Lenders, or, if the commitments under the DIP Agreement have been reduced to zero and the DIP Obligations have been paid in full, the Required Pre-Petition Lenders, in each case, such consent not to be unreasonably withheld, or (ii) if a Default or Event of Default shall have occurred and be continuing immediately prior to the withdrawal of funds.

15. *Perfection of DIP Liens and Adequate Protection Liens.*

(a) Subject to the provisions of paragraph 7(a) above, the DIP Agent, the DIP Lenders, the Pre-Petition Agent and the Pre-Petition Lenders are hereby authorized, notwithstanding section 362(a) of the Bankruptcy Code, but not required, to execute, file or record, as appropriate, financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments in any jurisdiction or take any other action in order to validate and perfect the liens and security interests granted to them hereunder. Whether or not the DIP Agent on behalf of the DIP Lenders, with respect to the DIP Liens, or the Pre-Petition

Agent on behalf of the Pre-Petition Lenders, with respect to the Adequate Protection Liens, shall, in its or their sole discretion, choose to file such financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments or otherwise confirm perfection of the liens and security interests granted to them hereunder, such liens and security interests shall be deemed valid, perfected, allowed, enforceable, non-avoidable and not subject to challenge, dispute or subordination, at the time and on the date of entry of this Order. Upon the request of the DIP Agent or the Pre-Petition Agent, each of the DIP Agent and the Pre-Petition Agent, without any further consent of any party, is authorized to take, execute and deliver such instruments (in each case without representation or warranty of any kind) to enable the DIP Agent or the Pre-Petition Agent to further validate, perfect, preserve and enforce the DIP Liens (in the case of the DIP Agent) or Adequate Protection Liens (in the case of the Pre-Petition Agent).

(b) A certified copy of this Order may, in the discretion of the Pre-Petition Agent or the DIP Agent, be filed with or recorded in filing or recording offices in addition to or in lieu of such financing statements, mortgages, notices of lien or similar instruments, and all filing offices are hereby authorized to accept such certified copy of this Order for filing and recording.

16. *Preservation of Rights Granted Under the Order.*

(a) No claim or lien having a priority superior to or pari passu with those granted by this Order to the DIP Agent and the DIP Lenders shall be granted or allowed while any portion of the Financing (or any refinancing thereof) or the commitments thereunder or the DIP Obligations remain outstanding, whether under section 364(d) of the Bankruptcy Code or otherwise.

(b) Unless all DIP Obligations shall have been paid in full in cash (other than contingent indemnity obligations as to which no claim has been asserted when all other amounts have been paid) and the commitments under the DIP Agreement have terminated (collectively, the "DIP Pay-Out"), the Debtors shall not seek, and it shall constitute an Event of Default and a termination of the right to use Cash Collateral if any of the Debtors seek, or if there is entered, (i) any modifications or extensions of this Order without the prior written consent of the Required DIP Lenders, and no such consent shall be implied by any other action, inaction or acquiescence by the DIP Agent, or (ii) an order dismissing any of the Cases. If an order dismissing any of the Cases under section 1112 of the Bankruptcy Code or otherwise is at any time entered, such order shall provide (in accordance with sections 105 and 349 of the Bankruptcy Code) that the Superpriority Claims, priming liens, security interests and replacement security interests granted to the DIP Agent and, as applicable, the Pre-Petition Agent pursuant to this Order shall continue in full force and effect and shall maintain their priorities as provided in this Order until the DIP Pay-Out shall have occurred and all Adequate Protection Obligations shall have been paid and satisfied in full in cash (and that such Superpriority Claims, priming liens, security interests and replacement security interests, shall, notwithstanding such dismissal, remain binding on all parties in interest).

(c) If any or all of the provisions of this Order are hereafter reversed, modified, vacated or stayed, such reversal, modification, vacation or stay shall not affect (i) the validity or enforceability of any DIP Obligations or Adequate Protection Obligations incurred prior to the actual receipt of written notice by the DIP Agent or Pre-Petition Agent, as applicable, of the effective date of such reversal, stay, modification or vacation or (ii) the validity, priority, perfection or enforceability of any security interest, lien or priority authorized or created hereby

or pursuant to the DIP Agreement with respect to any DIP Obligations or Adequate Protection Obligations. Notwithstanding any such reversal, stay, modification or vacation, all obligations and other financial accommodations made pursuant to this Order, all DIP Obligations and any use of Cash Collateral and other Pre-Petition Collateral by the Debtors prior to the actual receipt of written notice by the DIP Agent or the Pre-Petition Agent, as applicable, of the effective date of such reversal, stay, modification or vacation shall be governed in all respects by the original provisions of this Order, and the DIP Agent, Pre-Petition Agent, DIP Lenders and Pre-Petition Lenders shall be entitled to all the rights, remedies, privileges and benefits granted herein, including, without limitation, the DIP Liens, Superpriority Claims, Adequate Protection Obligations and Adequate Protection Lien.

(d) Except as expressly provided in this Order or in the DIP Documents, the DIP Liens, Adequate Protection Liens, the Superpriority Claims, the Section 507(b) Claims and all other rights and remedies of the DIP Agent, the DIP Lenders, the Pre-Petition Agent and the Pre-Petition Lenders granted by the provisions of this Order and the DIP Documents shall survive, and shall not be modified, impaired or discharged by the entry of an order converting any of the Cases to a case under chapter 7, dismissing any of the Cases, terminating the joint administration of these Cases or by any other act or omission, nor shall the DIP Liens, the Adequate Protection Liens, the Superpriority Claims, the Section 507(b) Claims or any of the other rights and remedies of the DIP Agent, the DIP Lenders, the Pre-Petition Agent and the Pre-Petition Lenders granted by the provisions of this Order and the DIP Documents be modified, impaired or discharged by the entry of an order confirming a plan of reorganization in any of the Cases and, pursuant to section 1141(d)(4) of the Bankruptcy Code, the Debtors have waived any discharge as to any remaining DIP Obligations and such waiver is hereby approved. The terms



and provisions of this Order and the DIP Documents shall continue in these Cases, in any successor cases if these Cases cease to be jointly administered, or in any superseding chapter 7 cases under the Bankruptcy Code, and the DIP Liens, the Superpriority Claims and all other rights and remedies of the DIP Agent and the DIP Lenders granted by the provisions of this Order and the DIP Documents shall continue in full force and effect until the DIP Obligations are indefeasibly paid in full.

