

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<p>In re:</p> <p>OPEN RANGE COMMUNICATIONS, INC.</p> <p style="text-align: center;">Debtor.</p>	<p>Chapter 7</p> <p>Case No. 11-13188 (KJC)</p>
<p>CHARLES M. FORMAN, in his capacity as Chapter 7 Trustee for OPEN RANGE COMMUNICATIONS, INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>UNITED STATES OF AMERICA, Acting through the United States Department of Agriculture, Rural Utilities Service, and through the Federal Communication Commission,</p> <p>and</p> <p>FEDERAL COMMUNICATIONS COMMISSION,</p> <p style="text-align: center;">Defendants.</p>	<p>Adv. Proc. No. 12-_____ (KJC)</p> <p>FILED UNDER SEAL</p>

COMPLAINT

Charles M. Forman, Chapter 7 Trustee (the “**Trustee**”) of the bankruptcy estate (the “**Estate**”) of Open Range Communications, Inc. (the “**Debtor**” or “**Open Range**”), by and through his undersigned counsel, hereby asserts his claims against Defendant United States of America, acting through the United States Department of Agriculture Rural Utilities Services (the “**RUS**”) and through the Federal Communications Commission, among other agents, and

against Defendant Federal Communications Commission, and in support thereof, states and alleges:

NATURE OF THE ACTION

1. The Trustee, on behalf of the Debtor's Estate, brings this action to assert federal statutory claims and state or federal common law claims against Defendants arising, in part, from the United States' breach of a loan and security agreement wherein it agreed to loan Debtor monies to construct a wireless broadband network.

JURISDICTION AND VENUE

2. On October 6, 2011 (the "**Petition Date**"), Open Range filed a Chapter 11 Petition for bankruptcy protection in the United States Bankruptcy Court for the District of Delaware (the "**Court**").

3. On November 3, 2011, the United States Bankruptcy Court for the District of Delaware entered a final order authorizing the Debtor to, among other things, (i) incur post-petition indebtedness, (ii) grant security interests and superpriority claims, and (iii) release claims [Docket No. 203] (the "**Final DIP Order**").

4. The Final DIP Order provided, among others things, that the Debtor and the official committee of unsecured creditors (the "**Creditors' Committee**") appointed in the above captioned case may investigate (the "**Investigation**") claims that may be asserted against (i) the Lender and/or any of the Lender's Affiliates with respect to the April 29, 2011 commitment (the "**Equity Commitment Letter**") of One Equity Partners III, L.P., to make an equity investment of up to \$40,000,000.00 in the Debtor through funding to the Lender and (ii) the RUS and/or the FCC in connection with the Prepetition Financing Documents or any other matter relating to the RUS.

5. On February 24, 2012, the Court entered the *Order Converting the Debtor's Chapter 11 Bankruptcy Case to a Case Under Chapter 7 of the Bankruptcy Code Effective as of February 24, 2012 at 5:00 p.m.* [Docket No. 654] (the “**Conversion Order**”).

6. The Final DIP Order provides that “if the case converts to chapter 7 . . . during the Challenge Period, the trustee shall have a challenge period of sixty days from the date of his appointment or as otherwise ordered by the Court upon a motion brought by the trustee to initiate a Challenge.” Final DIP Order, ¶ 12. Therefore, by operation of the Final DIP Order, the Challenge Period was set to expire on April 27, 2012, but has since been extended as to Defendants herein to July 31, 2012.

7. The Final DIP Order to which Defendants herein either consented and/or did not object, requires any Challenge to be brought in the instant court.

8. This is an adversary proceeding pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure.

9. This Court has original jurisdiction under 28 U.S.C. § 1334(b), in that this is a civil proceeding relating to the underlying case arising under Title 11 of the United State Code.

10. This adversary proceeding presents both “core” and “non-core” proceedings under 28 U.S.C. § 157(b).

11. Jurisdiction is proper in the United States District Court for the District of Delaware.

12. Venue of this adversary proceeding in this District is proper including pursuant to 28 U.S.C. §§ 1408 and 1409(a).

13. The acts and omissions hereinafter alleged either occurred in this District and/or caused injury in this District.

THE PARTIES

14. The Debtor, Open Range Communications, Inc. (“**Open Range**”), is a Delaware corporation with its principal place of business in Colorado. Prior to its liquidation, Open Range engaged in business as a broadband wireless services provider.

15. On October 6, 2011, Open Range filed a Chapter 11 petition for bankruptcy protection in the United States Bankruptcy Court for the District of Delaware.

16. During the Chapter 11 case, among other things, Open Range sold substantially all of its assets via an open auction process pursuant to 11 U.S.C. § 363.

17. On February 24, 2012, Open Range’s Chapter 11 case was converted to a Chapter 7 bankruptcy proceeding.

18. On February 27, 2012, the Trustee was duly appointed by the United States Bankruptcy Court for the District of Delaware as the Chapter 7 Trustee in the above-referenced Chapter 7 bankruptcy of Open Range. The Trustee has standing, pursuant to 11 U.S.C. § 704, to pursue this action to collect and reduce to money the assets of the Debtor’s Estate.

19. Defendant United States of America (“**United States**”), acting through the United States Department of Agriculture, the RUS, and through the Federal Communications Commission, and other agents, is a governmental entity. The RUS is an agency of the United States Department of Agriculture. The Department of Agriculture is an executive department of the United States.

20. Defendant Federal Communications Commission (the “**FCC**”) is an agency of the Executive Branch of the United States.

21. The RUS and the FCC are agents of the United States such that their acts and omissions constitute the acts and omissions of the United States. Further, the United States, the

RUS, and the FCC are so closely related and intertwined that the acts and omissions of one constitute the acts and omissions of all three.

GENERAL ALLEGATIONS

The Amended Loan

22. On January 9, 2009, Open Range and the United States, acting through the Administrator of the RUS, entered into a Loan and Security Agreement (the “**1/9/09 Loan Agreement**”), a true and accurate copy of which is attached hereto as **Exhibit A**, pursuant to which the RUS agreed to loan Open Range \$267,298,000. *See* 1/9/09 Loan Agreement, § 3.1(a).

23. The obligation of the RUS to advance the loan funds was scheduled to expire in the year 2014.

24. The loan funds were to be used to finance the construction project (the “**Project**”) described in Open Range’s loan application (the “**Loan Application**”) which was for Open Range to build a wireless broadband network in 546 rural communities. *Id.*, § 3.4(a).

