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The Treatment of Private Line Agreements In Telecommunications Bankruptcies

BY ARTHUR E. ROSENBERG AND PETER A. ZISSER

The past few years have shown that building a modern telecommunications system able to serve the needs of a wide variety of end users is enormously expensive. In the ''good old days'' of the nationwide monopoly, the entire system was established, maintained, and owned by only a handful of entities. Times have changed. In the U.S. and around the world, telecommunications systems, including twisted wire, fiber optics, and wireless technologies, have been, and continue to be, built and maintained by a myriad of individual companies, each trying to satisfy the existing and future needs of their customers.

This balkanization of the telecommunications industry, while improving service, reducing costs, and freeing consumers from the ''evils'' of state-mandated monopolies, was established in a manner common in rapidly expanding industries. In an attempt to gain a competitive advantage over others, many players in the industry overbuilt their networks resulting in the inevitable shakeout, which included many bankruptcies. The result of this wave of insolvencies, however, has not been borne only by millions of out-of-the-money shareholders, but by the remaining solvent telecommunications companies, nearly all of whom can claim the dubious honor of being a contract counterparty with many bankrupt entities. One consequence of a decentralized telecommunications industry is the interdependency of telecom providers. Because every telecom provider cannot reach every location, or connect everyone to everyone else, telecom providers, out of necessity, must contract with each other to provide the complete user-to-user service needed to attract and retain customers. Furthermore, federal law requires telecom providers, in various circumstances, to provide access to end-users through interconnections with each other. [1]

Arthur Rosenberg is a partner and Peter Zisser is senior counsel with Holland & Knight.

Accordingly, the telecommunications industry is built on a foundation of thousands of contracts—not only between suppliers and customers, but between competitors in the areas of long-distance and local service. The recent boom in the telecom industry has resulted in a bevy of new types of agreements, including Indefeasible Right of Use (IRU) agreements, Interconnection Agreements, Co-Location Agreements, and Private Line Agreements. Many of these agreements contain ''take or pay'' provisions, the telecom industry's way of providing for minimum purchase requirements.

Generally, parties to contracts know what their rights are as they are clearly defined in the contract. The supplier must provide the goods or services, and the customer must pay according to the terms of the contract. Each expects the other to perform. Failure to perform by either party constitutes a breach of the contract and gives rise to a claim for damages. Bankruptcy, however, changes these dynamics. The non-debtor telecom company is no longer simply dealing with a customer or supplier (sometimes the bankruptcy entity is both), but with a ''debtor,'' subject to the rules governing contracts set out in the Bankruptcy Code.[2] For the most part, these rules are intended to protect the debtor, not the non-debtor party. With respect to certain contracts,

particularly those with ''take or pay'' (TOP) or ''minimum rent'' provisions, the Bankruptcy Code can have a significant adverse impact on the rights of the non-debtor party.

Take or Pay Contracts

For many telecommunications companies, one method used to recover the costs of building the capacity needed to service their customers' immediate and future requirements is the take or pay or minimum rent payment structure. TOP provisions allow the telecom service provider to ensure that the capital invested in a built-out facility or capacity is paid for in full over time by amortizing that cost over the life of a particular contract. TOP structures not only benefit the provider, but also benefit the customer (who frequently provides such capacity to its own customers), by making sure that the capacity it needs is always available at a fixed price. Because the availability of capacity is contractually guaranteed, the customer can grow its business without fear that it will not be able to service its own customers when the time comes without having to pay a premium for additional capacity.

A TOP pricing structure usually has three components: (i) an aggregate life-of-the-contract minimum rent (the Total Commitment), (ii) a minimum monthly (or periodic) rent (the Monthly Commitment), and (iii) a unit price. The customer must pay the Monthly Commitment and the Total Commitment whether or not the customer uses the product or services in question. If the customer does use the product, the provider charges the unit price. For example, a contract with a five year (60 month) term may provide that the customer must pay a Total Commitment of $3 million. In addition, the contract would require that until the Total Commitment has been paid, the customer must pay a Monthly Commitment of $50,000 each month. If the customer uses less than $50,000 in goods or services per month (calculated using the relevant unit price), it must still pay the Monthly Commitment. If the customer uses more than $50,000 in goods or services per month (calculated using the relevant unit price), it must pay the higher amount, which will then be fully credited against the Total Commitment. Once the Total Commitment has been met, the customer is on a ''pay as you go'' basis.