17. *Limitation on Use of Financing Proceeds and Collateral / Bar Date.*

(a) Notwithstanding anything herein or in any other order by this Court to the contrary, no borrowings, Cash Collateral, Collateral or the Carve-Out may be used to (i) object, contest or raise any defense to, the validity, perfection, priority, extent or enforceability of any amount due under the DIP Documents, the liens or claims granted under this Order or the DIP Documents, the Pre-Petition Liens, the Pre-Petition Obligations or the liens and obligations provided for in the Liquidity Credit Agreement, (ii) assert any action for preferences, fraudulent conveyances, other avoidance power claims or any other any claims, counterclaims or causes of action, objections, contests or defenses against the DIP Agent, the DIP Lenders, the Pre-Petition Agent, the Pre-Petition Lenders or their respective agents, affiliates, representatives, attorneys or advisors, (iii) prevent, hinder or otherwise delay the DIP Agent's or the Pre-Petition Agent's assertion, enforcement or realization on the Cash Collateral or the Collateral in accordance with the DIP Documents or this Order, (iv) seek to modify any of the rights granted to the DIP Agent, the DIP Lenders, the Pre-Petition Agent and the Pre-Petition Lenders under the DIP Documents or this Order (other than objecting to the entry of the Final Order), in each of the foregoing cases without such parties' prior written consent or (v) pay any amount on account of any claims arising prior to the Petition Date unless such payments on account of such pre-petition claims are

(x) approved by an Order of this Court and (y) in accordance with the Approved Weekly Cash Forecasts (as defined in the DIP Agreement) to be delivered pursuant to section 5.12 of the DIP Agreement.

(b) The Committee or any other party in interest with standing to do so, including a chapter 7 or chapter 11 trustee appointed in the Cases or any subsequent cases, shall have sixty (60) days from the date counsel is retained by such Committee<sup>1</sup> to file, on behalf of the Debtors' estates, and to serve upon counsel for the Pre-Petition Agent, objections or complaints respecting the validity, extent, priority, avoidability or enforceability of the Pre-Petition Obligations or the Pre-Petition Liens and security interests (each a "Challenge"). In the event (i) a Challenge is not filed and served within the 60-day, or 75-day, as applicable, period described above or (ii) a final order is entered denying all such Challenges, then any Committee and any other party in interest shall thereafter be forever barred from bringing any Challenge, and the Pre-Petition Obligations and the liens and security interests of the Pre-Petition Lenders shall be deemed valid, enforceable, perfected, unavoidable and not subject to subordination for all purposes in these Cases and any subsequent chapter 7 cases.

18. *Order Governs.* In the event of any inconsistency between the provisions of this Order and the DIP Documents, the provisions of this Order shall govern.

19. *Binding Effect; Successors and Assigns.* The DIP Documents and the provisions of this Order, including all findings herein, shall be binding upon all parties in interest in these Cases, including, without limitation, the DIP Agent, the DIP Lenders, the Pre-Petition Agent, the Pre-Petition Lenders, any Committee appointed in these Cases, and the Debtors and their respective successors and assigns (including any chapter 7 or chapter 11 trustee hereinafter

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<sup>1</sup> In the event no Committee is appointed, the period shall be 75 days from the Petition Date.

appointed or elected for the estate of any of the Debtors) and shall inure to the benefit of the DIP Agent, the DIP Lenders, the Pre-Petition Agent, the Pre-Petition Lenders and the Debtors and their respective successors and assigns; *provided, however*, that the DIP Agent and the DIP Lenders shall have no obligation to extend any financing to any chapter 7 trustee or similar responsible person appointed for the estates of the Debtors.


20. *Final Hearing.* The Final Hearing is scheduled for September 14, 2005 at 3:00 p.m. before this Court.

The Debtors shall promptly mail copies of this Order (which shall constitute adequate notice of Final Hearing, including without limitation, notice that the Debtors will seek approval at the Final Hearing of a waiver of rights under section 506(c) of the Bankruptcy Code) to the parties having been given notice of the Interim Hearing, the landlords on the Debtors' real property leases, any government entity with jurisdiction and authority to levy a tax on the Debtors or their operations and to any other party that has filed a request for notices with this Court and to any Committee after the same has been appointed, or Committee counsel, if the same shall have been appointed. Any party in interest objecting to the relief sought at the Final Hearing shall serve and file written objections; which objections shall be served upon

(a) Skadden, Arps, Slate, Meagher & Flom LLP, One Rodney Square, P.O. Box 636, Wilmington, Delaware 19899, Attn: Mark S. Chehi, Esq., attorneys for the Debtors; (b) Sidley Austin Brown & Wood LLP, 787 Seventh Avenue, New York, New York 10019, Attn: Lee S. Attanasio, Esq., and Richards, Layton & Finger, One Rodney Square, 920 North King Street, Wilmington, DE 19801, Attn: Mark D. Collins, Esq., attorneys for Bank of America, as Agent; and (c) the Office of the United States Trustee for the District of Delaware, and shall be filed with the Clerk of the United States Bankruptcy Court, District of Delaware, in each case to allow

actual receipt by the foregoing no later than September 8, 2005 at 4:00 p.m.,  
prevailing Eastern time.

Dated: Aug 15, 2005

  
HONORABLE PETER J. WALSH  
UNITED STATES BANKRUPTCY JUDGE

# EXHIBIT D

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 11
	)	
BIRCH TELECOM, INC., et al.,	)	Case No. 05-12237 (PJW)
	)	
Debtors.	)	Jointly Administered
	)	
		Re: Docket No. 14

**FINAL ORDER (I) AUTHORIZING DEBTORS (A) TO OBTAIN POST-PETITION FINANCING PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) AND 364(e) AND (B) TO UTILIZE CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363, (II) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED PARTIES PURSUANT TO 11 U.S.C. §§ 361, 362, 363 AND 364 AND (III) SCHEDULING FINAL HEARING PURSUANT TO BANKRUPTCY RULES 2002, 4001 AND 9014**

Upon the motion (the "Motion"), dated August 12, 2005, of Birch Telecom, Inc. (the "Company") and its affiliated debtors, each as a debtor and debtor-in-possession (collectively, the "Debtors") in the above-captioned cases (the "Cases"), pursuant to sections 105, 361, 362, 363(c)(2), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code"), and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), seeking, among other things:

(1) authorization for Birch Telecom Finance, Inc. (the "Borrower") to obtain post-petition financing (the "Financing"), and for all of the other Debtors (the "Guarantors") to guaranty the Borrower's obligations in connection with the Financing, up to the aggregate principal amount of \$5,000,000 (the actual available principal amount at any time being subject to those conditions set forth in the DIP Documents (as defined below)), pursuant to the Senior Secured Superpriority Debtor-in-Possession Credit Agreement among the Company, the Borrower, Bank of America, N.A. ("Bank of

America”), acting as Administrative Agent (in such capacity, the “Agent”) for itself and the other lenders from time to time party thereto, and such lenders (together with Bank of America, the “DIP Lenders”), substantially in the form attached as Exhibit A to the Motion (the “DIP Agreement”);

(2) authorization for the Debtors to execute and enter into the DIP Documents (as defined below) and to perform such other and further acts as may be required in connection with the DIP Documents;