25. On April 29, 2011, Open Range and the United States, acting through the Administrator of the RUS, entered into an Amendment to Loan and Security Agreement (the “**4/29/11 Loan Amendment**”), a true and accurate copy of which is attached hereto as **Exhibit B**.

26. Among other things, that amendment restricted loan fund advances beyond \$180,000,000 unless certain conditions were met that are not pertinent to this action.

27. Hereinafter, the 1/9/09 Loan Agreement as amended by the 4/29/11 Loan Amendment, will be referred to as the “**Amended Loan**.”

28. To date, the United States has advanced approximately \$78.4 million under the Amended Loan, although Project capital items and other expenses that were approved for

advance or were otherwise eligible for RUS loan funds significantly exceed that amount, yet have not been disbursed.

RUS Approval of Project Capital Items and Other Expenditures

29. Pursuant to § 4.1(i) and § 5.14(e) of the 1/9/09 Loan Agreement, Open Range was required to submit extensive written six-month build-out plans for the RUS’s consideration that described the work to be performed under the Project and the proposed expenditures to be incurred.

30. The parties’ agreement required the RUS to either approve or disapprove these six-month business plans.¹

31. Under the agreement, once the RUS approved the six-month build-out plan setting forth the equipment, supplies, and services to be incurred, the RUS mandated that Open Range “shall commence construction and/or installation of the Project within three (3) months from the date the [six-month] Build-out Plan is approved by RUS” 1/9/09 Loan Agreement § 5.14(f)(1).

32. Stated differently, the RUS required Open Range to incur the expenditures it approved.²

¹ By way of example, see 10/8/10 Letter from Kuchno to Paglusch, a true and correct copy of which is attached hereto as **Exhibit C** and incorporated herein by reference.

² The procedures in § 4.1(i) and § 5.14(e) for approval of capital expenditures by the RUS through the submission of six-month business plans, is not required of all borrowers. Rather, it is an option that is chosen by the RUS under the standard form contract drafted by the RUS. See e.g., 1/9/09 Loan Agreement § 4.1(i) and Schedule 1, Article IV, 2. (“The Build-Out Plan at Section 4.1(i) **IS** required.”) (emphasis in the original).

33. Similarly, the RUS also required Open Range to enter into RUS form contracts with its vendors for services, equipment and supplies necessary under the various six-month build-out plans that were subject to RUS approval.

34. Attached to the 1/9/09 Loan Agreement was RUS Bulletin 1738-2 (the “**Bulletin**”) titled “Rural Broadband Access Loan and Loan Guarantee Advance and Construction Procedures Guide.”

35. The Bulletin sets forth the accounting procedures for a borrower to obtain disbursement of loan funds for previously approved expenditures.

36. In general, the Bulletin provides that a borrower is to periodically submit an RUS form entitled, “Financial Responsibility Statement” (**FRS**), to the RUS pursuant to which the borrower requests release and disbursement of loan funds “previously approved for advance.” See Instructions for Use of RD Form 481, p. 1, Explanation of Column 2, a true and accurate copy of which is attached hereto as **Exhibit D** and incorporated herein by reference.

37. In this way, the FRS submission provided the accounting mechanism to track and reconcile disbursements against expenditures already approved for advance.

38. Notwithstanding the RUS’s approval of various six-month business plans and/or RUS form contracts with vendors, it breached the parties’ agreement, and/or committed a series of breaches of contract, by improperly failing to disburse loan funds to Open Range for capital and other expenditures that it previously approved for advance.

39. The RUS approved in excess of \$100,000,000 in expenditures for advance but only disbursed approximately \$78,400,000 in loan funds to Open Range.

40. In addition to the RUS's failure to disburse loan funds for expenditures already approved for advance, the RUS also improperly refused to approve for advance certain expenditures that were eligible to be approved.

41. The RUS's breach of contract caused and/or substantially contributed to Open Range's insolvency and eventual bankruptcy filing.

United States Had a Fiduciary Relationship with Open Range

42. The relationship between the United States and Open Range went far beyond that of a typical lender and borrower as reflected, in part, in the pervasive control that the United States had over nearly every aspect of Open Range's business and the expert advisory role that the United States assumed with respect to Open Range. The United States had a fiduciary relationship with Open Range.

43. For example, the RUS employed a field representative dedicated to Open Range (the "**Dedicated Field Representative**") whose responsibilities included, without limitation, reviewing capital and other expenditures of Open Range at Open Range's headquarters in Colorado to assist Open Range in properly completing and submitting FRS forms to RUS employees in Washington D.C. for disbursement.

44. The RUS had greatly superior expert knowledge respecting its funding procedures and it was a further duty of the Dedicated Field Representative to train Open Range employees in the procedures to be followed for the administration of the Amended Loan.

45. The RUS would not review or entertain an FRS unless its Dedicated Field Representative had signed his initials to the document, indicating that he had performed the responsibilities set forth above.

46. And, the RUS controlled the frequency with which Open Range was entitled to submit FRS's to the RUS.

47. In addition to the RUS's control over capital and other expenditures, the RUS controlled Open Range in other substantial ways.

48. The RUS interjected itself and had control over nearly every aspect of the Project and Open Range's business plan.

49. As a purported expert, the RUS reviewed and approved the materials and services that were part of the Project, and approved or disapproved of all contracts with vendors.

50. The RUS also controlled other aspects of the finances of Open Range.

51. The RUS required Open Range to submit to six-month build-out plans and budgets for its review and approval.

52. In addition to requiring that Open Range submit pro forma and monthly financial statements, as well as minutes of meetings of Open Range's board of directors, the RUS would closely monitor the financial statements for compliance with budgets and the business plan, including but not limited to, by tracking the cash-flow needs of Open Range.

53. The RUS also performed numerous audits of Open Range, covering nearly all aspects of its finances and business plan.

54. The RUS also had control over the amount and timing of equity contributions into Open Range, by virtue of its review and approval of the revised business plan that included a schedule for Open Range's primary equity holder to provide equity financing.

55. As discussed below, the RUS also entered into a side agreement with Open Range's primary equity holder that imposed a duty on the equity holder to fund additional equity contributions into Open Range.

56. Pursuant an earlier agreement with Open Range's primary equity holder, the RUS received pledged stock of Open Range's parent company.