Because of the myriad of interconnections among various parts of the system, it is not unusual for telecommunications companies to have TOP contracts with each other that flow in both directions, such that each company must pay a minimum rent to the other under their respective contracts. As will be discussed below, TOP contracts raise interesting issues in bankruptcy situations.

Effect of Bankruptcy on Contracts in General

The commencement of a bankruptcy case has a dramatic effect on the parties' rights under many types of contracts. First, upon the filing of a bankruptcy petition, an ''automatic stay'' is triggered,[3] prohibiting a creditor from taking any action to collect pre-bankruptcy debt from the debtor or any steps to control the debtor's property. The automatic stay also severely limits a non-debtor party to a contract with the debtor from unilaterally terminating that contract without court approval, even when the contract specifically allows such termination.[4] Further, once the case is commenced, absent court approval, the debtor is generally prohibited from paying any claim that arose pre-petition, including claims of a non-debtor contract counterparty.

The Bankruptcy Code also contains specific provisions governing ''executory contracts,''[5] including provisions that permit a debtor to ''assume'' or ''reject'' an executory contract with court approval.[6] Under the Bankruptcy Code, a Chapter 11 debtor generally has until confirmation of its plan of reorganization to decide whether to assume or reject its executory contracts.[7] The non-debtor party, however, may file a motion with the Bankruptcy Court to compel the debtor to make the assumption or rejection decision within a ''reasonable time.''[8]

If the debtor ''rejects'' an executory contract, any performance under the contract terminates, and the debtor is deemed to be in breach of the contract as of the petition date. Thus, any claims arising from such rejection, including claims for damages, are deemed to be pre-petition, general, unsecured claims.[9]

If the debtor ''assumes'' an executory contract, it is required to immediately (i) ''cure'' any payment default or material non-monetary default, if any, including both pre- and post-petition defaults, (ii) compensate the non-debtor party for any actual pecuniary loss arising from any such default, and (iii) provide the non-debtor party with adequate assurance of future performance of the contract.[10] Once an executory contract is assumed, all obligations of the debtor under that contract, including any damages for breach of that contract subsequent to assumption, become an administrative expense of the estate, and must be paid before any distribution may be made to holders of general, unsecured claims.[11]

The key issue facing most non-debtor parties, particularly in cases in which the debtor cannot (or simply does not) make the assumption or rejection decision quickly, is what happens during this ''gap'' period. The non-debtor party generally wonders whether it will need to continue providing products and/or services to the debtor, and, if so, whether the non-debtor party will get paid for goods or services provided post-petition. The answer to the first question is simple: yes, if the debtor wants the non-debtor to continue to perform. The answer to the second question is more complex.

Administrative Claim Treatment for Post-Petition Claims

The Bankruptcy Code provides priority for the expenses incurred by the debtor in the operation of its business post-petition.[12] Generally, courts have adopted a two-part test to determine whether a claim is entitled to priority under Bankruptcy Code Section 503(b)(1)(A): if the debt both (1) ''arises from a transaction with the debtor-in-possession'' and (2) is ''beneficial to the debtor-in-possession in the operation of the business.''[13] Although this standard is generally satisfied if the debtor continues to use a product or service post-petition, the non-debtor party only will be afforded an administrative priority claim for the ''reasonable value'' of such use.[14] The term ''reasonable value,'' however, is a trap for the unwary. It is not necessarily the amount set forth in the contract, but rather is based on the ''actual'' benefit conferred on the estate. Further, ''actual'' benefit has been interpreted as requiring ''ac-

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tual'' use by the estate.[15] In other words, whether the non-debtor party gets administrative expense priority for its claim does not depend on whether such party supplied the product or made the service available to the debtor post-petition, at the debtor's request, but whether the debtor *actually uses* the product or service provided.