(3) the granting of adequate protection of the security interests and liens (provided that such security interests and liens are valid, perfected and indefeasible as of the date on which the Debtors filed the Cases (the “Petition Date”)) of Bank of America, as administrative agent (in such capacity, the “Pre-Petition Agent”) under the Second Amended and Restated Credit Agreement, dated as of September 30, 2004 (as heretofore amended, supplemented or otherwise modified, the “Pre-Petition Agreement”), among the Company, the Borrower, the Pre-Petition Agent and the other lenders from time to time party thereto (together with Bank of America, the “Pre-Petition Lenders”). All of the Borrower’s indebtedness to the Pre-Petition Lenders in respect of loans made by the Pre-Petition Lenders pursuant to, and in accordance with the terms of, the Pre-Petition Agreement, plus, in each case, interest thereon and fees, expenses (including any attorneys’, accountants’, appraisers’ and financial advisors’ fees that are chargeable or reimbursable under the Pre-Petition Agreement), charges and other obligations incurred in connection therewith as provided in the Pre-Petition Agreement hereinafter referred to as the “Pre-Petition Obligations”), whose liens and security interests are being primed by the Financing;

(4) authorization for the Debtors to use cash collateral (as such term is defined in the Bankruptcy Code) in which the Pre-Petition Lenders have an interest, and the granting of adequate protection to the Pre-Petition Lenders with respect to, inter alia, such use of their cash collateral and all use and diminution in the value of the liens and security interests (the “Pre-Petition Liens”) in the personal and real property (the “Pre-Petition Collateral”) described in the Security Documents (as defined in the Pre-Petition Agreement);

(5) the granting of superpriority claims to the DIP Agent and the DIP Lenders payable from, and having recourse to, all pre-petition and post-petition property of the Debtors’ estates and all proceeds thereof, subject to the Carve-Out (as defined below);

(6) the limitation of the Debtors’ and their estates’ right to surcharge against collateral pursuant to section 506(c) of the Bankruptcy Code;

(7) pursuant to Bankruptcy Rule 4001, that an interim hearing (the “Interim Hearing”) on the Motion be held before this Court to consider entry of an interim order pursuant to Bankruptcy Rule 4001 (the “Interim Order”); and

(8) that this Court schedule a final hearing (the “Final Hearing”) to consider entry of this order authorizing the balance of the borrowings under the DIP Documents on a final basis, as set forth in the Motion and the DIP Documents filed with this Court (this “Order”).

Notice of the Motion, the relief requested therein and the Final Hearing was served on the Debtors in accordance with Rules 4001(b) and (c) on the parties having been given notice of the Interim Hearing, the statutory committee appointed in the Cases (the “Committee”), if any, the landlords on the Debtors’ real property leases, any government entity with jurisdiction and



authority to levy a tax on the Debtors or their operations and to any other party that has filed a request for notices with this Court.

The Interim Hearing was held by this Court on August 15, 2005, at which time the Court approved the entry of the Interim Order.

Upon the record made by the Debtors at the Interim Hearing and the Final Hearing and after due deliberation and consideration and sufficient cause appearing therefor;

IT IS FOUND, DETERMINED, ORDERED AND ADJUDGED, that:

1. *Jurisdiction.* This Court has core jurisdiction over the Cases, this Motion, and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(b) and 1334. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. *Notice.* The notice given by the Debtors of the Motion and the Interim Hearing complies with Bankruptcy Rules 4001(b) and (c).

3. *Findings Regarding the Financing and Use of Cash Collateral.*

(a) Good cause has been shown for the entry of this Order.

(b) The Debtors have a continued need for the Financing and use of Cash Collateral (as defined below) in order to permit, among other things, the orderly continuation of the operation of their businesses, to maintain business relationships with vendors, suppliers and customers, to make payroll and to satisfy other working capital and operational needs. The ability of the Debtors to obtain sufficient working capital and liquidity through the use of Cash Collateral (as defined below), incurrence of new indebtedness for borrowed money and other financial accommodations is vital to the preservation and maintenance of the going concern values of the Debtors and to a successful reorganization of the Debtors.

(c) The Debtors have been unable to obtain financing from sources other than the DIP Lenders on more favorable terms than under the DIP Documents and are unable to obtain adequate unsecured credit allowable under section 503(b)(i) of the Bankruptcy Code as an administrative expense. The Debtors are also unable to obtain secured credit allowable under sections 364(c)(1), 364(c)(2) and 364(c)(3) of the Bankruptcy Code without the Debtors granting to the DIP Agent and the DIP Lenders, subject to the Carve-Out as provided for herein, the DIP Liens and the Superpriority Claims (each as defined below) under the terms and conditions set forth in the Interim Order and this Order and in the DIP Documents. The terms of the Financing and the use of Cash Collateral appear to be fair and reasonable, reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duties and constitute reasonably equivalent value and fair consideration.

(d) Based on the record presented to the Court by the Debtors, the Financing has been negotiated in good faith and at arm's length between the Debtors, the DIP Agent and the DIP Lenders, and all of the Debtors' obligations and indebtedness arising under, in respect of or in connection with the Financing and the DIP Documents, including without limitation, (i) all loans made to the Debtors pursuant to the DIP Agreement, and (ii) any Obligations (as defined in the DIP Agreement), including credit extended in respect of overdrafts and related liabilities arising from depository, treasury, and cash management services or in connection with any automated clearing house transfer of funds provided by Bank of America, or any other DIP Lender or any of their respective affiliates (or any person that was a DIP Lender or an affiliate of a DIP Lender at the time so provided) (all of the foregoing in clauses (i) and (ii) collectively, the "DIP Obligations"), have been extended by the DIP Agent, the DIP Lenders and their respective affiliates in good faith, as that term is used in section 364(e) of the Bankruptcy Code and in

express reliance upon the protections offered by section 364(e) of the Bankruptcy Code, and shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that the Interim Order, this Order or any provision thereof or hereof is vacated, reversed or modified, on appeal or otherwise.

(e) Subject to paragraph 18(b), below, the Debtors stipulate and agree (i) to the validity of the Pre-Petition Obligations, without defense, offset or counterclaim of any kind, in an amount no less than \$100,000,000, plus accrued interest, fees, costs, and expenses incurred in connection therewith as provided under the Pre-Petition Agreement; (ii) to the validity, perfection and priority of the Pre-Petition Liens; (iii) that the Debtors waive any right to challenge or contest the Pre-Petition Obligations and Pre-Petition Liens; (iv) that the Debtors have no valid claims or causes of action against the Pre-Petition Agent or any Pre-Petition Lender with respect to the Pre-Petition Agreement or any related documents or transactions; (v) that pursuant to the Second Amended and Restated Guarantee and Collateral Agreement, dated as of September 30, 2002 (the "Guarantee"), entered into by the Company, the Borrower and the Guarantors, the Guarantors have unconditionally guaranteed all the Pre-Petition Obligations owed by the Borrower to the Pre-Petition Agent and the Pre-Petition Lenders; and (vi) that the Guarantee continues in full force and effect notwithstanding any use of Cash Collateral permitted under the Interim Order, this Order or any financing and financial accommodations extended by the DIP Agent or DIP Lenders to the Debtors pursuant to the terms of the Interim Order, this Order or the DIP Documents.