57. The United States, through the FCC, also controlled the specification, licensing and availability of the spectrum necessary for Open Range to operate its broadband network, and demanded changes to Open Range's business plan to conform to such spectrum arrangements. Consequently the United States determined the strategic direction for Open Range.

58. In these and in other ways, the relationship between Defendants and Open Range was in no way that merely of a typical lender/regulator and borrower/licensee. Rather, it rose to the level of a fiduciary relationship.

Defendants' Failure to Follow Bulletin

59. The Bulletin states that the borrower of RUS broadband loan funds is required to pay the vendor first for small-scale construction related expenses before seeking reimbursement or advance from the RUS, unless the RUS agrees to waive this requirement by pre-funding construction-related expenses through a work order fund of up to \$500,000 per specific project site, for subsequent reconciliation through the FRS process.

60. Small-scale construction on sites eligible for RUS broadband loan funds under the 1/9/09 Loan Agreement comprised a substantial amount of the equipment and services at issue in this case.

61. Despite this provision in the Bulletin, many of Open Range's master services agreements ("MSA's") with its vendors provided that the vendors would not be paid until after the RUS disbursed loan funds in order for Open Range to pay such vendors.³

62. Open Range provided copies of its MSA's to the RUS for review and approval.

63. Upon information and belief, the business plan and related financial models that served as part of the basis of the 1/9/09 Loan Agreement did not contemplate that Open Range would be required to have significant cash for the purpose of financing construction costs until such time that the RUS actually disbursed loan funds to cover the expenses.

64. Open Range's original business plan, as approved by the RUS, was therefore, dependent on waivers or accommodations by the RUS in order for Open Range to comply with the Bulletin. Specifically, Open Range's business plan depended on the RUS pre-funding construction activities through work order funds.

65. Upon information and belief, the RUS never approved or implemented any work order funds. Upon information and belief, work order funds could have been established by the RUS to permit Open Range to pay eligible construction costs exceeding \$20 million for subsequent reimbursement by the RUS to Open Range, thereby reducing the number of creditors in this case.

66. The RUS should have timely disbursed loan funds for the expenses or created a work order fund pursuant to the Bulletin for the purpose of timely disbursing loan funds to pay the construction activities by Open Range's vendors on the Project.

³ The MSA's were contracts between Open Range and its vendors separate from the RUS form contracts discussed above, although both types of contracts were subject to RUS review and approval.

Defendants Take Action that Prevents Open Range From Fulfilling the Original Business Plan

67. In or about 2006, Open Range previously sought and had been denied RUS loan funds, in part, on the ground that its business plan at that time was dependent on the use of publicly available spectrum, rather than leased or other spectrum that Open Range controlled.

68. Therefore, as part of the loan application that was ultimately approved by the RUS, Open Range entered into lease agreements with Globalstar Licensee LLC (“**Globalstar**”) for the spectrum necessary in the operation of the wireless broadband network. The RUS was aware that the Globalstar spectrum depended on a waiver from the FCC that required Globalstar to comply with certain gating criteria for the Ancillary Terrestrial Component (“ATC”) of Globalstar’s satellite system by July 1, 2010.

69. Open Range and the RUS each considered the spectrum lease agreements with Globalstar to be an important part of the Project. The FCC gave its approval to such spectrum lease agreement and was aware of its significance for the Project.

70. After executing the 1/9/09 Loan Agreement, Open Range began in earnest to build its organization and its broadband network.

71. Open Range relied on the RUS’s approval of its six-month build-out plans and related contracts when Open Range began to incur debts to its vendors. In fact, under § 5.14(f)(1) of the 1/9/09 Loan Agreement, the RUS required Open Range to incur the expenses.

72. In the Spring of 2010, the FCC failed to act promptly on Globalstar’s request for additional time to meet its ATC gating criteria. Citing its anticipation of adverse action from the FCC, the RUS issued a notice to Open Range announcing its intent to suspend RUS funding on July 1, 2010. The FCC subsequently confirmed to the RUS on or about June 10, 2010 that it intended to deny Globalstar’s request and that Open Range should request Special Temporary

Authority (“**STA**”) to use the Globalstar spectrum and search for another permanent source of spectrum. The RUS and FCC further coordinated their approach as to Open Range with direction from the Executive Office of the President.

73. Through a letter to Open Range dated July 14, 2010, the RUS followed through on its previous threat and suspended funding under the 1/9/09 Loan Agreement, stating that “all *future* advances are hereby suspended on the grounds that Globalstar’s non-compliance constitutes a material adverse effect on Open Range’s ability to perform its obligations.” (emphasis added).

74. Thus, through no fault of Open Range, the United States, through the FCC, prevented Open Range from fulfilling its business plan under the 1/9/09 Loan Agreement, and then the United States, through the RUS, denied Open Range funding on the basis of the United States’ own conduct.

75. Former FCC Commissioner and RUS Administrator Jonathan Adelstein wrote to FCC Chairman Julius Genachowski on September 10, 2010 to advise the FCC of action needed to avert a failure of the Open Range loan, which “represents the single largest loan of the RUS Broadband Program.” Adelstein requested the FCC grant “Open Range Full use of the ATC spectrum for all 540 communities for the life of the loan, or [enable] Open Range to develop a comparably effective business plan.” Adelstein attached the July 14, 2010 letter from the RUS suspending funding, and both letters became part of the public record in the Open Range STA request then pending before the FCC.

76. In the Fall of 2010, the FCC granted Open Range a Special Temporary Authority (“**STA**”) to use the Globalstar spectrum in only 264 markets in which Open Range had commenced the build-out of its network comprised of approximately 540 markets.

77. But this authority was only temporary in order to permit Open Range to attempt to find other sources of spectrum, and it drastically limited the number of markets in which Open Range could operate.

78. While the FCC continued to grant Open Range temporary authority to use the Globalstar spectrum, Open Range operated under the continuous threat that it would lose the ability to use the spectrum.

79. Therefore, long term planning by Open Range became impossible.

80. Instead, from the Summer of 2010 until the bankruptcy filing, Open Range continuously explored agreements with other spectrum providers, including but not limited to, LightSquared, Inc. (“**LightSquared**”) and Clearwire Communications.

81. Upon information and belief, Adelstein was involved in discussions between Open Range and other entities concerning potential sources of spectrum.

82. Upon information and belief, the purpose of those discussions was to attempt to force Open Range to obtain its spectrum from another provider so that the Defendants could defend action against Globalstar without concern over the effect on Open Range or Defendants’ exposure to Open Range for preventing it from fulfilling its original business plan.

