

**Docket No. 11-0597**

**BRIEF ON EXCEPTIONS OF AT&T ILLINOIS**

**Attachment**



WHEREAS, the Debtor commenced the above-captioned case (the “**Bankruptcy Case**”) with the filing of a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the “**Bankruptcy Code**”) on October 18, 2011 (the “**Petition Date**”);

WHEREAS, prior to the Petition Date, the Debtor entered into certain interconnection agreements with AT&T for thirteen (13) states (collectively, the “**ICAs**”) pursuant to which AT&T provides certain services to the Debtor in six (6) states, including, among other things, services related to the transport and termination of local and, prior to December 29, 2011, long distance (interstate and intrastate) IP-PSTN traffic sent by the Debtor to AT&T for termination to end-users, including but not limited to AT&T’s end-user customers (the “**IP-PSTN Traffic Termination Services**”);

WHEREAS, prior to the Petition Date, a dispute arose between the Debtor and AT&T with respect to the proper interpretation of certain language in the ICAs pertaining to the appropriate access charges for the IP-PSTN Traffic Termination Services being provided by AT&T pursuant to the ICAs and similar and related disputes continued following the Petition Date with respect to the postpetition services provided by AT&T to the Debtor;

WHEREAS, on May 5, 2011, the Debtor commenced an action in the United States District Court for the District of Connecticut (the “**Connecticut District Court**”), Case No 3:11-cv-00739-JCH (the “**Federal District Court Case**”) seeking, among other things, (a) an order restraining AT&T from terminating the ICAs or discontinuing services to the Debtor, and (b) a declaration that the Debtor has not breached the ICAs;

WHEREAS, on July 15, 2011, the Connecticut District Court granted AT&T's motion to dismiss the Debtor's declaratory judgment and injunction claims, leaving the Debtor's unlawful discrimination claim pending;

WHEREAS, on July 19, 2011, the Debtor appealed the Connecticut District Court's dismissal to the United States Court of Appeals for the Second Circuit, Case No. 11-2916 (the "**Second Circuit Appeal**"), which issued a temporary stay and enjoined AT&T from discontinuing services to the Debtor;

WHEREAS, in connection with the Federal District Court Case, the Debtor and AT&T entered into an escrow agreement, dated as of July 22, 2011, pursuant to which the Debtor deposited \$150,000 into an escrow account (the "**Prepetition Escrow**") to be disbursed in accordance with a ruling of the Connecticut District Court or such other court or agency of competent jurisdiction with respect to whether the Debtor had breached the ICAs;

WHEREAS, following dismissal of the Debtor's declaratory judgment and injunction claims by the Connecticut District Court, the Debtor commenced proceedings against AT&T in state public utility commissions in California, Michigan, Illinois, Texas, Indiana, and Ohio (collectively, the "**State PUC Proceedings**");

WHEREAS, a dispute has arisen between the Debtor and AT&T as to whether the ICA governing California (the "**California ICA**") was terminated prior to the Petition Date;

WHEREAS, following the Petition Date on October 21, 2011, the Debtor commenced an adversary proceeding against AT&T in the Bankruptcy Court [Doc. No. 18], Adv. Pro. No. 11-01299 (the "**Adversary Proceeding**") seeking, among other

things, a declaration that AT&T is not a “utility” entitled to the protections of Section 366 of the Bankruptcy Code, and temporary, preliminary, and permanent injunctive relief preventing AT&T from terminating the ICAs and discontinuing service to the Debtor. The Debtor also filed a motion for temporary restraining order (the “**TRO Motion**”);

WHEREAS, also on October 21, 2011, the Debtor filed an Emergency Motion for Entry of Order (I) Enforcing the Automatic Stay against AT&T and (II) Awarding Sanctions for AT&T’s Willful Stay Violation [Doc. No. 19] (the “**Stay Relief Motion**”), seeking to stop AT&T from taking actions in the State PUC Proceedings to oppose the application of the automatic stay to those proceedings;

WHEREAS, the Debtor and AT&T resolved the Stay Relief Motion by agreement, and on November 23, 2011, the Bankruptcy Court entered the Stipulation and Consent Order [Doc. No. 82] between the Debtor and AT&T which, among other things, provided that (a) the TRO Motion would be withdrawn with prejudice; (b) AT&T would not discontinue providing services to the Debtor without obtaining entry of a Bankruptcy Court order authorizing such discontinuation; and (c) the Federal District Court Case, the Second Circuit Appeal and the State PUC Proceedings would be stayed until January 15, 2012;