(f) Pre-Petition Lenders holding more than 50% of the aggregate unpaid principal amount of the Pre-Petition Obligations outstanding under the Pre-Petition Agreement (the "Required Pre-Petition Lenders") have consented to the Debtors' entering into the financing

arrangements contemplated by the Interim Order, this Order and the DIP Documents and to the Debtors' use of Cash Collateral in which the Pre-Petition Agent and the Pre-Petition Lenders have an interest, on the terms and conditions set forth in the Interim Order and this Order (the "Consent"). The Consent is expressly limited to the post-petition financing being provided by the DIP Lenders as contemplated by the Interim Order, this Order and the DIP Agreement. The protections provided in the Interim Order and this Order to the Pre-Petition Agent and the Pre-Petition Lenders are in exchange for the Consent and are consistent with and authorized by the Bankruptcy Code.

(g) The Debtors have requested entry of this Order pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2). Absent entry of this Order, the Debtors' estates will be immediately and irreparably harmed. The Financing and the use of Cash Collateral in accordance with this Order and the DIP Documents is therefore in the best interest of the Debtors' estates.

4. *Authorization of the Financing and the DIP Documents.*

(a) The Debtors are hereby authorized on a final basis to enter into the DIP Documents. The Borrower is hereby authorized on a final basis to borrow money pursuant to the DIP Agreement, and the Guarantors are hereby authorized to guaranty such borrowings, up to an aggregate principal or face amount of \$5,000,000 (plus interest, fees and other expenses provided for in the DIP Documents), subject to any limitations to extensions of credit under the DIP Documents, and in accordance with the terms of the Interim Order, this Order and the DIP Documents, which shall be used solely for purposes permitted under the DIP Documents. In addition to such amounts and obligations, the Debtors are authorized to incur overdrafts and related liabilities from treasury, depository and cash management services or in connection with

any automated clearing house fund transfers provided to or for the benefit of the Debtors by Bank of America, any other DIP Lender or any of their respective affiliates; *provided, however*, that nothing herein shall require Bank of America or any other party to incur overdrafts or to provide any such services or functions to the Debtors.

(b) In furtherance of the foregoing and without further approval of this Court, each Debtor is authorized to do and perform all acts, to make, execute and deliver all instruments and documents (including, without limitation, the execution or recordation of security agreements, mortgages and financing statements), and to pay all fees, that may be reasonably required or necessary for the Debtors' performance of their obligations under the DIP Documents, including, without limitation:

(i) the execution, delivery and performance of the Credit Documents (as defined in the DIP Agreement) and any exhibits attached thereto, including, without limitation, the DIP Agreement and the Guaranty and Collateral Agreement (as defined in the DIP Agreement) (collectively, and together with the letter agreement referred to in clause (iii) below, the "DIP Documents"),

(ii) the execution, delivery and performance of one or more non-material, as determined by the DIP Agent, amendments to the DIP Agreement, in such form as the Debtors, the DIP Agent and the DIP Lenders may agree; *provided*, that no such amendment shall shorten the maturity of the extensions of credit, increase the commitments, increase the maximum aggregate amount of indebtedness that may be incurred or increase the rate of interest or fees payable,

(iii) the non-refundable payment to the DIP Agent or the DIP Lenders, as the case may be, of the fees referred to in the DIP Agreement (and in the

separate letter agreement among the DIP Agent, the Company and the Borrower in connection with the Financing) and reasonable costs and expenses as may be due from time to time, including, without limitation, reimbursable fees and reasonable and documented expenses of the professionals retained as provided for in the DIP Documents, and

(iv) the performance of all other acts required or advisable under or in connection with the DIP Documents.

(c) Any and all DIP Documents entered into by the Debtors prior to the date of this Order in accordance with the terms of the Interim Order are hereby approved and ratified in full, and, upon the execution and delivery of any additional DIP Documents, such DIP Documents shall constitute valid and binding obligations of the Debtors, enforceable against each Debtor party thereto in accordance with the terms thereof. No obligation, payment, transfer or grant of security under the DIP Documents, the Interim Order or this Order shall be stayed, restrained, voidable, or recoverable under the Bankruptcy Code or under any applicable law (including without limitation, under section 502(d) of the Bankruptcy Code), or subject to any defense, reduction, setoff, recoupment or counterclaim.

5. *Interim Order Payments.* Pursuant to the Interim Order, the Debtors were authorized to pay the fees referred to in the DIP Documents and reasonable costs and expenses as may be due from time to time, including, without limitation, fees and expenses of the professionals retained as provided for in the DIP Documents, and any such payments are hereby approved and ratified on a final basis.

6. *Superpriority Claims.*

(a) Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP Obligations shall constitute allowed claims against the Debtors with priority over any and all administrative expenses, diminution claims (including all Adequate Protection Obligations (as defined below)) and all other claims against the Debtors, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, and over any and all administrative expenses or other claims arising under sections 105, 326, 328, 330, 331, 503(b), 507(a), 507(b), 726, 1113, 1114 or any other provisions of the Bankruptcy Code (the "Superpriority Claims"), whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed claims shall be payable from and have recourse to all pre- and post-petition property of the Debtors and all proceeds thereof, subject only to the payment of the Carve-Out to the extent specifically provided for herein.

(b) For purposes hereof, the "Carve-Out" means (A) all allowed professional fees and disbursements incurred by the professionals retained pursuant to Bankruptcy Code §§ 327 or 1103(a) by the Debtors and any statutory committee of unsecured creditors appointed in the Chapter 11 Cases (and any disbursements of any member of such committee) (i) in an aggregate allowed amount not to exceed \$1,000,000 (the "Post-Default Carve-Out Amount") on account of such professional fees and disbursements incurred following the "Default Point" (as defined below), plus (ii) the aggregate allowed amount (the "Pre-Default Carve-Out Amount") of all unpaid professional fees and disbursements incurred, accrued or invoiced from the Petition Date until the Default Point; *provided*, that all such professional fees and disbursements to the extent allowed shall be paid pursuant to interim compensation procedures established in an order

of the Bankruptcy Court and shall be subject to final allowance by order of the Bankruptcy Court under sections 330 and 331 of the Bankruptcy Code; and (B) all fees required to be paid to the Clerk of the Bankruptcy Court and to the United States Trustee under section 1930(a) of title 28 of the United States Code. Notwithstanding anything in the Interim Order or this Order to the contrary, no loans, Cash Collateral or any portion of the Carve-Out may be used to object to or contest in any manner, or raise any defense to, the validity, perfection, priority or enforceability of the Pre-Petition Obligations, the DIP Obligations, the Pre-Petition Liens, the DIP Liens, the Adequate Protection Liens, or to assert any claims or causes of action against the Pre-Petition Lenders, the Pre-Petition Agent, the DIP Lenders or the DIP Agent, whether through an adversary proceeding, contested matter or otherwise, *provided, however*, that up to \$50,000 of the Carve-Out may be used to pay for professional fees and disbursements incurred in connection with the investigation of the matters described above. None of the DIP Agent, the DIP Lenders, the Pre-Petition Agent or the Pre-Petition Lenders shall be responsible for the direct payment or reimbursement of any professional fees or disbursements incurred in connection with the Debtors' cases under any chapter of the Bankruptcy Code, and nothing in the Interim Order or this Order or otherwise shall be construed to obligate the DIP Agent, the DIP Lenders, the Pre-Petition Agent or the Pre-Petition Lenders in any way to pay professional fees or disbursements, or to ensure that the Debtors have sufficient funds to pay such professional fees or disbursements. As used herein, "Default Point" means that date when (x) an unwaived event of Default (as defined in the DIP Agreement) shall have occurred and is continuing; (y) the DIP Agent and the DIP Lenders have permanently ceased making advances or extensions of credit to the Debtors under the DIP Agreement; and (z) (i) either the DIP Agreement and the other DIP Documents or the Debtors' rights to use Cash Collateral are permanently terminated (or both)



and (ii) the DIP Agent or the Pre-Petition Agent shall have provided at least five (5) business days' notice to the affected professionals of a date certain on which a Default Point shall occur.