83. The RUS was also involved in continuing direct discussions with the United States Department of Agriculture (“USDA”), FCC and/or the Executive Office of the President concerning Open Range’s search for alternative spectrum and the 1/9/09 Loan Agreement.

84. Upon information and belief, the purpose of those discussions included coordinating and mitigating adverse actions taken by the United States against Open Range so as to minimize political repercussions of an Open Range default of the 1/9/09 Loan Agreement near the time of the November 2010 elections.

85. The United States' conduct with respect to Open Range reflects pervasive control that went far beyond that of a typical lend-creditor relationship. Further, the United States' conduct, by and through the FCC and other agents, went far beyond that of a regulator. Such conduct also included the following:

- a. Shortly after Adelstein's September 10, 2010 letter, the RUS and FCC coordinated their approaches to facilitate a spectrum licensing agreement between Open Range and LightSquared;
- b. The September 14, 2010 decision of the FCC regarding Open Range's STA request only provided Open Range 60 days to find alternative spectrum, but the FCC revised that to 4.5 months following substantial input from the RUS and Open Range's announcement of its intention to seek Chapter 7 bankruptcy protection at that time if only the 60 days were granted;
- c. The RUS approved a revised business plan from Open Range on October 8, 2010 based on the 264 markets limited by the FCC Order, which included up to \$93 million in additional costs that Open Range anticipated for transition to new spectrum and to be funded under the 1/9/09 Loan Agreement, but the RUS subsequently reversed itself in February 2011 and declared Open Range could not use loan funds for its necessary transition;
- d. Between November 2010 and January 2011 the FCC gave unusually fast approval to LightSquared's application to waive ATC requirements to enable a spectrum licensing agreement with Open Range, while having previously denied Globalstar's more limited waiver request; and

e. The RUS and FCC continued to communicate directly to discuss Open Range's business plan and otherwise coordinate on the FCC's decisions to extend Open Range's STA.

86. After the FCC granted Open Range the STA in the Fall of 2010, the RUS claimed that it lifted its suspension of disbursements to Open Range.

87. But, upon information and belief, the RUS continued to delay disbursements and refused to release monies that had been previously approved for advance.

88. This in turn caused Open Range to have cash-flow problems of which the RUS was well-aware.

89. On or about February 21, 2011, an Open Range representative advised the RUS that it was insolvent as a result of the RUS's refusal to make disbursements of amounts previously approved for advance. *See 2/21/11 E-mail from Kuchno to Adelstein et al.*, a true and accurate copy of which is attached hereto as **Exhibit E**.

Revision of Business Plan, the 4/29/11 Amendment and the Equity Commitment

90. In approximately December 2010, Open Range advised the RUS that due to the adverse action by Defendants, it was forced to revise its business plan to include a network of only 160 rural communities.⁴

91. This reduction in markets downward from the original 546 markets was necessitated by the adverse action that Defendants had taken against Open Range. Thus, Defendants interfered with Open Range's ability to meet its original business plan and service its debt to the United States.

⁴ The revised business plan initially included only 153 markets but was later revised upward to 160 markets.

92. During approximately the first quarter of 2011, Open Range submitted various versions of the revised business plan to the RUS for approval.

93. The revised business plan made clear that an additional equity commitment of approximately \$40 million would be necessary in order for Open Range to have a sufficient amount of cash necessary to pay operating expenses under the revised business plan until Open Range became cash-sufficient.

94. Further, the RUS refusal to disburse loan funds caused a backlog of construction expenses to accumulate.

95. The RUS intentionally delayed or refused to disburse monies that had previously been approved for advance for equipment and services for those markets outside of the 160 markets that would be included in the proposed revised business plan (the “**non-160 work**” or “**non-160 markets**”), even though the work was performed at a time that Open Range was still operating under the original 546 business plan.

96. As a result of Open Range and the RUS’s discussions about the proposed revised business plan, Open Range and the United States entered into the Loan Amendment on April 29, 2011.

97. In short, that Amendment reduced the amount of the RUS loan from \$267 million to \$180 million.

98. Incorporated into the 4/29/11 Loan Amendment was a 4/29/11 Equity Commitment Letter (the “**Equity Commitment Letter**”) from One Equity Partners III, L.P. to OEP Open Range Holdings, LLC that provided that Open Range “shall require OEP Open Range Holdings, LLC” to purchase equity in an amount sufficient to provide Open Range with at least

four weeks of operating capital. A true and accurate copy of the Equity Commitment Letter is attached hereto as **Exhibit F**.

99. The Equity Commitment Letter also required that One Equity Partners III, L.P. fund OEP Open Range Holdings, LLC with the funds needed to make the equity contribution up to a total amount of \$40 million.

100. OEP Open Range Holdings, LLC and the United States also entered into a separate agreement on 4/29/11 (“**the 4/29/11 Side Agreement**”) requiring OEP to purchase equity in an amount up to \$40,000,000 in Open Range based on the cash position of the Open Range. A true and accurate copy of the Side Agreement is attached hereto as **Exhibit G**.

101. The Equity Commitment Letter also included Schedules B-1 and B-2, which represented some of the backlogged expenses.

102. Schedule B-1 included \$6,664,814 in advances and Schedule B-2 comprised approximately \$8,726,635 related to vendor, Alvarion, Inc., and \$2,820,192 related to vendor, Velocitel, Inc., for a total of \$11,546,826.

103. The Schedule B-1 amounts were to be paid by the RUS unconditionally, while the Schedule B-2 amounts were required to be funded by the RUS subject only to the conditions stated therein.

104. At the 4/29/11 closing, the RUS funded the \$6,664,814 in advances under Schedule B-1 that had been part of the backlog.

105. OEP Open Range Holdings, LLC also made the initial equity contribution of \$10 million under the Equity Commitment Letter.

106. But, the RUS improperly refused to disburse loan funds for all of the items comprising the \$11,546,826 listed on Schedule B-2 to the Equity Commitment Letter. Instead,

the RUS insisted on additional conditions, nowhere contained in the agreement, as a prerequisite to disbursement.

107. Upon information and belief, given the further delays in RUS disbursement, Open Range was required to use general funds to pay RUS-eligible capital expenditures. This further eroded Open Range's cash position. Since the RUS was in the process of auditing Open Range at the time and otherwise monitored Open Range's finances, it knew or should have known of Open Range's cash position.