WHEREAS, on November 18, 2011, the FCC issued an order (the “**FCC Order**”) that became effective on December 29, 2011 (the “**FCC Order Effective Date**”);

WHEREAS, on November 28, 2011, AT&T filed its Motion to (I) Compel the Debtor to Pay Reasonable Compensation for Postpetition Services and (II) in the Event the Debtor is Unable to Provide Assurance of Such Payments, (A) Compel Immediate Rejection of the Interconnection Agreements between the Debtor and the AT&T

Companies or (b) Lift the Stay to Permit the AT&T Companies to Discontinue Providing Services (the “**Reasonable Compensation Motion**”);

WHEREAS, the Debtor and AT&T resolved the Reasonable Compensation Motion by agreement, and on December 30, 2011, the Bankruptcy Court entered the Stipulated Order Resolving the AT&T Companies’ Motion Seeking Reasonable Compensation and Related Relief [Doc. No. 135] (the “**Reasonable Compensation Order**”) which, among other things, provided that: (a) the Debtor would compensate AT&T for any IP-PSTN Traffic Termination Services provided by AT&T to the Debtor from and after the December 29, 2011 effective date of the FCC Order (the “**FCC Order Effective Date**”) at the rates required by the FCC Order; (b) the Debtor would deposit \$500,000 into escrow (the “**Postpetition Escrow**”) to be disbursed in a manner consistent with a subsequent Bankruptcy Court order regarding allowance of AT&T’s administrative claim; and (c) the Federal District Court Case, the Second Circuit Appeal and the State PUC Proceedings would be stayed until April 14, 2012 unless the Bankruptcy Court ordered otherwise;

WHEREAS, on January 14, 2012, AT&T filed its Motion for Allowance and Payment of Administrative Expense Claim [Doc. No. 147] (the “**Admin Claim Motion**”), seeking allowance and payment of an administrative expense claim in the amount of not less than \$1,081,714.25 for the period from the Petition Date through the FCC Order Effective Date (the “**Admin Claim**”), and on January 31, 2012, five different AT&T entities filed prepetition proofs of claim [Claim Nos. 36 through 40], pursuant to which AT&T is seeking allowance of a general unsecured claim in the aggregate amount

of \$10,211,467.57 for amounts alleged to be due AT&T, as of the Petition Date (collectively, the “**Prepetition Claim**”);

WHEREAS, on February 1, 2012, the Debtor filed its objection [Doc No. 160] (the “**Admin Claim Objection**”) to the Admin Claim Motion seeking disallowance of the Admin Claim in its entirety, and the Debtor anticipates filing an objection to the Prepetition Claim on grounds substantially similar to those set forth in the Admin Claim Objection;

WHEREAS, as set forth in the Admin Claim Motion and as reflected in the Prepetition Claim, AT&T asserts, among other things, that the ICAs and the FCC Order require the Debtor to pay for all prepetition and postpetition long distance IP-PSTN Traffic Termination Services provided by AT&T at applicable interstate switched access service rates; and as set forth in the Admin Claim Objection, the Debtor asserts, among other things, that it is not required by the ICAs or the FCC Order to pay AT&T for long distance IP-PSTN Traffic Termination Services at the applicable interstate switched access service rate for any period prior to the FCC Order Effective Date;

WHEREAS, on February 15, 2012, the Debtor filed its Chapter 11 plan and a disclosure statement pertaining thereto [Doc. Nos. 177 and 178] (the “**Chapter 11 Plan**”), which provides for the sale of substantially all the Debtor’s assets, including the assumption and assignment of the ICAs (the “**Asset Sale**”), to The Broadvox Holding Company, LLC, or such other entity that submits the highest and best bid for such assets (the “**Purchaser**”), and the distribution of the proceeds from the Asset Sale to the Debtor’s creditors, including, in part, to AT&T to cure alleged defaults under the ICAs, which ICAs will be assumed by the Debtor and assigned to the Purchaser;

WHEREAS, the Parties have agreed to resolve the disputed issues presented by the Federal District Court Case, the Second Circuit Appeal, the State PUC Proceedings, the disputed termination of the California ICA, the Admin Claim Motion, the Admin Claim Objection, the Prepetition Claim, and the Chapter 11 Plan pursuant and subject to the terms set forth in this Stipulated Order;

WHEREAS, the Official Committee of Unsecured Creditors appointed in the Bankruptcy Case filed a Limited Objection to the entry of this Stipulated Order (Doc. No. 258) which was resolved by agreement as stated on the record during the March 20, 2012 hearing;