The impact of this rule may be greatest on contracts with TOP clauses. In a set of decisions by the U.S. Bankruptcy Court for the Southern District of New York in the Enron bankruptcy (each called *In re Enron*, but known for purposes of this article as *Enron I* and *Enron II*), the court addressed whether certain gas pipeline ''reservation charges'' were entitled to administrative expense status.[16] In *Enron II*, a subsidiary of Enron Corp. known as ''ENA'' was a party to certain gas supply contracts with Florida Gas Transmission Company (Florida Gas), pursuant to which ENA reserved pipeline capacity for the transportation of natural gas. Under the contracts, ENA was required to pay a fixed monthly charge (*i.e.*, a minimum monthly charge) to Florida Gas, as well as a charge for any gas actually transported on the pipeline. Florida Gas filed a motion seeking to compel assumption or rejection of the agreement by ENA and for allowance of an administrative expense claim for both the unpaid fixed monthly charges and the charges for actual transportation of gas.

ENA argued that because it used only a small portion of the total ''reserved'' capacity, for which it either paid or would pay the transportation charge, the estate received no benefit from having available (but not using) the ''reserved'' capacity. Thus, ENA argued the fixed monthly charge represented capacity for which the non-debtor party was *not* entitled to administrative expense status, as it conveyed no *actual* benefit on the debtor. The court in *Enron II* agreed with the debtor's theory, holding that only capacity that was *actually used* conferred a benefit on the debtor's estate; and that the right to use the ''reserved capacity'' was only a *potential benefit* to ENA, which was not sufficient to give rise to an administrative expense claim.

This result may also apply to TOP contracts in the telecommunications industry. To the extent a bankruptcy court overseeing a telecommunications-related bankruptcy adopts the holding of *Enron II*, the non-debtor party to a TOP telecommunications contract would get administrative priority treatment only for the capacity actually used by the debtor post-petition, no matter how much capacity it actually reserves for the debtor under the contract in question.

Taken to its logical conclusion, this principal could leave non-debtor suppliers of telecommunications capacity with a Hobson's choice: (i) attempt to force the debtor to decide whether to assume or reject the TOP contract early in the case (which courts are frequently hesitant to order); (ii) provide services to, and ''reserve'' potential capacity for, the debtor, possibly turning away profitable business in order to ensure that the requisite capacity is available for use by the debtor, with an unknown probability of getting paid; or (iii) provide services to the debtor, but use its excess capacity for other customers, assuming the risk of not having sufficient capacity to fully service the debtor, which could result in a breach of the executory contract by the non-debtor party. There is no reason why a non-debtor should be put in this position.

Post-Petition Treatment of Certain Lease Agreements Under Section 365(d)

Notwithstanding *Enron I* and *Enron II*, however, all may not be lost for non-debtor parties to TOP contracts. Although many executory contracts are subject to the requirement under Bankruptcy Code Section 503(b)(1) that the non-debtor party may receive an administrative priority claim only for the reasonable value of the goods or services provided to and actually used by the debtor, the Bankruptcy Code confers special status on two particular kinds of executory contracts by excluding them (to some degree) from application of Section 503(b)(1).

After considering the uncertain post-petition status of many contracts in bankruptcy, Congress determined to provide lessors of non-residential real property and personal property with more certainty, by enacting Bankruptcy Code Sections 365(d)(3)[17] and 365(d)(10).[18] Section 365(d)(3) requires that the debtor timely perform all of its obligations as a lessee under an unexpired lease of non-residential real property, including paying all rents, from the date of the order for relief [19] until the lease is assumed or rejected. Similarly, Section 365(d)(10) requires that the debtor timely perform all of its obligations as a lessee under an unexpired lease of personal property, including paying all rents reserved under the lease, from the 61st day after the date of the order for relief until the lease is assumed or rejected.