7. *DIP Liens.* As security for the DIP Obligations, effective and perfected upon the date of this Order and without the necessity of the execution, recordation of filings by the Debtors of mortgages, security agreements, control agreements, pledge agreements, financing statements or other similar documents, the following security interests and liens are hereby granted to the DIP Agent for its own benefit and the benefit of the DIP Lenders (all property identified in clauses (a), (b) and (c) below being collectively referred to as the "Collateral"), subject to the payment of the Carve-Out (all such liens and security interests granted to the DIP Agent, for its benefit and for the benefit of the DIP Lenders, pursuant to this Order and the DIP Documents, the "DIP Liens"):

(a) First Lien on Unencumbered Property. Pursuant to section 364(c)(2) of the Bankruptcy Code, the DIP Agent is hereby granted (for the benefit of itself and the DIP Lenders) a valid, binding, continuing, enforceable, fully-perfected first priority senior security interest in and lien upon all pre- and post-petition property of the Debtors, whether existing on the Petition Date or thereafter acquired, that, on or as of the Petition Date is not subject to valid, perfected and non-avoidable liens (collectively, "Unencumbered Property"), including without limitation, all cash and cash collateral of the Debtors (whether maintained with the DIP Agent or otherwise) and any investment of such cash and cash collateral, inventory, accounts receivable, intercompany notes, tax refund claims, insurance proceeds and tort claims whether arising before or after the Petition Date, contracts, properties, plants, equipment, general intangibles, documents, instruments, interests in leaseholds, real properties, chattel paper, fixtures, deposit and other accounts (including the Restricted Account as defined below), patents, copyrights,

trademarks, trade names, rights under Federal Communications Commission or other license agreements, and other intellectual property and capital stock of subsidiaries of the Borrower and the Guarantors and the proceeds of all the foregoing. Unencumbered Property shall exclude the Debtors' claims and causes of action under sections 544, 545, 547, 548 and 550 of the Bankruptcy Code, or any other avoidance actions under the Bankruptcy Code (collectively, "Avoidance Actions") and any proceeds or property recovered, unencumbered or otherwise the subject of successful Avoidance Actions).

(b) Liens Priming Pre-Petition Lenders' Liens. Pursuant to section 364(d)(1) of the Bankruptcy Code, the DIP Agent is hereby granted (for the benefit of itself and the DIP Lenders) a valid, binding, continuing, enforceable, fully-perfected first priority senior priming security interest in and lien upon all pre-petition and post-petition property of the Debtors, including, without limitation, all cash and cash collateral of the Debtors (whether maintained with the DIP Agent or otherwise) and any investment of such cash and cash collateral, inventory, accounts receivable, intercompany notes, tax refund claims, insurance proceeds and tort claims whether arising before or after the Petition Date, contracts, properties, plants, equipment, general intangibles, documents, instruments, interests in leaseholds, real properties, chattel paper, fixtures, deposit accounts, patents, copyrights, trademarks, trade names, rights under Federal Communications Commission or other license agreements, and other intellectual property and capital stock of subsidiaries of the Borrower and the Guarantors and the proceeds of all the foregoing, whether now existing or hereafter acquired, that is subject to the existing liens presently securing the Pre-Petition Obligations (collectively, the "Primed Liens"). Such security interests and liens shall be senior in all respects to the Primed Liens and any other interests in such property of the Pre-Petition Lenders arising from current and future liens of the Pre-Petition

Lenders (including, without limitation, adequate protection liens granted hereunder), but shall not be senior to any valid, perfected and unavoidable interests of other parties arising out of liens, if any, on such property existing immediately prior to the Petition Date, or to any valid, perfected and unavoidable interests in such property arising out of liens to which the liens of the Pre-Petition Lenders become subject subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code.

(c) Liens Junior to Certain Other Liens. Pursuant to section 364(c)(3) of the Bankruptcy Code, the DIP Agent is hereby granted (for the benefit of itself and the DIP Lenders) valid, binding, continuing, enforceable, fully-perfected security interests in and liens upon all pre-petition and post-petition property of the Debtors (other than the property described in clauses (a) or (b) of this paragraph 6, as to which the liens and security interests in favor of the DIP Agent will be as described in such clauses), whether now existing or hereafter acquired, that is subject to valid, perfected and unavoidable liens in existence immediately prior to the Petition Date or to valid and unavoidable liens in existence immediately prior to the Petition Date that are perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code, which security interests and liens in favor of the DIP Agent are junior to such valid, perfected and unavoidable liens.

(d) Liens Senior to Certain Other Liens. The DIP Liens and the Adequate Protection Liens (as defined below) shall not be subject or subordinate to (i) any lien or security interest that is avoided and preserved for the benefit of the Debtors and their estates under section 551 of the Bankruptcy Code or (ii) any liens arising after the Petition Date including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other governmental unit, commission, board or court for any liability of the Debtors.

8. *Protection of DIP Lenders' Rights.*

(a) So long as there are any borrowings or other amounts (other than contingent indemnity obligations as to which no claim has been asserted when all other amounts have been paid) outstanding, or the DIP Lenders have any commitment (collectively, the "Commitment") under the DIP Agreement, the Pre-Petition Agent and Pre-Petition Lenders shall (i) take no action to foreclose upon or recover in connection with the liens granted pursuant to the Pre-Petition Agreement, the Interim Order or this Order, or otherwise exercise remedies against any Collateral or seek additional adequate protection or other relief and (ii) not file any further financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments, or otherwise take any action to perfect their security interests in the Collateral unless required by applicable state law to continue the perfection of valid and unavoidable liens or security interests as of the Petition Date.

(b) The automatic stay provisions of section 362 of the Bankruptcy Code are modified to the extent necessary to permit the DIP Agent and the Required DIP Lenders to exercise, (i) upon the occurrence of an Event of Default, all rights and remedies under the DIP Documents other than those rights and remedies against the Collateral as provided in clause (ii) below, including, without limitation, (x) terminating the commitments under the DIP Agreement, (y) declaring the DIP Obligations due and payable or (z) charging the default interest rate provided for in Section 2.8(b) of the DIP Agreement and (ii) upon the occurrence and during the continuance of an Event of Default, to the extent provided for in the DIP Agreement and after the giving of five business days' prior written notice to counsel to the Debtors, counsel to the Committee, counsel to the Pre-Petition Agent and the United States Trustee for the District of Delaware, all rights and remedies against the Collateral provided for in the DIP Documents

(including, without limitation, the right to setoff monies of the Debtors in accounts maintained with the DIP Agent or any DIP Lender). In any hearing regarding any exercise of rights or remedies, the only issue that may be raised by any party in opposition thereto shall be whether, in fact, an Event of Default has occurred and is continuing, and the Debtors and the Pre-Petition Lenders hereby waive their right to seek relief, including, without limitation, under section 105 of the Bankruptcy Code, to the extent such relief would in any way impair or restrict the rights and remedies of the DIP Agent or the DIP Lenders set forth in this Order or the DIP Documents. In no event shall the DIP Agent or the DIP Lenders be subject to the equitable doctrine of “marshalling” or any similar doctrine with respect to the Collateral.