**IT IS HEREBY STIPULATED, ORDERED AND AGREED THAT:**

1. The Debtor and AT&T shall amend the ICAs as required therein to conform the ICAs (including the California ICA) to the terms of the FCC Order (the “**ICA Amendment**”). AT&T hereby consents to the assumption by the Debtor and the Debtor’s assignment to the Purchaser of all of the ICAs, as amended by the ICA Amendment, including the California ICA, which shall be deemed in full force and effect (the “**Assumption and Assignment**”), in exchange for the following consideration to be provided by the Debtor at the closing of the Asset Sale (the “**Closing**”) on the effective date of the Chapter 11 Plan: cash in the amount of \$1,562,003.89 (the “**Settlement Amount**”), comprised of all funds in the Prepetition Escrow (\$150,000), all funds in the Postpetition Escrow (\$500,000), and the sum of \$912,003.89 in immediately available funds; **provided that**, nothing in this Stipulated Order shall be construed as or deemed to be (a) a waiver or relinquishment by AT&T of its right to receive adequate assurance of future performance of the ICAs from the Purchaser, as required by Section 365(f)(2)(B)

of the Bankruptcy Code, (b) AT&T's consent to any such adequate assurance from any particular Purchaser, or (c) a waiver or relinquishment by AT&T of its right, if any, to reasonable compensation and an allowed administrative priority claim for any unpaid services provided by AT&T to the Debtor during the period from the FCC Order Effective Date through the date of the Assumption and Assignment (a "**Post-FCC Order Admin Claim**"). The Settlement Amount may be allocated by AT&T between the Admin Claim and the Prepetition Claim in its discretion.

2. Receipt by AT&T of the Settlement Amount at the Closing shall be in full and complete satisfaction of the Admin Claim, the Prepetition Claim and AT&T's right to a cure under Section 365(b)(1) of the Bankruptcy Code as a condition to the Assumption and Assignment.

3. Upon completion of the Assumption and Assignment at the Closing, the Purchaser shall be party to and bound by all of the terms and conditions of the ICAs including, but not limited to, the terms of the ICA Amendment that require that the Purchaser shall pay for all long distance IP-PSTN Traffic Termination Services provided by AT&T at the applicable interstate switched access service rates as provided in the FCC Order and for local IP-PSTN Traffic Termination Services at the rate of \$0.00035 per minute of use. Whether the IP-PSTN traffic delivered by the Purchaser to AT&T is long distance or local traffic shall be determined based upon the "calling" and "called party" information delivered to the Purchaser by its customers, and to the fullest extent required by the FCC Order, the Purchaser shall provide to AT&T accurate calling and called party information for all IP-PSTN traffic delivered to AT&T precisely as it is delivered to the Purchaser by its customers.

4. Upon receipt by AT&T of the Settlement Amount at the Closing, AT&T on behalf of itself and its agents, servants, employees, attorneys, insurers, assigns, and other representatives (the “**AT&T Parties**”), shall be deemed to have forever RELEASED AND DISCHARGED the Debtor and the Debtor’s past, present or future successors, predecessors, affiliates (including Broadvox, LLC and its affiliates if The Broadvox Holding Company, LLC or an affiliate is the Purchaser), shareholders, members, partners, directors, officers, employees, agents, attorneys, insurers, administrators or other representatives (collectively, the “**Debtor Parties**”), from all actual or potential claims, complaints, demands, causes of action, damages, costs, expenses, fees, and other liabilities of every sort and description, direct or indirect, fixed or contingent, known or unknown, and whether or not liquidated, from the beginning of time through and including the date of the Closing (collectively, “**Claims**”) that the AT&T Parties may have had or may now have against the Debtor Parties relating to, arising under, or in connection with the Debtors, the Bankruptcy Case, the ICAs, the provision of IP-PSTN Traffic Termination Services, the Federal District Court Case, the Second Circuit Appeal, the Prepetition Escrow, the State PUC Proceedings, the California ICA, the Adversary Proceeding, the TRO Motion, the Stay Relief Motion, the FCC Order, the Reasonable Compensation Motion, the Postpetition Escrow, the Admin Claim Motion, and/or the Prepetition Claim (collectively, the “**Release Subject Matter**”); **provided, however**, that the AT&T Parties shall not be deemed to have released or discharged (a) their rights under this Stipulated Order, (b) any Claims that they may have against the Purchaser arising under the ICAs after effectuating the Assumption and Assignment; or (c) any Post-FCC Order Admin Claim.