108. In or about late August 2011, OEP contacted FTI Consulting, Inc. ("FTI") to conduct a review of Open Range's business model to determine its viability and to advise the Open Range Board of Directors of its findings and recommendations.

109. On September 21, 2011, FTI provided a report to the Open Range Board in conjunction with a telephonic board meeting of Open Range directors.

110. The next day, September 22, 2011, Open Range presented a version of the report to the RUS in Washington D.C.

111. The report states that Open Range had approximately \$27 million in payables on August 31, 2011, for which approximately \$15.2 million are subject to advance by RUS.

112. The report also states that there are over \$10.0 million in other obligations that Open Range expects to be reimbursable by the RUS.

113. During the September 22 meeting in Washington D.C., Open Range inquired whether the RUS would disburse loan funds to cover the construction costs that were eligible for RUS advance.

114. There presently is conflicting information as to the RUS's response to Open Range's request.

115. An FTI Consultant states that the RUS verbally told him that RUS would not disburse loan funds for these items.

116. But, the Director of the Broadband Division of the RUS, Ken Kuchno, testified that he does not recall the RUS taking a position on whether it would disburse loan funds for the outstanding the items presented to the RUS at the September 22, 2011 meeting.

117. In either case, upon information and belief, no writing confirms any position taken by the RUS.

118. On October 6, 2011, Open Range filed the instant Chapter 11 proceedings.

119. Since executing the 4/29/11 Loan Amendment, the RUS has never issued a notice of default to Open Range, a notice of a material adverse condition, or sent other correspondence indicating an intent to suspend advances.

120. And, from the time of the 4/29/11 Loan Amendment to the bankruptcy filing on October 6, 2011, the RUS never declared a default or issued any notice that Open Range has breached the Amended Loan that would purportedly excuse the RUS from performing its obligations under the Amended Loan.

121. To the extent that Defendants otherwise assert that all or some of their acts and omissions are subject to discretionary function or other immunities, they have been waived, including but not limited to, under 11 U.S.C. § 106.

COUNT I
BREACH OF CONTRACT

For Count I of his claims against the United States for breach of contract, the Trustee states and alleges:

122. The Trustee incorporates herein by reference all paragraphs above as though fully set out herein.

123. Open Range and the United States entered into the written Loan and Security Agreement dated January 9, 2009, whereby the United States agreed to extend financial assistance to Open Range in the form of a loan up to \$267,298,000 to finance the construction of a wireless broadband network in rural areas.

124. As part of the Loan Agreement, Open Range executed a promissory note (“**Note**”) on January 9, 2009, made payable to the United States in the amount actually loaned to Open Range, not to exceed \$267,298,000.

125. The Loan Agreement was amended on April 29, 2011 in part to reduce the amount of the loan from \$267,298,000 to \$180,000,000.

126. Among other things, under the Loan Agreement, any expense for which Open Range sought an advance from the RUS had to be approved by the presentation of a build-out plan encompassing that expense and/or the submission of RUS form contracts.

127. Before the RUS became obligated to approve an advance under the Loan Agreement, Open Range was required to satisfy the conditions precedent of Section 4.3 of the Loan Agreement.

128. Under the Loan Agreement, once an advance was approved, the RUS having first found that the conditions precedents of Section 4.3 had been satisfied, Open Range was free to, and in fact was required to, incur the expenditures of the approved advance for the approved purpose.

129. Under the Agreement, once an advance was approved, the RUS was obligated to release the funds to Open Range for the approved advance, provided Open Range had expended the monies advanced or incurred the expenditure for the approved purpose, which was determined via the FRS process.

130. Open Range substantially performed all of its obligations under the 1/9/09 Loan Agreement and 4/29/11 Loan Amendment, including its obligations for approval of advances.

131. The United States breached the contract, or committed a series of breaches of contract, by refusing to release loan funds for RUS-eligible equipment, services and other expenses, including:

- a. Equipment, services, and other expenses previously approved for advance, including but not limited to, that related to non-160 markets;
- b. Equipment, services, and other expenses that were submitted for approval but that the RUS improperly rejected; and
- c. Other equipment, services, and expenses eligible for RUS funding.

132. As a result of the United States' breach of the 1/9/09 Loan Agreement and 4/29/11 Loan Amendment, Open Range has sustained damages, including but not limited to, an amount measured by the destruction of its business and the loan funds that the RUS improperly failed to disburse that are estimated to be in excess of \$20 million.

COUNT II
BREACH OF GOOD FAITH AND FAIR DEALING

For Count II of his claims against the United States for breach of good faith and fair dealing, the Trustee states and alleges:

133. The Trustee incorporates herein by reference all paragraphs above as though fully set out herein.

134. Open Range and the United States entered into the written Loan and Security Agreement dated January 9, 2009, whereby the United States agreed to extend financial assistance to Open Range in the form of a loan up to \$267,298,000 to finance the construction of a wireless broadband network in rural areas.

135. As part of the Loan Agreement, Open Range executed a promissory note (“**Note**”) on January 9, 2009, made payable to the United States in the amount actually loaned to Open Range, not to exceed \$267,298,000.

136. The Loan Agreement was amended on April 29, 2011 in part to reduce the amount of the loan from \$267,298,000 to \$180,000,000.

137. Among other things, under the Loan Agreement, any expense for which Open Range sought an advance from the RUS had to be approved by the presentation of a build-out plan encompassing that expense and/or the submission of RUS form contracts.

138. Before the RUS became obligated to approve an advance under the Loan Agreement, Open Range was required to satisfy the conditions precedent of Section 4.3 of the Loan Agreement.

139. Under the Loan Agreement, once an advance was approved, the RUS having first found that the conditions precedents of Section 4.3 had been satisfied, Open Range was free to, and in fact was required to, incur the expenditures of the approved advance for the approved purpose.

140. Under the Agreement, once an advance was approved, the RUS was obligated to release the funds to Open Range for the approved advance, provided Open Range had expended the monies advanced or incurred the expenditure for the approved purpose, which was determined via the FRS process.

141. Open Range substantially performed all of its obligations under the 1/9/09 Loan Agreement and 4/29/11 Loan Amendment, including its obligations for approval of advances.