9. *Limitation on Charging Expenses Against Collateral.* Except to the extent of the Carve-Out, no expenses of administration of the Cases or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the Collateral securing the DIP Obligations or the Pre-Petition Obligations pursuant to section 506(c) of the Bankruptcy Code or any similar principle of law, without the prior written consent of DIP Lenders holding at least a majority of the commitments under the DIP Agreement (the “Required DIP Lenders”) or the Required Pre-Petition Lenders, and no such consent shall be implied from any other action, inaction, or acquiescence by the DIP Agent, the DIP Lenders, the Pre-Petition Agent or the Pre-Petition Lenders.

10. *The Cash Collateral.* For purposes of this Order, the term “Cash Collateral” shall mean and include all “cash collateral” as defined by section 363 of the Bankruptcy Code, deposits subject to setoff, and cash arising from the collection, sale, lease or other disposition, use or conversion to cash of any property of the Debtors in which the Pre-Petition Agent or Pre-

Petition Lenders have any lien or security interest, whether such liens or security interests (including, without limitation, any adequate protection liens or security interests) existed at the commencement of the Chapter 11 Cases or arise thereafter pursuant to the Interim Order, this Order or any other order of the Court, applicable law or otherwise.

11. *Use of Cash Collateral.* Based on the Consent of the Required Pre-Petition Lenders on the terms set forth in this Order, including, without limitation, in paragraphs 3, 8, 9, 12, 13, 14, 15, 16, 17 and 18 hereof, the Debtors are hereby authorized to use all Cash Collateral of the Pre-Petition Lenders as contemplated by the Approved Weekly Forecasts (as defined in the DIP Agreement); *provided*, that the Pre-Petition Lenders are granted adequate protection as hereinafter set forth. The Debtors' right to use the Cash Collateral shall terminate automatically upon the earlier of the Revolving Credit Termination Date (as defined in the DIP Agreement) or the date on which the Debtors fail to comply with the adequate protection provisions specified in paragraph 11 or 12 of this Order, after the giving of five business days' prior written notice to counsel to the Debtors, counsel to the Committee, counsel to the Pre-Petition Agent and the United States Trustee for the District of Delaware.

12. *Adequate Protection.* The Pre-Petition Lenders are entitled, pursuant to sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code, to adequate protection of their interest in the Pre-Petition Collateral, including the Cash Collateral, to the extent that their interests in the Pre-Petition Collateral constitute valid, perfected and indefeasible security interests and liens as of the Petition Date, for and equal in amount to the aggregate diminution in value, if any, of the Pre-Petition Lenders' interests in the Debtors' interests in the Pre-Petition Collateral, including, without limitation, any such diminution resulting from the sale, lease or use by the Debtors (or other decline in value) of Cash Collateral and any other Pre-Petition

Collateral, the priming of the Pre-Petition Agent's security interests and liens in the Pre-Petition Collateral by the DIP Agent and the DIP Lenders pursuant to the DIP Documents, the Interim Order and this Order, and the imposition of the automatic stay pursuant to section 362 of the Bankruptcy Code (collectively, the "Adequate Protection Obligations"). The Pre-Petition Agent and the Pre-Petition Lenders consent to and are hereby granted the following):

(i) Adequate Protection Liens. As security for the payment of the Adequate Protection Obligations, the Pre-Petition Agent (for itself and for the benefit of the Pre-Petition Lenders) is hereby granted (effective and perfected upon the date of this Order and without the necessity of the execution by the Debtors of mortgages, security agreements, pledge agreements, financing statements or other agreements) a replacement security interest in and lien upon all Collateral other than Avoidance Actions, subject and subordinate only to (A) the DIP Liens and any liens on the Collateral to which such DIP Liens are junior and (B) the Carve-Out (the "Adequate Protection Liens"),

(ii) Section 507(b) Claim. The Pre-Petition Agent and the Pre-Petition Lenders are hereby granted, subject to the payment of the Carve-Out, a superpriority claim in the amount of the Adequate Protection Obligations as provided for in section 507(b) of the Bankruptcy Code, immediately junior to the Superpriority Claims (the "Section 507(b) Claim"), *provided, however*, that the Pre-Petition Agent and the Pre-Petition Lenders shall not receive or retain any payments, property or other amounts in respect of the Section 507(b) Claim granted hereunder or under the Pre-Petition Agreement unless and until the DIP Obligations have been indefeasibly paid in cash in full (other than contingent

indemnity obligations as to which no claim has been asserted when all other amounts have been paid);

(iii) Fees and Expenses. Subject to section 506(b) of the Bankruptcy Code, the Pre-Petition Agent shall receive from the Debtors current cash payments of all reasonable and documented fees and expenses payable to them under the Pre-Petition Agreement, including, but not limited to, their reasonable fees and disbursements of one external counsel, one local counsel, financial and other consultants, and shall be entitled to the payment of such additional fees and expenses as they may accrue.

(iv) Reporting Requirements. The Pre-Petition Agent shall receive the same reports and other information required to be provided to the DIP Agent under the DIP Documents, regardless of whether or not the Revolving Credit Termination Date has occurred.

13. *Net Cash Proceeds*. All Net Cash Proceeds of a Substantial Transaction (as each such term is defined in the DIP Agreement) shall be first deposited in a segregated account maintained by the DIP Agent (the "DIP Collateral Account") as collateral securing the DIP Obligations, until the amount in the DIP Collateral Account equals the Commitment, and second remitted to the Pre-Petition Agent, for application to any and all Pre-Petition Obligations in accordance with the terms of the Pre-Petition Agreement; *provided*, that the Net Cash Proceeds of a sale of all or substantially all of the assets of the Debtors in a Substantial Transaction, as set forth in clause (iii) thereof, (x) shall be applied first to repay in full the DIP Obligations, at which time the Commitment shall be reduced to zero (\$0), and second remitted to the Pre-Petition Agent, for application to any and all Pre-Petition Obligations in accordance with the terms of the



Pre-Petition Agreement, and (y) shall be subject to any remaining obligations with respect to the Carve-Out to the extent provided in any order governing the relevant sale. Neither the Debtors nor their estates shall have any interest in the DIP Collateral Account.