For purposes of the non-debtor party to a TOP contract, the most important provision of both Section 365(d)(3) and Section 365(d)(10) is the phrase ''notwithstanding section 503(b)(1) of this title.'' The effect of this language is that for the types of leases covered by these provisions, the debtor must pay the rent provided for in the lease, and not the ''reasonable value,'' whether or not the debtor actually occupies the non-residential real property or uses the personal property that is the subject of the lease in question. The requirements in Sections 365(d)(3) and (d)(10) that a debtor tender these payments to the lessor were ''intended to eliminate the argument that accrued rent [is] not actual and necessary and, hence, not entitled to an administrative priority'' under Section 503(b)(1)(A) of the Bankruptcy Code.[20]

Accordingly, a non-debtor party to a TOP contract clearly would be benefited by the contract being characterized as a lease of personal property or non-residential real estate, which would, in either event, result in the entire Monthly Commitment being characterized as rent, which the debtor would be required to pay.

Of course, the non-debtor telecom must pick its theories carefully, as it may be a ''lessor'' *and* ''lessee'' under various agreements with the same telecom debtor.

Telecom Contracts Under Section 365(d)

There are various types of agreements used in the telecommunications industry that arguably could qualify as ''leases'' under either Section 365(d)(3) or Section 365(d)(10).[21] For purposes of this analysis, we have focused on one type of agreement, generally called a private line agreement.[22] Under a private line agreement, one party, for a fee, permits a second party to use certain capacity[23] on its system in the form of one or more dedicated ''private line circuits.'' The circuits in question are owned by the provider and opened at the

direct request and for the exclusive use of the customer, with each circuit configured to the customer's unique specifications. Private line agreements usually, if not always, include a TOP provision because the provider often is required to make a significant amount of dedicated capacity available to the customer, which the provider must build-out on its own.

The question, then, is whether a non-debtor who is a provider of capacity under a private line agreement with a TOP clause will get administrative claim treatment only for the capacity actually used by the debtor, on the theory that the estate received no ''actual benefit'' for unused reserved capacity,[24] or whether such provider can get administrative claim treatment for the entire Monthly Commitment.

Private Line Agreement as a Lease of Personal Property

In order to determine whether the non-debtor provider under a private line agreement would be entitled to the benefit of Section 365(d)(10), we must first determine whether such agreement would satisfy the legal requirements for a ''lease of personal property.''[25] Although the terms ''lease'' and ''personal property'' are not defined in the Bankruptcy Code,[26] courts generally have defined a ''lease'' as an ''agreement by the owner of property (the lessor) to (i) allow exclusive possession of that property by another person (the lessee), (ii) for a defined period of time, (iii) in exchange for payment (rent) by the lessee, and (iv) with the property reverting to the lessor at the end of the lessee's period of possession.''[27] Most private line agreements satisfy all four of these criteria.

First, a private line agreement generally provides for ''exclusive possession'' by the customer of the installed capacity provided for thereunder by the provider. Under a private line agreement, the provider generally provides the customer with exclusive control of various dedicated ''private line circuits,'' which are defined in the telecommunications industry as ''leased lines . . . specifically dedicated to a customer's use.''[28] ''Private line circuits'' generally are custom-designed to the customer's specifications, utilizing specific dedicated ''ports'' on specific, dedicated ''cards,''[29] which, working together, give the customer exclusive use of these circuits and require the provider to have dedicated custom-designed cards and multiplexed capacity at various locations along the circuits provided to the user. Furthermore, ''private line circuits'' cannot be used simultaneously by any other party, including the provider, which only bolsters the claim that a private line is a lease of circuits.[30] Indeed, due to the complexity of the configuration of private line circuits, it may take a provider several weeks, or even months, to reconfigure its private line circuits for use by itself or by another customer.

A private line agreement also satisfies the second, third and fourth prong of the ''lease'' test, in that such agreements generally (i) explicitly provide for a ''definite period of time'' for which each of the circuits is open and dedicated to the customer's exclusive use, (ii) provide that the customer must pay rent, in the form of a monthly minimum payment, and (iii) provide that the circuits and the capacity available in those circuits revert back to the provider at the end of each circuit's term, with the capacity remaining the property of the provider at all times.