5. Upon receipt by the Debtor of an instrument in form and substance reasonably satisfactory to the Debtor and the Purchaser duly executed and delivered by AT&T which effectuates the Assumption and Assignment, the Debtor Parties shall be deemed to have forever RELEASED AND DISCHARGED the AT&T Parties from all Claims that the Debtor Parties may have had or may now have against the AT&T Parties relating to, arising under, or in connection with the Release Subject Matter; **provided,** **however,** that (a) the Debtor Parties shall not be deemed to have released or discharged their rights under this Stipulated Order or any defenses to any Post-FCC Order Admin Claim, and (b) if The Broadvox Holding Company LLC or its affiliate is the Purchaser, The Broadvox Holding Company, LLC shall not be deemed to have released or discharged any claims it may have against the AT&T Parties arising under the ICAs after effectuating the Assumption and Assignment.

6. AT&T hereby waives any rights that it may have under Section 366 of the Bankruptcy Code against the Debtor in this case. Within three (3) business days following the date that this Stipulated Order is entered by the Bankruptcy Court and becomes final and non-appealable, the Debtor and AT&T shall dismiss the Adversary Proceeding with prejudice to refiling.

7. The Parties agree that the stay of the Federal District Court Case, the Second Circuit Appeal and the State PUC Proceedings provided by the Reasonable Compensation Order shall be extended until ninety (90) days from the date this Stipulated Order is entered by the Bankruptcy Court and becomes final and non-appealable (the “**Outside Date**”). All rights with respect to whether the automatic stay of Section 362(a) of the Bankruptcy Code applies to such proceedings are expressly reserved; **provided,**

**however**, that nothing set forth herein shall be construed as effectuating an automatic lifting of the automatic stay (to the extent it applies to such actions) after the Outside Date.

8. During the period from the entry of this Stipulated Order through the earlier of the Closing or the Outside Date, (a) the Debtor will continue to comply with its obligations under the Reasonable Compensation Order, (b) the Parties shall cooperate in good faith with one another in effectuating the terms of this Stipulated Order, including the Assumption and Assignment and the confirmation of the Chapter 11 Plan, (c) as long as the Chapter 11 Plan conforms to and does not seek to alter the terms of this Stipulated Order in a manner adverse to AT&T, AT&T shall not interpose any objection to the Chapter 11 Plan and to the extent that the Prepetition Claim is allowed for voting purposes, AT&T shall vote in favor of the Chapter 11 Plan; and (d) any further proceedings in respect of the Admin Claim Motion and the Prepetition Claim shall be held in abeyance. Within five (5) business days following the Closing, the Parties shall file all necessary and appropriate pleadings to dismiss the Federal District Court Case, the Second Circuit Appeal, the State PUC Proceedings, and all proceedings in the Bankruptcy Court concerning the Admin Claim Motion and the Prepetition Claim (collectively, the “**Pending Disputed Matters**”), all with prejudice to refile. In the event that the Closing does not occur on or before the Outside Date, this Stipulated Order shall be void and of no force and effect and each of the Parties shall have all of their respective rights, claims and defenses in respect of all of the Pending Disputed Matters. Nothing herein shall preclude the Parties from extending the Outside Date by agreement and without further order of the Bankruptcy Court.

9. For the avoidance of doubt, nothing in this Stipulated Order is, or shall be deemed to constitute, an admission, acknowledgement, or waiver by either the Debtor or AT&T, or a finding or determination by the Bankruptcy Court with respect to (a) the appropriate rates and/or charges for long distance IP-PSTN Traffic Termination Services provided by AT&T to the Debtor at any time prior to the FCC Order Effective Date; (b) the construction of the provisions of the ICAs; or (c) whether the California ICA was properly terminated prior to the Petition Date; and the rights of the Parties with respect to such matters and all arguments pertaining thereto are expressly reserved unless and until the Closing occurs.

10. Nothing herein shall constitute a finding or determination whatsoever by the Bankruptcy Court with respect to (a) the assumption of any of the ICAs by the Debtor or the assignment of such ICAs to any Purchaser; (b) whether any particular Purchaser has or can provide AT&T with adequate assurance of future performance of any of the ICAs, as required by Section 365(f)(2)(B) of the Bankruptcy Code; (c) the allowance or disallowance of the Admin Claim or the Prepetition Claim; (d) AT&T's right to and the Debtor's defenses with respect to any Post-FCC Order Admin Claim or (e) any disputes between or among the Debtor and AT&T in any of the Pending Disputed Matters. All rights, claims and defenses of any of the Parties with respect to such disputes are expressly preserved pending the occurrence of the Closing.

11. This Stipulated Order shall bind the successors and assigns of the Parties.

12. The Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Stipulated Order.

SEEN AND AGREED:

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