14. *Debtors' Waiver of Rights.* The Debtors hereby irrevocably waive, and are barred from asserting or exercising any right, (a) without Agents' and Lenders' prior written consent (which may be withheld in their sole discretion), or (b) without prior indefeasible payment and satisfaction in full in cash of the DIP Obligations and the termination of the Commitment: (i) to grant or impose, or request that the Court grant or impose, under section 364 of the Bankruptcy Code or otherwise, liens on or security interests in any Post-Petition Collateral, which are pari passu with, equal to or superior to the DIP Agents' or Lenders' liens on and security interests in such Post-Petition Collateral granted under the Interim Order or this Order; (ii) to grant or impose, or request that the Court grant or impose, under section 364 of the Bankruptcy Code or otherwise, claims or expenses against the Debtors, which are pari passu with, equal to or superior to the DIP Agents' or Lenders' claims and expenses granted under the Interim Order or this Order; (iii) to request that the Court authorize the use of Cash Collateral in which Agents or Lenders have an interest or the sale, lease, or other disposition of any property of Debtors' estates in which Agents or Lenders have a lien or security interest, except as expressly permitted hereunder or under the DIP Agreement; or (iv) to modify or affect any of the rights of Agents or Lenders under the Interim Order, this Order or any DIP Documents by any order entered in any of the Chapter 11 Cases or any Successor Case.

15. *Restricted Account.* If, on any Friday, no amounts are outstanding under the Financing, the Debtors shall deposit Adjusted Excess Cash On Hand or Net Cash Proceeds, each as defined in the DIP Agreement, into a restricted account maintained at Bank of America (the

“Restricted Account”). The Debtors may not withdraw funds from the Restricted Account (i) without the written consent of the Required DIP Lenders, or, if the commitments under the DIP Agreement have been reduced to zero and the DIP Obligations have been paid in full, the Required Pre-Petition Lenders, in each case, such consent not to be unreasonably withheld, or (ii) if a Default or Event of Default shall have occurred and be continuing immediately prior to the withdrawal of funds.

16. *Perfection of DIP Liens and Adequate Protection Liens.*

(a) Subject to the provisions of paragraph 7(a) above, the DIP Agent, the DIP Lenders, the Pre-Petition Agent and the Pre-Petition Lenders are hereby authorized, notwithstanding section 362(a) of the Bankruptcy Code, but not required, to execute, file or record, as appropriate, financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments in any jurisdiction or take any other action in order to validate and perfect the liens and security interests granted to them hereunder. Whether or not the DIP Agent on behalf of the DIP Lenders, with respect to the DIP Liens, or the Pre-Petition Agent on behalf of the Pre-Petition Lenders, with respect to the Adequate Protection Liens, shall, in its or their sole discretion, choose to file such financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments or otherwise confirm perfection of the liens and security interests granted to them hereunder, such liens and security interests shall be deemed valid, perfected, allowed, enforceable, non-avoidable and not subject to challenge, dispute or subordination, as of the time and on the date of entry of the Interim Order. Each of the DIP Agent and the Pre-Petition Agent, without any further consent of any party, is authorized to take, execute and deliver such instruments (in each case without representation or warranty of any kind) to enable the DIP Agent or the Pre-Petition Agent to further validate,

perfect, preserve and enforce the DIP Liens (in the case of the DIP Agent) or Adequate Protection Liens (in the case of the Pre-Petition Agent). Upon the request of the DIP Agent or the Pre-Petition Agent, the Debtors shall make, execute and deliver such instruments, and take such other acts, as are reasonably necessary to facilitate the further perfection, preservation and enforcement of the DIP Liens or the Adequate Protection Liens, as applicable.

(b) A certified copy of this Order may, in the discretion of the Pre-Petition Agent or the DIP Agent, be filed with or recorded in filing or recording offices in addition to or in lieu of such financing statements, mortgages, notices of lien or similar instruments, and all filing offices are hereby authorized to accept such certified copy of this Order for filing and recording.

17. *Preservation of Rights Granted Under the Order.*

(a) No claim or lien having a priority superior to or pari passu with those granted by this Order to the DIP Agent and the DIP Lenders shall be granted or allowed while any portion of the Financing (or any refinancing thereof) or the commitments thereunder or the DIP Obligations remain outstanding, whether under section 364(d) of the Bankruptcy Code or otherwise.

(b) Unless all DIP Obligations shall have been paid in full in cash (other than contingent indemnity obligations as to which no claim has been asserted when all other amounts have been paid) and the commitments under the DIP Agreement have terminated (collectively, the "DIP Pay-Out"), the Debtors shall not seek, and it shall constitute an Event of Default and a termination of the right to use Cash Collateral if any of the Debtors seek, or if there is entered, (i) any modifications or extensions of this Order without the prior written consent of the Required DIP Lenders, and no such consent shall be implied by any other action, inaction or

acquiescence by the DIP Agent, or (ii) an order dismissing any of the Cases. If an order dismissing any of the Cases under section 1112 of the Bankruptcy Code or otherwise is at any time entered, such order shall provide (in accordance with sections 105 and 349 of the Bankruptcy Code) that the Superpriority Claims, priming liens, security interests and replacement security interests granted to the DIP Agent and, as applicable, the Pre-Petition Agent pursuant to this Order shall continue in full force and effect and shall maintain their priorities as provided in this Order until the DIP Pay-Out shall have occurred and all Adequate Protection Obligations shall have been paid and satisfied in full in cash (and that such Superpriority Claims, priming liens, security interests and replacement security interests, shall, notwithstanding such dismissal, remain binding on all parties in interest).

(c) If any or all of the provisions of this Order are hereafter reversed, modified, vacated or stayed, such reversal, modification, vacation or stay shall not affect (i) the validity or enforceability of any DIP Obligations or Adequate Protection Obligations incurred prior to the actual receipt of written notice by the DIP Agent or Pre-Petition Agent, as applicable, of the effective date of such reversal, stay, modification or vacation or (ii) the validity, priority, perfection or enforceability of any security interest, lien or priority authorized or created hereby or pursuant to the DIP Agreement with respect to any DIP Obligations or Adequate Protection Obligations. Notwithstanding any such reversal, stay, modification or vacation, all obligations and other financial accommodations made pursuant to this Order, all DIP Obligations and any use of Cash Collateral and other Pre-Petition Collateral by the Debtors prior to the actual receipt of written notice by the DIP Agent or the Pre-Petition Agent, as applicable, of the effective date of such reversal, stay, modification or vacation shall be governed in all respects by the original provisions of the Interim Order and this Order, as applicable, and the DIP Agent, Pre-Petition

Agent, DIP Lenders and Pre-Petition Lenders shall be entitled to all the rights, remedies, privileges and benefits granted herein, including, without limitation, the DIP Liens, Superpriority Claims, Adequate Protection Obligations and Adequate Protection Lien.