142. The United States failed to exercise the discretion afforded to it under the parties’ contract reasonably and in good faith and/or prevented Open Range from receiving the expected

fruits of its contract, thereby breaching its implied duty of good faith and fair dealing, by refusing to release loan funds for RUS-eligible equipment, services and other expenses, including:

- a. Equipment, services, and other expenses previously approved for advance, including but not limited to, that related to non-160 markets;
- b. Equipment, services, and other expenses that were submitted for approval but that the RUS improperly rejected; and
- c. Other equipment, services, and expenses eligible for RUS funding.

143. As a result of the United States' breach of good faith and fair dealing as aforesaid, Open Range has sustained damages, including but not limited to, an amount measured by the destruction of its business and the loan funds that the RUS improperly failed to disburse that are estimated to be in excess of \$20 million.

COUNT III
BREACH OF GOOD FAITH AND FAIR DEALING

For Count III of his claims against Defendants for breach of good faith and fair dealing, the Trustee states and alleges:

144. The Trustee incorporates herein by reference all paragraphs above as though fully set out herein.

145. Open Range and the United States entered into a written Loan and Security Agreement dated January 9, 2009, as amended April 29, 2011, that was premised on, and which included, a business plan approved by the RUS for Open Range to construct and operate a wireless broadband network in 546 rural communities using spectrum rights obtained through Globalstar.

146. Defendants thereafter suspended Globalstar's and in turn, Open Range's authority to use the spectrum that served as the basis of the 1/9/09 Loan Agreement.

147. Defendants then used their adverse action against Globalstar and Open Range as a basis to deny Open Range funding under the 1/9/09 Loan Agreement.

148. Defendants further prevented Open Range from fulfilling the business plan approved by the RUS to construct and operate a wireless broadband network in 546 rural communities.

149. In taking this action, Defendants failed to exercise the discretion afforded to them under the parties' contract reasonably and in good faith and/or prevented Open Range from receiving the expected fruits of its contract, thereby breaching their implied duty of good faith and fair dealing.

150. Alternatively, Defendants failed to exercise the discretion afforded to them under the parties' contract reasonably and in good faith and/or prevented Open Range from receiving the expected fruits of its contract, thereby breaching their implied duty of good faith and fair dealing, by not, at a minimum, crafting a less restrictive STA or otherwise enabling Open Range to comply with the original business plan, rather than placing Open Range in the position that caused the deterioration and ultimate destruction of Open Range's business.

151. As a result of Defendants' breach of good faith and fair dealing as aforesaid, Open Range has been damaged, including, but not limited to, by the destruction of Open Range's business.

COUNT IV
PROMISSORY/EQUITABLE ESTOPPEL

For Count IV of his claims against Defendants for promissory and/or equitable estoppel, the Trustee states and alleges:

152. The Trustee incorporates herein by reference all paragraphs above as though fully set out herein.

153. The United States represented to Open Range that it would disburse loan funds for certain expenditures that it previously approved for advance and/or that were otherwise eligible for RUS loan funds.

154. The United States intended that Open Range would rely on the representations.

155. The United States in fact required that Open Range incur the expenditures.

156. Open Range relied to its detriment on the United States' representations by incurring debts, obligations, and expenses to vendors who expended millions of dollars toward the furtherance of the build-out plans and/or RUS form contracts approved by the United States.

157. The United States failed and refused to disburse the loan funds for certain expenditures that it previously approved for advance and/or that were otherwise eligible for RUS loan funds.

158. As a direct result of the United States' failure to perform its promises, Open Range sustained damages.

159. Defendants also engaged in other wrongful acts and omissions, including but not limited to, failing to follow RUS Bulletin 1738-2, and engaging in other adverse action against Open Range described hereinabove.

160. Defendants should be further estopped from denying Open Range the benefit of their promises and from asserting various defenses as a result of their wrongful acts and omissions, including but not limited to,

- a. from denying disbursement of loan funds previously approved for advance and that they required Open Range to incur;

- b. from claiming an interest in any of the Debtor's assets;
- c. from asserting that Open Range was not in compliance with the loan agreement when Defendants were the cause of any alleged non-compliance;
and
- d. from asserting alleged defenses presently unknown by the Trustee.

COUNT V
TORTIOUS INTERFERENCE

For Count V of his claims against the FCC for tortious interference with contract, the Trustee states and alleges:

161. The Trustee incorporates herein by reference all paragraphs above as though fully set out herein.

162. Open Range and the United States entered into a written Loan and Security Agreement dated January 9, 2009, as amended April 29, 2011, that was premised on, and which included, a business plan approved by the RUS for Open Range to construct and operate a wireless broadband network in 546 rural communities using spectrum rights obtained through Globalstar.

163. The FCC knew of the contract between Open Range and the United States.

164. The FCC intentionally and without justification interfered with Open Range's contract with the United States by suspending Globalstar's authority to use the spectrum that served as the basis of the 1/9/09 Loan Agreement and by engaging in wrongful conduct beyond its role of regulator as described hereinabove.

165. The FCC's interference induced or caused the RUS to breach its contract with Open Range by denying funding to Open Range under the 1/9/09 Loan Agreement.

166. The FCC's conduct in this regard went far beyond that of merely a regulator as set forth hereinabove.

167. The FCC's conduct prevented Open Range from fulfilling the business plan approved by the RUS to construct and operate a wireless broadband network in 546 rural communities.

168. As a result of the FCC's interference as aforesaid, Open Range has been damaged, and is also entitled to equitable relief set forth herein below.

COUNT VI
BREACH OF FIDUCIARY DUTY

For Count VI of his claims against the United States for breach of fiduciary duty, the Trustee states and alleges:

169. The Trustee incorporates herein by reference all paragraphs above as though fully set out herein.

170. The United States and Open Range had a diverse and multi-faceted relationship wherein the United States exercised such dominion and control over Open Range as set forth hereinabove that it gave rise to a fiduciary relationship owed by the United States to Open Range.

171. The United States breached its fiduciary duties to Open Range by:

- a. failing to ensure that the RUS disbursed loan funds for all capital and other expenses previously approved for advance or eligible for RUS disbursement;
- b. failing to ensure that all FRS's were properly completed and submitted and/or preventing or delaying completion and submission, for all capital and other expenses eligible for RUS disbursement;

- c. failing to enforce the 4/29/11 Equity Commitment Letter by requiring OEP to make its required equity contribution to Open Range;
- d. preventing Open Range from fulfilling its business plan;
- e. failing to establish a work order fund to finance construction costs as provided in the Bulletin;
- f. failing to take steps to ensure that Open Range did not incur further debt and expense it could not reasonably expect to pay under the circumstances;
- g. otherwise breaching its fiduciary duties.