Further, under applicable law, private line circuits are ''personal property.'' Black's Law Dictionary defines personal property as ''any movable or intangible thing that is subject to ownership and not classified as real property.''[31] Private line circuits are certainly movable and tangible things, subject to ownership, and are not real property. Furthermore, the providing of private line circuits is not just a ''service'' provided by the provider, which term is defined to be *inter alia*, ''performance of duties for benefit of another, or at another's command.''[32] The provider in a private line agreement does not simply carry the customer's ''signals'' along interchangeable and fungible circuits for a price. The circuits provided in private line agreements are physical assets, dedicated to the customer for its exclusive use, which places them squarely within the definition of ''personal property,'' which can be the subject of a lease.

Thus, an argument can be made that private line agreements are leases of personal property for purposes of Section 365(d)(10) of the Bankruptcy Code, and, thus, the non-debtor party can be assured that if such party provides the capacity it is required to provide under the agreement, the non-debtor party will be paid the full Monthly Commitment from the 61st day of the bankruptcy and onward, whether or not the debtor actually uses the capacity.

Private Line Agreements and *Enron*

Since the decisions in *Enron I* and *Enron II*, debtors frequently cite to these cases whenever a TOP provision is part of a request for allowance of an administrative expense claim. There are, however, substantial differences between private line agreements and the gas transmission agreements considered in those cases.[33]

First, the agreements considered in *Enron I* and *Enron II* were denominated as ''firm transportation agreements,'' subject to tariffs approved by the Federal Energy Regulatory Commission, which tariffs referred to these types of agreements as ''service agreements,'' and not as ''leases.'' However, many private line agreements are *not* subject to tariffs, and those private line agreements that are subject to tariffs generally are not referred to in the tariffs as ''service agreements.''[34]

Second, the economic realities of private line agreements are significantly different from the gas supply contracts at issue in *Enron I* and *Enron II*. A private line agreement does not simply confer on the customer ''the right to receive delivery'' of signals over the provider's bandwidth. Instead, it grants to the customer the exclusive possession and control of specific ''private line circuits,'' opened at the direct request of the customer and for the use only of the customer. Unlike the contracts at issue in *Enron I* and *Enron II*, which involved the delivery of fungible gas through a common pipeline, a private line agreement provides for the effective transfer of control and possession of property to the customer, which reverts back to the provider at the end of the definite term of each ''private line circuit.''

There are additional facts that distinguish private line agreements from the gas delivery contracts at issue in *Enron I* and *Enron II*. In *Enron I* and *Enron II*, the contracts merely gave the debtors the right to receive a certain amount of natural gas. ENA was not the shipper of

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the natural gas at the head end of the pipeline, but simply a customer buying the gas at the spout. Thus, even if the gas that ENA bought occupied the entire pipeline capacity, ENA was not ''renting'' the pipeline from Florida Gas. That is not the case under private line agreements, in which the customer is both the shipper and receiver of signals along the provider's lines, having explicitly leased a circuit between two destinations.

Based on the foregoing, it is clear that the holdings of *Enron I* and *Enron II* should not be applied to private line agreements. A careful reading of these decisions indicates that application of the ''actual use'' requirement is the exception, not the rule, and must be narrowly applied based on the specific contractual provisions before the court. Interestingly enough, every case cited in *Enron I* and *Enron II* for the proposition that Bankruptcy Code Section 503(b)(1)(A) requires ''actual use'' by the debtor either directly dealt with, or cited for support to cases that directly dealt with, contracts that are now governed by Bankruptcy Code Sections 365(d)(3) or 365(d)(10).[35]

Conclusion

The uncertainty inherent in the post-petition performance by non-debtors of unassumed executory contracts in bankruptcy is magnified in the telecommunications industry, with its multitude of executory contracts in all directions among vendors, customers and competitors. This uncertainty is further increased by the take or pay nature of certain executory contracts in the telecom industry, which obfuscates the ''actual value'' of the product provided, and calls into question the value to the debtor of reserved capacity, while putting the provider of goods or services in a TOP contract in a bind as to how much capacity to provide and how much to reserve for the debtor customer. Under these circumstances, the non-debtor risks not being paid for services reserved or committing a default for non-performance under the contract.