(d) Except as expressly provided in the Interim Order, this Order or in the DIP Documents, the DIP Liens, Adequate Protection Liens, the Superpriority Claims, the Section 507(b) Claims and all other rights and remedies of the DIP Agent, the DIP Lenders, the Pre-Petition Agent and the Pre-Petition Lenders granted by the provisions of the Interim Order, this Order and the DIP Documents shall survive, and shall not be modified, impaired or discharged by the entry of an order converting any of the Cases to a case under chapter 7, dismissing any of the Cases, terminating the joint administration of these Cases or by any other act or omission, nor shall the DIP Liens, the Adequate Protection Liens, the Superpriority Claims, the Section 507(b) Claims or any of the other rights and remedies of the DIP Agent, the DIP Lenders, the Pre-Petition Agent and the Pre-Petition Lenders granted by the provisions of the Interim Order, this Order and the DIP Documents be modified, impaired or discharged by the entry of an order confirming a plan of reorganization in any of the Cases and, pursuant to section 1141(d)(4) of the Bankruptcy Code, the Debtors have waived any discharge as to any remaining DIP Obligations and such waiver is hereby approved. The terms and provisions of this Order and the DIP Documents shall continue in these Cases, in any successor cases if these Cases cease to be jointly administered, or in any superseding chapter 7 cases under the Bankruptcy Code, and the DIP Liens, the Superpriority Claims and all other rights and remedies of the DIP Agent and the DIP Lenders granted by the provisions of this Order and the DIP Documents shall continue in full force and effect until the DIP Obligations are indefeasibly paid in full.

18. *Limitation on Use of Financing Proceeds and Collateral / Bar Date.*

(a) Notwithstanding anything herein or in any other order by this Court to the contrary, no borrowings, Cash Collateral, Collateral or the Carve-Out may be used to (i) object, contest or raise any defense to, the validity, perfection, priority, extent or enforceability of any amount due under the DIP Documents, the liens or claims granted under the Interim Order, this Order or the DIP Documents, the Pre-Petition Liens, the Pre-Petition Obligations or the liens and obligations provided for in the Liquidity Credit Agreement, (ii) assert any action for preferences, fraudulent conveyances, other avoidance power claims or any other any claims, counterclaims or causes of action, objections, contests or defenses against the DIP Agent, the DIP Lenders, the Pre-Petition Agent, the Pre-Petition Lenders or their respective agents, affiliates, representatives, attorneys or advisors, (iii) prevent, hinder or otherwise delay the DIP Agent's or the Pre-Petition Agent's assertion, enforcement or realization on the Cash Collateral or the Collateral in accordance with the DIP Documents or this Order, (iv) seek to modify any of the rights granted to the DIP Agent, the DIP Lenders, the Pre-Petition Agent and the Pre-Petition Lenders under the DIP Documents, the Interim Order or this Order, in each of the foregoing cases without such parties' prior written consent or (v) pay any amount on account of any claims arising prior to the Petition Date unless such payments on account of such pre-petition claims are (x) approved by an order of this Court and (y) in accordance with the Approved Weekly Cash Forecasts (as defined in the DIP Agreement) to be delivered pursuant to section 5.12 of the DIP Agreement.

(b) The Committee or any other party in interest with standing to do so, including a chapter 7 or chapter 11 trustee appointed in the Cases or any subsequent cases, shall have sixty (60) days from the date counsel is retained by such Committee<sup>1</sup> to file, on behalf of

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<sup>1</sup> In the event no Committee is appointed, the period shall be 75 days from the Petition Date.

the Debtors' estates, and to serve upon counsel for the Pre-Petition Agent, objections or complaints respecting the validity, extent, priority, avoidability or enforceability of the Pre-Petition Obligations or the Pre-Petition Liens and security interests (each a "Challenge"). In the event (i) a Challenge is not filed and properly served within the 60-day, or 75-day, as applicable, period described above or (ii) a final order is entered denying all such Challenges, then any Committee and any other party in interest shall thereafter be forever barred from bringing any Challenge, and the Pre-Petition Obligations and the liens and security interests of the Pre-Petition Lenders shall be deemed valid, enforceable, perfected, unavoidable and not subject to subordination for all purposes in these Cases and any subsequent chapter 7 cases. Nothing in this Order shall be deemed to grant standing to the Committee or any other committee, person or entity to commence such an action.

19. *Order Governs.* In the event of any inconsistency between the provisions of this Order and the DIP Documents, the provisions of this Order shall govern.

20. *Binding Effect; Successors and Assigns.* The DIP Documents and the provisions of this Order, including all findings herein, shall be binding upon all parties in interest in these Cases, including, without limitation, the DIP Agent, the DIP Lenders, the Pre-Petition Agent, the Pre-Petition Lenders, any Committee appointed in these Cases, and the Debtors and their respective successors and assigns (including any chapter 7 or chapter 11 trustee hereinafter appointed or elected for the estate of any of the Debtors) and shall inure to the benefit of the DIP Agent, the DIP Lenders, the Pre-Petition Agent, the Pre-Petition Lenders and the Debtors and their respective successors and assigns; *provided, however*, that the DIP Agent and the DIP Lenders shall have no obligation to extend any financing to any chapter 7 trustee or similar responsible person appointed for the estates of the Debtors.

Dated: \_\_\_\_\_, 2005

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HONORABLE PETER J. WALSH  
UNITED STATES BANKRUPTCY JUDGE



**File a Notice:**

05-12237-PJW Birch Telecom, Inc.

**U.S. Bankruptcy Court****District of Delaware**

## Notice of Electronic Filing

The following transaction was received from Quirk, Marion M. entered on 8/25/2005 at 1:26 PM EDT and filed on 8/25/2005

**Case Name:** Birch Telecom, Inc.**Case Number:** 05-12237-PJW**Document Number:** 74**Docket Text:**

Notice of Hearing of Motion, Interim Order and Final Hearing on Debtor's Motion for Interim and Final Orders (I) Authorizing Debtors (A) to Obtain Post-Petition Financing and (b) to Utilize Cash Collateral (II) Granting Adequate Protection to Pre-Petition Secured Parties and (III) Scheduling Final Hearing (related document(s)[41], [14] ) Filed by Birch Telecom, Inc.. Hearing scheduled for 9/14/2005 at 03:00 PM at US Bankruptcy Court, 824 Market St., 6th Floor, Wilmington, DE. Objections due by 9/8/2005. (Attachments: # (1) Exhibit A - Motion for Interim and Final Order# (2) Exhibit B - Credit Agreement# (3) Exhibit C - Signed Interim Order# (4) Exhibit D - Proposed Final Order) (Quirk, Marion)

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

**Document description:**Main Document**Original filename:**C:\temp\convert\Main Doc.pdf**Electronic document Stamp:**

[STAMP bkecfStamp\_ID=983460418 [Date=8/25/2005] [FileNumber=4107125-0]  
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**Document description:**Exhibit A - Motion for Interim and Final Order**Original filename:**C:\temp\convert\Exhibit A.pdf**Electronic document Stamp:**

[STAMP bkecfStamp\_ID=983460418 [Date=8/25/2005] [FileNumber=4107125-1]  
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**Document description:**Exhibit B - Credit Agreement**Original filename:**C:\temp\convert\Exhibit B.pdf**Electronic document Stamp:**

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**Document description:**Exhibit C - Signed Interim Order**Original filename:**C:\temp\convert\Exhibit C.pdf**Electronic document Stamp:**

[STAMP bkecfStamp\_ID=983460418 [Date=8/25/2005] [FileNumber=4107125-3]