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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In Re:	Proceedings Under Chapter 11
BCE WEST, L.P., *et al.*,	Case No. B98-12547-ECF-CGC
Debtors.	(Case Nos. 98-12547-ECF-CGC through 98-12570-ECF-CGC)
	(Jointly Administered)
	OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR APPROVAL OF FIFTH AMENDMENT TO DEBTOR IN POSSESSION CREDIT AGREEMENT
EID: 38-319719	Date: September 24, 1999, 10:00 a.m.

The Official Committee of Unsecured Creditors (the "**Committee**") of the above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**"), by and through its undersigned counsel, Bingham Dana LLP

("**Bingham**") and Snell & Wilmer LLP, hereby files its objection (the "**Objection**") to the Debtors' Motion for Approval of Fifth Amendment to Debtor in Possession Credit Agreement (the "**Debtors' Fifth DIP Facility Amendment Motion**" or the "**Motion**"). In support of its Objection, the Committee respectfully states as follows:

I. BACKGROUND

1. On October 5, 1998 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the "**Bankruptcy Code**").

2. Pursuant to Sections 1107 and 1108 of the Bankruptcy Code, the Debtors are continuing to operate their respective businesses and manage their respective properties and assets as debtors-in-possession. No trustee or examiner has been appointed in the Debtors' chapter 11 cases (the "**Cases**").

3. On October 20, 1998 the United States Trustee for the District of Arizona (the "**U.S. Trustee**") appointed the Committee pursuant to 1102(a)(1) of the Bankruptcy Code. The Committee represents an unsecured creditor constituency holding approximately $627 million of subordinated bond claims and an undetermined amount of other unsecured claims believed to aggregate several hundred million dollars. The unsecured creditors comprise, by orders of magnitude, the largest creditor constituency in the Cases.

4. Prior to the Petition Date, the Debtors entered into various

financial accommodations, as follows: (i) a secured revolving credit facility with Bank of America National Trust and Savings Association ("**BofA**"), as loan agent and as a lender, and certain other bank lenders (collectively, the "**1996 Revolving Lenders**"), (ii) a master lease facility with General Electric Capital Corporation ("**GECC**"), for itself and as agent for certain participants, as lessor (collectively, the "**1996 Lease Lenders**" and together with the 1996 Revolving Lenders, the "**1996 Lenders**"), and (iii) a master lease facility with Citizens Bank of Rhode Island[1/], for itself and as agent for certain participants, as lessor (collectively, the "**1995 Lease Lenders**", and together with the 1996 Lenders, the "**Prepetition Banks**"). The Prepetition Banks collectively hold prepetition claims of approximately $275 million, which the Prepetition Banks allege are secured by substantially all of the assets of the Debtors.

5. On October 29, 1998, this Court entered its Order Approving Postpetition Financing and Granting Liens and Super Administrative Priority Pursuant to 11 U.S.C. § 364(a) and (d) and Modifying the Automatic Stay (the "**DIP Financing Order**"), pursuant to which GECC, as a lender and as administrative agent, BofA, as lender and as collateral agent, and certain other lenders (collectively, the "**DIP Lenders**") provided, and continue to provide, postpetition financing (as amended from time to time,

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[1/] Citizens Bank of Rhode Island succeeded GECC as agent under the 1995 Lease Facility.

the "**DIP Credit Facility**") to the Debtors. As of the date hereof, there remains outstanding under the DIP Credit Facility approximately $40 million.

6. Throughout 1999, the Debtors have been operating on a "hand to mouth" basis under the DIP Credit Facility. In order to address prospective defaults by the Debtors with respect to their Minimum System EBITDAL covenant under the DIP Credit Facility[2/], and to obtain relief from an Availability Reserve that has eaten into the Debtors' availability under the DIP Credit Facility[3/], the Debtors have been constrained to request waivers and amendments of certain provisions of the DIP Credit Facility on four prior occasions.[4/]

[2/] See DIP Credit Facility, § 6.10 at Annex F.

[3/] The Availability Reserve (as defined in Amendment No. 1 to Debtor in Possession Credit Agreement, dated as of February 24, 1999 [the "**First DIP Facility Amendment**") is an amount equal to the aggregate adequate protection payments required to be paid by the Debtors to the 1995 Lenders and the 1996 Lenders, respectively, pursuant to adequate protection orders entered by the Court, which payments are deferred pursuant to orders of the Court.

[4/] See First DIP Facility Amendment (approved by order of the Court dated February 24, 1999); Amendment No. 2 to Debtor in Possession Credit Agreement, dated as of May 25, 1999 (approved by order of the Court dated May 25, 1999); Amendment No. 3 to Debtor in Possession Credit Agreement, dated as of June 29, 1999 (approved by order of the Court dated June 29, 1999); Amendment No. 3 to Debtor in Possession Credit Agreement, dated as of August 30, 1999 (approved by order of the Court dated September 8, 1999) (the "**Fourth DIP Facility Amendment**").