However, Sections 365(d)(3) and 365(d)(10) of the Bankruptcy Code provide exceptions to the general rules involving the post-petition performance of executory contracts, providing lessors under leases of nonresidential real estate or personal property with the opportunity to receive an administrative claim for the full amount of the rent charged under the lease. There are various types of agreements in the telecom industry that can be characterized as leases under many circumstances, including private line agreements.

As described above, a private line agreement is neither a supply nor service contract, nor is it a contract for the delivery of signals on the provider's bandwidth. It is instead a lease of personal property in the form of dedicated private line circuits. As such, most private line agreements should be governed by Section 365(d)(10), with the result that the requirements of Section 503(b)(1)(A), including any requirement that the debtor must have ''actual use'' of the capacity provided by the non-debtor provider, do not apply to any payments due under a private line agreement that accrue after the 60-day period provided for in subsection 365(d)(10).

The uncertainty as to the status of private line and similar agreements in bankruptcy might be reduced by the party supplying circuits to users under private line agreements adding language to the agreement providing that the agreement is a lease of personal property governed by Section 365(d)(10). While such language may be potentially helpful, questions may arise regarding its enforceability. Furthermore, the ability of a supplier to include such language may depend on the relative bargaining powers of the parties, as well as whether there are ''mutual'' private line agreements between the parties. In any event, the possibility of including language clarifying the status of such agreements in bankruptcy should be considered in the drafting of any such agreements.

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For more information, e-mail Arthur E. Rosenberg or Peter A. Zisser at arthur.rosenberg@hklaw.com or peter.zisser@hklaw.com, respectively, or call toll free, 1-888-688-8500.

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[1] 47 U.S.C. § 251.

[2] 11 U.S.C. §§ 101 *et seq.*

[3] *See* 11 U.S.C. § 362.

[4] *See* 11 U.S.C. § 365(e). Clauses which generally allow a party to a contract to terminate the contract when the other party is a debtor under the Bankruptcy Code are commonly called *ipso facto* clauses, and such clauses are unenforceable under the Bankruptcy Code.

[5] Generally, a contract is ''executory'' if there is performance remaining on both sides of the contract such that the failure of either party to perform such obligations would constitute a material breach excusing further performance by the other party. *See, e.g.*, Countryman, *Executory Contracts in Bankruptcy,* 57 Minn. L. Rev. 439, 460 (1973). When one party to a contract has fully performed, and the principal obligation remaining between the parties is the other party's obligation to pay, the contract is considered non-executory.

[6] *See* 11 U.S.C. § 365.

[7] 11 U.S.C. § 365(d)(2).

[8] *See, e.g., In re Enron Corp.,* 279 B.R. 695, 702 (Bankr. S.D.N.Y. 2002).

[9] In most bankruptcy cases, holders of general, unsecured claims receive only a fraction of their claims and only after significant delay.

[10] *See* 11 U.S.C. § 365(b).

[11] *See, e.g., In re Klein Sleep Products Inc.,* 78 F.3d 18 (2d Cir. 1996).

[12] *See* 11 U.S.C.§ 503(b)(1)(A). Section 503(b) provides, in pertinent part, that ''[A]fter notice and a hearing, there shall be allowed, administrative expenses [including] the actual, necessary costs and expenses of preserving the estate.''

[13] *In re Jartran*, 732 F.2d 584, 586-87 (7th Cir. 1984) (quoting *In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir. 1976)).

[14] *See, e.g., In re Patient Education Media*, 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998) (''Where a debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to assume or reject the contract, the debtor-in-possession is obligated to pay the reasonable value of those services.'') (quoting *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984)).

[15] *See, e.g., In re ICS Cybernetics Inc.,* 111 B.R. 32, 36 (Bankr. N.D.N.Y. 1989).