172. The United States' breach of fiduciary duty caused a deepening of Debtor's insolvency in that:

- a. Open Range continued to incur debt and expense in reliance upon RUS's approval of advances and, earlier, in reliance on the ability to proceed under the original business plan; and
- b. Had the United States caused Open Range to wind up its affairs after it became apparent that Open Range's insolvency was inevitable, Open Range's equipment and other assets could have been sold at a more favorable price and other terms over a period of time rather than on the courthouse steps at fire-sale prices.

173. As a result of the United States' breach of its fiduciary duties as aforesaid, Open Range sustained damage.

COUNT VII
AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

For Count VII of his claims against the FCC for aiding and abetting breach of fiduciary duty, the Trustee states and alleges:

174. The Trustee incorporates herein by reference all paragraphs above as though fully set out herein.

175. A fiduciary relationship existed between the United States and Open Range as set forth hereinabove.

176. The United States breached its fiduciary duties to Open Range as described in Count IV above.

177. The United States' breach of fiduciary duties caused a deepening of Debtor's insolvency in that:

- a. Open Range continued to incur debt and expense in reliance upon RUS's approval of advances and, earlier, in reliance on the ability to proceed under the original business plan; and
- b. Had the United States caused Open Range to wind up its affairs after it became apparent that Open Range's insolvency was inevitable, Open Range's equipment and other assets could have been sold at a more favorable price and other terms over a period of time rather than on the courthouse steps at fire-sale prices.

178. The FCC knowingly participated in the breach as alleged hereinabove.

179. The FCC also knowingly participated in the breach by not crafting a less restrictive STA or otherwise enabling Open Range to comply with the original business plan, rather than placing Open Range in the position that caused the deterioration and ultimate destruction of Open Range's business.

180. As a result thereof, Open Range sustained damages.

COUNT VIII
EQUITABLE SUBORDINATION
(PURSUANT TO 11 U.S.C. §§ 510(C) AND 105(A))

For Count VIII of his claims against the United States for equitable subordination pursuant to 11 U.S.C. §§ 510(c) and 105(a), the Trustee states and alleges:

181. The Trustee incorporates herein by reference all paragraphs above as though fully set out herein.

182. To the extent the United States asserts a secured claim against the Debtor's bankruptcy estate, its claim should be equitably subordinated in its entirety.

183. The United States engaged in inequitable conduct, including but not limited to the following:

- a. failing to ensure that the RUS disbursed loan funds for all capital and other expenses previously approved for advance or eligible for RUS disbursement;
- b. preventing Open Range from fulfilling its business plan;
- c. failing to ensure that all FRS's were properly completed and submitted and/or preventing or delaying completion and submission, for all capital and other expenses eligible for RUS disbursement;
- d. failing to enforce the 4/29/11 Equity Commitment Letter by requiring OEP to make its required equity contribution to Open Range.
- e. failing to establish a work order fund to finance construction costs as provided in the Bulletin;
- f. failing to take steps to ensure that Open Range did not incur further debt and expense it could not reasonably expect to pay under the circumstances; and
- g. otherwise breaching its fiduciary duties.

184. The United States obtained an unfair advantage over the Debtor's other unsecured creditors and caused injury to those creditors in that the creditors did not receive payment for legitimate, RUS-eligible work that the creditors performed.

185. Pursuant to §§ 510(c) and 105(a) of the Bankruptcy Code, the United States' claims against the Debtor should be subordinated to the claims of the Debtor's other unsecured creditors as such is consistent with the provisions of the Bankruptcy Code which authorizes a creditor's claim to be subordinated to the claims of other creditors.

COUNT IX
DECLARATORY JUDGMENT

For Count IX of his claims against the United States for declaratory judgment 28 U.S.C. § 2201(a) and Fed R. Civ. P. 57, the Trustee states and alleges:

186. The Trustee incorporates herein by reference all paragraphs above as though fully set out herein.

187. The United States claims a perfected security interest in substantially all of the assets of Open Range except vehicles, pursuant to the written Loan and Security Agreement between the Debtor and the United States dated January 9, 2009, as amended April 29, 2011, as collateral for the loan. Specifically, the items the United States claims as collateral include:

All personal property and fixtures of every kind and nature, including without limitation all goods, . . . instruments, . . . documents accounts (such as deposit accounts or trust accounts pursuant hereto or to a loan agreement), letter-of-credit rights, investment property, . . . software, general intangibles, . . . support obligations, contract rights or rights to the payment of money, insurance claims and proceeds

188. An actual controversy of a justiciable nature currently exists between the parties as to whether the United States has a valid security interest in the assets of Open Range.

189. The Trustee contends that the United States was the first to materially breach the Loan and Security Agreement such that it is barred from seeking to enforce the provisions of the agreement by claiming a priority interest in the alleged collateral.

190. The United States authorized Open Range to pay its vendors and thereby intended to relinquish any interest in the monies deposited in the Pledged Deposit Account.

191. Further, the Trustee contends that certain assets in which the United States claims an interest are not collateral.

192. In addition, the United States is estopped from asserting a security interest in the Debtor's assets for the reasons set forth in Count IV above.

193. The Trustee requests a judgment declaring that the United States has no security interest in the assets of Open Range, that the United States' purported lien on such assets be declared invalid, and that the assets are property of the Debtor's Estate.

COUNT X
OBJECTION TO THE UNITED STATES' LIEN NOTICE
(Pursuant to 11 U.S.C. § 502 and Fed. R. Bankr. P. 3007)

For Count X of his claims against the United States pursuant to 11 U.S.C. § 502 and Fed. R. Bankr. P. 3007, the Trustee states and alleges:

194. The Trustee incorporates herein by reference all paragraphs above as though fully set out herein.

195. On June 12, 2012, the United States filed a document in the bankruptcy estate of Debtor entitled, "United States' Lien Notice."

196. The United States' claims are not enforceable in accordance with applicable non-bankruptcy law and should be disallowed because the United States has failed to provide adequate explanation or documentation supporting the amounts, basis of liability, or consideration for the claims.

197. The claims of the United States are further not enforceable as the monies it provided to Debtor which it now seeks to characterize as a loan were, in fact, equity contributions that it was required to contribute into Open Range before the bankruptcy filing and/or those monies should otherwise be treated as equity contributions.