7. The Debtors' Fifth DIP Facility Amendment Motion, filed on September 17,1999, represents the Debtors' fifth request to obtain Court approval of the fifth in a series of amendments to the DIP Credit Facility -- Amendment No. 5 to Debtor in Possession Credit Agreement, dated as of September 17, 1999 (the "**Fifth DIP Facility Amendment**"). The Debtors were constrained to negotiate the Fifth DIP Facility Amendment because the Fourth DIP Facility Amendment only provided the Debtors with necessary waivers and credit availability for a period of nine days![5/]

8. The' Fifth DIP Facility Amendment provides for, among things, (i) a limited waiver, through October 8, 1999, of any Event of Default that may occur as a result of the Debtors' failure to comply with the Minimum System EBITDAL Covenant for Retail Periods 7-10 of 1999, and (ii) a reduction of the Availability Reserve through October 8, 1999. The Fifth DIP Facility Amendment also provides for a broad, sweeping release by the Debtors of the DIP Lenders as follows:

> Each Borrower . . . releases and discharges Agents and Lenders, in their respective capacities as such, together with their respective agents, attorneys, employees, heirs, executors,

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[5/] The Fourth DIP Facility Amendment was approved by the Court on September 8, 1999, and provided the Debtors with a waiver of the Minimum System EBITDAL Covenant for Retail Periods 7 and 8, respectively, through September 17, 1999, after which date "such waiver shall terminate and Agents and Lenders shall have all of their respective rights and remedies with respect to any such Event of Default." See Fourth DIP Facility Amendment, ¶ 2 at 2. Similarly, the Fourth DIP Facility Amendment provided a reduction of the Availability Reserve only through September 17, 1999. Id., ¶ 3.9(a).

> administrators, officers, directors, successors and assigns, from any and all claims, causes of action and remedies (whether under the Bankruptcy Code or under other applicable law) arising out of, based upon or related to the Obligations, the Collateral or the Loan Documents or any actions taken by any such Person in connection therewith..

II. OBJECTION

9. The Debtors offer no justification for the blanket release of the DIP Lenders set forth in the DIP Release other than the unsubstantiated, conclusory statements that "the proposed amendments [do not] have an adverse or negative impact on operations or the assets of the estates" and that "the proposed amendments are, in fact, in the best interests of the estates and their creditors." See Motion, ¶ 13 at 4. The Committee submits that the DIP Release potentially may have a material adverse effect on the assets of the estates if it is later determined that, the DIP Lenders, through their control, direction and manipulation of the ongoing sale process (or otherwise) and/or the Debtors' business operations have acted in a manner that is actionable under applicable law. Further, the Committee submits that the only creditors in whose "best interests" the DIP Release operates are the DIP Lenders.

10. Through the mechanism of the DIP Credit Facility, the DIP Lenders have kept the Debtors on a very "tight leash" by dribbling out limited waivers and credit availability in such a fashion as to require the Debtors frequently to request the DIP Lenders to grant further limited

waivers and credit availability. The "tight leash" that the Debtors have been operating under has left the Debtors no practical alternative but to submit to demands made by the DIP Lenders concerning operational issues, strategic issues and the sale process. The Committee has reason to believe that, through the DIP Credit Facility, the DIP Lenders have exercised an increasing level of control over the Debtors' operations, business strategy and the ongoing process to sell the Debtors assets. While the Committee wishes to be clear that it does not contend, at this time, that the DIP Lenders have engaged in actionable misconduct to the detriment of the estates (but reserves the right to do so if facts and applicable so warrant), it is inappropriate for the Debtors to grant the DIP Lenders a wholesale blanket release under the Fifth DIP Facility Amendment under the present circumstances.

11. It was through the vehicle of the initial amendment to the DIP Credit Facility (the "**First DIP Facility Amendment**") and the Debtors' related retention of BT Alex. Brown Incorporated as their financial advisors that sale process formally commenced.[6/] The DIP Lenders have been intimately involved from the outset in all aspects of the sale process, from the decision to market the Debtors for sale, to determining the scope of the

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[6/] The First DIP Facility Amendment was approved by order of the Court dated February 4, 1999; the Debtors were authorized to retain BT Alex. Brown Incorporated by orders of the Court dated February 24, 1999 and March 30, 1999, respectively.

potential buyers to be solicited, to prescribing a schedule by which various sale-related events must occur, to, ultimately, taking control of and conducting the sale negotiations directly with the bidders.

12. The DIP Lenders have exercised their considerable financial leverage to closely monitor the Debtors' marketing and related strategic plans and the implementation thereof, at times second-guessing the business judgment of the Debtors' management and directing that the business judgment of the DIP Lenders be substituted for that of management. Here again, the Committee wishes to be clear that it does not, at this time, contend that the DIP Lenders' have engaged in actionable misconduct to the detriment of the estates (but reserves the right to do so if facts and applicable law so warrant); however, given the nature and degree of the apparent control exercised by the DIP Lenders, it is inappropriate for the Debtors to grant the DIP Lenders a wholesale release under the Fifth DIP Facility Amendment.

13. The wholesale release provided in the Fifth DIP Facility Amendment substantially prejudices the interests of the estates unnecessarily by sacrificing potential claims that the estates may have against the DIP Lenders without any justification whatsoever.

14. Rule 9013 of the Federal Rules of Bankruptcy Procedure states that motions "shall state with particularity the grounds therefor . . . ." This standard requires far more than self-serving, conclusory statements that the

relief requested will not "have an adverse or negative impact on operations or the assets of the estates" or that "proposed amendments are, in fact, in the best interests of the estates and their creditors." Significantly, the Motion altogether fails to address the considerable potential prejudice to the interests of general, unsecured creditors, the Debtors' largest constituency, that would be caused were the DIP Release approved.

CONCLUSION

WHEREFORE, the Committee hereby respectfully requests that the Court (i) deny the Debtors' Fifth DIP Facility Amendment Motion to the extent that it seeks approval of the DIP Release and (ii) grant the Committee such other and further relief as is just and proper.

DATED this 22nd day of September, 1999

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By /s/ Donald L. Gaffney – 5717

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COPY OF THE FOREGOING
mailed, faxed or served electronically this
22nd day of September, 1999, to:

All Parties on Master Service List No. 12

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