[16] *See In re Enron*, 279 B.R. 79 (Bankr. S.D.N.Y. 2002) (*Enron I*), and *In re Enron*, 279 B.R. 695 (Bankr. S.D.N.Y. 2002) (*Enron II*).

[17] Section 365(d)(3) of the Bankruptcy Code provides as follows:

The trustee shall timely perform all the obligations of the debtor, except those specified in Section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding Section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title. 11 U.S.C. § 365(d)(3).

[18] Section 365(d)(10) of the Bankruptcy Code provides as follows:

The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under Chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title. 11 U.S.C. § 365(d)(10).

[19] A voluntary bankruptcy case is commenced by the filing of a petition under one of the chapters of Title 11 (*i.e.,* Chapter 7, Chapter 9, Chapter 11, Chapter 12 and Chapter 13). The commencement of a voluntary case constitutes an ''order for relief.'' *See* 11 U.S.C. § 301.

[20] *See* 3 *Collier on Bankruptcy* ¶ 365.04[6], p. 365-44 ((15th ed. rev. 2004). *See also In re Furley's Transport Inc.*, 263 B.R. 733, 740 (Bank. D. Md. 2001) (''Section 365(d)(10), like its nonresidential real property counterpart section 365(d)(3), grants lessors the extraordinary benefit of an automatic administrative expense, without the usual proofs required under Section 503(b)(1)(A) to show actual, necessary costs of preserving the estate.''); *In re D.M. Kaye & Sons Transport Inc.,* 259 B.R. 114, 123-24 (Bank. D.S.C. 2001) (''The purpose of § 365(d)(10) is to mandate the performance of the debtor's duties and obligations under an unexpired lease beginning 60 days after filing, regardless of whether the claim meets the requirements of § 503(b)(1)(A).'').

Although the protection of Section 365(d)(10) begins only on the 61st day after the order for relief, the nondebtor contract party is still free to seek an administrative expense claim for the rent arising from days 1-60. *See, e.g.*, *In re Furley's Transport Inc.,* 263 B.R. at 740 (''[Section 365(d)(10)] strikes a balance between the debtor-in-possession's need for time to reject nonbeneficial personal property leases without creating administrative claims against the estate, and the lessor's right to get paid for the leased goods. However, the language of section 365(d)(10) does not do away with a claimant's right to apply for administrative expenses under section 503(b)(1).'').

[21] These types of agreements include co-location agreements, under which the owners or users of communications switches or similar telecom equipment permit another user to use their equipment and IRUs, which, in either case, could be characterized as leases of personal property or, under the right circumstances, leases of non-residential real property. These types of agreements, however, do not generally contain TOP terms.

[22] A ''private line'' is defined, as inter alia, ''[a] direct channel specifically dedicated to a customer's use between specified points. A line leased from a carrier, local or long distance.'' *See* Newton's Telecom Dictionary 570 (19th ed. 2003). *See also* 47 CFR Sec. 21.2 (2004), defining ''private line service'' as ''[a] service whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time.''

[23] The term ''capacity'' is commonly defined in the telecommunications industry as ''[t]he information carrying ability of a telecommunications facility.'' *See* Newton's Telecom Dictionary 146 (19th ed. 2003).

[24] *See Enron I* and *Enron II*, footnote 16, *supra*.

[25] We have assumed that a private line agreement could not be characterized as a lease of non-residential real property.

[26] *See In re Resource Technology Corp.*, 254 B.R. 215, 225 (Bankr. N.D. Ill. 2000); *see also Wells Fargo Equipment Finance Inc. v. Circuit-Wise Inc. (In re Circuit-Wise Inc.),* 277 B.R. 460, 462 (Bankr. D. Conn. 2002).

[27] *See In re Resource Technology*, *supra*, at 226; *see also*, N.Y. UCC § 2-A-103(j) (defining the term ''lease,'' for non-real estate purposes, as ''a transfer of the right to possession and use of goods for a term in return for consideration . . .'').