198. To the extent that the United States' claims are established in any amount and at any level of priority, they should be disallowed under § 502(d) of the Bankruptcy Code for the reasons stated in this Complaint.

COUNT XI
AVOIDABLE PREFERENCE UNDER 11 U.S.C. §§ 547 AND 550

For Count XI of his claims against the United States for avoidable preference under 11 U.S.C. § § 547 and 550, the Trustee states and alleges:

199. The Trustee incorporates herein by reference all paragraphs above as though fully set out herein.

200. In the 90 days preceding the filing of Debtor's bankruptcy petition, the Debtor made payments to the RUS totaling \$2,532,190.20 (7/6/11 - \$617,319.60; 8/2/11 - \$645,053.70; 9/9/11 - \$636,701.90; and 10/5/11 - \$633,115.00) for interest accrued on loans made by the United States to the Debtor under the written Loan and Security Agreement between Plaintiff and the United States dated January 9, 2009, as amended April 29, 2011.

201. The payments referenced above constitute transfers of property of the Debtor to or for the benefit of the United States, which was a creditor of Debtor.

202. The payments were made to the United States for or on account of antecedent debts allegedly owed by the Debtor to the United States before the transfers were made.

203. The transfers enabled the United States to receive more than it would have received if (A) the case were a case under Chapter 7 of this title; (B) the transfer had not been

made; and (C) the United States received payment of such debt to the extent provided by the provisions of Title 11. Specifically, while the United States was a secured creditor, it is significantly undersecured, such that if the preferential payments were not made, the United States would *not* have recovered them in a Chapter 7 case.

204. The payments constitute avoidable preferences pursuant to § 547 that are recoverable pursuant to § 550 of the Bankruptcy Code.

205. Further, pursuant to § 502(d) of the Bankruptcy Code, the Court should disallow any claim by the RUS as it has failed to return the preference payments to the Trustee.

COUNT XII
AVOIDABLE PREFERENCE TO INSIDER UNDER 11 U.S.C. §§ 547 AND 550

For Count XII of his claims against the United States for avoidable preference under 11 U.S.C. §§ 547 and 550, the Trustee states and alleges:

206. The Trustee incorporates herein by reference all paragraphs above as though fully set out herein.

207. The United States asserted actual control over Open Range such that it is a “person in control of the debtor” within the meaning of 11 U.S.C. § 101(31), and thus a statutory insider.

208. Alternatively, the United States had a close relationship with the Debtor and the transactions between the Debtor and the United States were not arms length transactions. As such, the United States is a non-statutory insider.

209. Between 90 days and one year before the filing of the Debtor’s bankruptcy petition the Debtor made payments to the United States totaling approximately \$3,500,000.00 for interest accrued on loans made by the United States to the Debtor under the written Loan and

Security Agreement between Plaintiff and the United States dated January 9, 2009, as amended April 29, 2011.

210. The payments referenced above constitute transfers of property of the Debtor to or for the benefit of the United States, which was a creditor of the Debtor.

211. The payments were made to the United States for or on account of antecedent debts allegedly owed by the Debtor to the United States before the transfers were made.

212. The transfers enabled the United States to receive more than it would have received if (A) the case were a case under Chapter 7 of this title; (B) the transfer had not been made; and (C) the United States received payment of such debt to the extent provided by the provisions of Title 11.

213. The payments constitute avoidable preferences pursuant to § 547 that are recoverable pursuant to § 550 of the Bankruptcy Code.

214. Further, pursuant to § 502(d) of the Bankruptcy Code, the Court should disallow any claim by the RUS as it has failed to return the preference payments to the Trustee.

PRAYER FOR RELIEF

WHEREFORE, the Trustee prays this Court for judgment against Defendants for

(a) the amount of Open Range's damages, including but not limited to, the amount that the United States improperly failed to fund under the parties agreement, presently estimated to be in excess of \$20,000,000;

(b) the amount of Open Range's damages, including but not limited to, the amount as measured by destruction of its business;

(c) equitable relief in the form of a declaration that Defendants are equitably estopped by their conduct, including but not limited to,

- (1) from denying disbursement of loan funds previously approved for advance or otherwise eligible for RUS loan funds and that they required Open Range to incur,
 - (2) from claiming an interest in any of the Debtor's assets,
 - (3) from asserting that Open Range was not in compliance with the loan agreement when Defendants were the cause of any alleged non-compliance,
 - (4) from asserting alleged defenses presently unknown to the Trustee;
- (d) a constructive trust over funds previously approved to be disbursed to Open Range and/or eligible for RUS loan funds;
- (e) an order subordinating the United States' secured claim to the claims of the Open Range's unsecured creditors;
- (f) a declaration that the United States has no security interest in the assets of Open Range, that the United States' purported lien on such assets be declared invalid, and that the assets are property of the Debtor's Estate;
- (g) a declaration that the claims of the United States are disallowed;
- (h) a declaration that the payments Open Range made to the United States from July 6, 2011 to October 6, 2011, are avoidable preferences, and enter judgment against the United States and in favor of the Trustee, for the benefit of the Debtor's Estate, in the amount of \$2,532,190.20;
- (i) a declaration that the payments Open Range made to the United States from October 6, 2010 to July 5, 2011 are avoidable preferences, and enter judgment against the United States and in favor of the Trustee, for the benefit of the Debtor's Estate, in the approximate amount of \$3,500,000;
- (j) other equitable monetary relief to be determined after further discovery;

- (k) prejudgment interest at the statutory rate;
- (l) attorneys' fees and expenses; and
- (m) such other and further relief as the Court deems just and equitable.

Dated: July 31, 2012
Wilmington, Delaware

Respectfully submitted,

POLSINELLI SHUGHART PC

/s/ Christopher A. Ward

Christopher A. Ward (Del. Bar No. 3877)

Jarrett Vine (Del Bar No. 5400)

222 Delaware Avenue, Suite 1101

Wilmington, DE 19801

302-252-0920

302-252-0921 (fax)

cward@polsinelli.com

jvine@polsinelli.com

- and -

Todd H. Bartels (*admitted pro hac vice*)

3101 Frederick Avenue

St. Joseph, MO 64506

816-364-2117

816-279-3977 (fax)

tbartels@polsinelli.com

SPECIAL LITIGATION COUNSEL FOR CHARLES M.
FORMAN, IN HIS CAPACITY AS CHAPTER 7 TRUSTEE
FOR OPEN RANGE COMMUNICATIONS, INC.