[28] *See* footnote 22, *supra*. This type of agreement can be differentiated from agreements in which the provider is simply providing the customer with ''capacity'' on its network.

[29] ''Port'' is defined as, *inter alia*, ''the physical interface between a device and a circuit.'' *See* Newton's Telecom Dictionary at 624. ''Card'' is defined as, *inter alia*, ''a printed circuit card or printed circuit board.'' *See* Newton's Telecom Dictionary at 147.

[30] *See In re Resource Technology*, 254 B.R. at 226, in which the court stated that ''[c]onsistent with the general definition [of a lease], the granting of a right to use property concurrently with the owner is not a lease.''

[31] BLACK'S LAW DICTIONARY (7th ed. 1999).

[32] *Id.*

[33] In *Enron II*, Florida Gas argued that Section 365(d)(10) of the Bankruptcy Code should apply to its agreements with ENA. The debtors, however, argued that their agreements with Florida Gas were service agreements and, thus, were not subject to Section 365(d)(10). At the hearing, Florida Gas conceded that the agreements *were not* governed by Section 365(d)(10). *Enron II*, 279 B.R. at 704 fn 5. Consequently, the issue was not adjudicated by the court in that case.

[34] It should be noted that in some cases where private line agreements are subject to tariffs, the tariffs refer to the ''product'' provided by the carrier as ''services.'' *See, e.g.,* Southwestern Bell Telephone Company, Tariff F.C.C. No. 67, Section 2.5, page 40, effective date

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2/19/91 (definition of ''Other Common Carrier''); Qwest Corporation, Tariff F.C.C. No. 4, Section 2.5, page 44, effective date 7/26/00 (definition of ''Other Common Carrier''); *see also* the definition of ''private line service'' in 47 CFR 21.2, in footnote 22, *supra*.'' In *Enron I* and *Enron II*, however, although the debtors raised the issue of the tariff designation, it was not in support of a general rule that firm transportation contracts were ''service agreements,'' but only for the purpose of estoppel, *i.e.*, ENA had acknowledged that it was bound by the tariffs, and, thus, ENA could not argue that the designations set forth in the tariffs were in error. Thus, the private line tariffs that speak in terms of providing ''services'' should be read not as a general rule, but rather should be limited to the affected carriers. Furthermore, referring to private line ''services'' does not necessarily preclude private line agreements from being seen as leases, as opposed to service agreements, in light of the other factors discussed in this article.

[35] *See General Am. Trans. Corp. v. Martin (In re Mid Region Petroleum, Inc.),* 1 F.3d 1130 (10th Cir. 1993) (lease of rail cars); *In re CIS Corp.,* 142 B.R. 640 (S.D.N.Y. 1992) (lease of computer equipment); *In re Patient Educ. Media Inc.,* 221 B.R. 97 (Bankr. S.D.N.Y. 1998) (citing *Reisenwebers Inc. v. Irving Trust Co. (In re United Cigar Stores Co.),* 69 F.2d 513 (2d Cir. 1934) (lease of non-residential real property), *In re Thompson*, 788 F.2d 560 (9th Cir. 1986) (lease of farm equipment), and *In re Templeton*, 154 B.R. 930 (Bankr. W.D. Tex. 1993) (lease of farm equipment)); *In re R.H. Macy & Co. Inc.,* 170 B.R. 69 (Bankr. S.D.N.Y. 1994) (lease of non-residential real property); *In re Drexel Burnham Lambert Group Inc.,* 134 B.R. 482 (Bankr. S.D.N.Y. 1991) (citing *In re Carmichael,* 109 B.R. 849 (Bankr. N.D. Ill. 1990) (lease of farm equipment)); *In re ICS Cybernetics Inc.,* 111 B.R. 32 (Bankr. N.D.N.Y. 1989) (lease of computer equipment); *In re Kessler*, 23 B.R. 722 (Bankr. S.D.N.Y. 1982), *aff'd,* 55 B.R. 735 (S.D.N.Y. 1985) (citing *In re Rhymes*, 14 B.R. 807 (Bankr. D. Conn. 1981)) (lease of non-residential real property).