

Daniel C. Stewart, SBT #19206500
William L. Wallander, SBT #20780750
Richard H. London, SBT #24032678
VINSON & ELKINS L.L.P.
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201-2975
Tel: 214-661-7299
Fax: 214-220-7716
VarTec@velaw.com

PROPOSED ATTORNEYS FOR THE DEBTORS

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE:	§	
	§	
VARTEC TELECOM, INC., et al.,	§	CASE NO. 04-81694-SAF-11
	§	
DEBTORS.	§	(Chapter 11)
	§	(Joint Administration Requested)

EXPEDITED MOTION TO APPROVE DEBTORS' PROVISION OF ADEQUATE ASSURANCE OF PAYMENT TO UTILITIES PURSUANT TO 11 U.S.C. § 366

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

The above-referenced debtors and debtors in possession (collectively, the "Debtors")¹ file this Expedited Motion for Order Approving Debtors' Provision of Adequate Assurance of Payment to Utilities (the "Motion") and in support thereof the Debtors would show as follows:

¹ The Debtors include VarTec Telecom, Inc., Excel Communications Marketing, Inc., Excel Management Service, Inc., Excel Products, Inc., Excel Telecommunications, Inc., Excel Telecommunications of Virginia, Inc., Excel Teleservices, Inc., Excelcom, Inc., Telco Communications Group, Inc., Telco Network Services, Inc., VarTec Business Trust, VarTec Properties, Inc., VarTec Resource Services, Inc., VarTec Solutions, Inc., VarTec Telecom Holding Company, VarTec Telecom International Holding Company, and VarTec Telecom of Virginia, Inc.

JURISDICTION AND PROCEDURAL BACKGROUND

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This Motion concerns the administration of the estate; and therefore, it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. On November 1, 2004 (the "Petition Date"), the Debtors each filed a voluntary petition for relief (collectively, the "Cases") under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

4. Since the Petition Date, the Debtors have continued to operate and manage their businesses as debtors in possession pursuant to Bankruptcy Code §§ 1107(a) and 1108.

5. Contemporaneously with the filing of this Motion, the Debtors filed their Expedited Motion for Joint Administration of Cases.

STATEMENT OF FACTS

VarTec and Its Business

6. VarTec Telecom, Inc., a Texas corporation, ("VarTec") along with its sixteen direct and indirect domestic subsidiaries, each of which is a Debtor, and eighteen non-debtor direct and indirect foreign subsidiaries (collectively, the "VarTec Entities"), is among the largest privately held companies providing telecommunications services in North America and Europe. The VarTec Entities, founded in DeSoto, Texas in February 1989, with current employees totaling over 1,300 worldwide (including approximately 1,000 in the Dallas metroplex), sell a full range of telecommunication products and services to customers. In 2003, the VarTec Entities had revenues of

approximately \$1,260,000,000, and anticipate 2004 revenue in the approximate amount of \$900,000,000. VarTec's revenues have been derived primarily from three sale distribution channels: (a) Direct Marketing; (b) Commercial Services; and (c) Multi-Level Marketing.

7. The Direct Marketing channel, managed by VarTec and certain of its subsidiaries offers telecommunications services to small business and residential consumers, including local and long distance telephone services, wireless telephone services, and internet access. VarTec pioneered the "10-10 dial-around" long distance market by offering customers the opportunity to access VarTec's discounted long distance services on a call-by-call basis by dialing "10-10" then a three-digit unique carrier access code. Under the "dial-around" model, a customer's long distance usage is billed on her local phone service provider's invoice, the local phone service provider collects the billed amounts, and the local phone service provider remits those collected amounts to VarTec.

8. While experiencing tremendous success with the "dial-around" model, VarTec began to offer other telecommunication services, including local and traditional long distance telephone services, wireless telephone service, and internet access, directly to small business and residential customers. VarTec is licensed to provide local and long distance telephone services in all fifty states, and markets its products and services through, among other means, direct mail and magazine insert campaigns composed of several hundred million items to persons in a targeted market each year. VarTec also uses outbound telemarketing for targeted campaigns to attract new

customers of existing products and to offer new and/or additional products to existing customers.

9. The Commercial Services channel, managed by VarTec Solutions, Inc. (formerly known as eMeritus Communications, Inc.) and certain of its subsidiaries (collectively, "VarTec Solutions"), provides customized voice, data, and internet services to commercial and wholesale carrier customers throughout the U.S. VarTec Solutions' voice product offerings include switched and dedicated access, domestic and international toll-free service, calling cards, audio conferencing, and other specialized products. In addition, VarTec Solutions offers high-capacity data services that provide access to frame relay and IP networks. For carrier customers, VarTec Solutions offers the ability to co-locate their equipment inside carrier-class facilities, saving the cost and complications involved with building their own facilities.

10. Through the Multi-Level Marketing channel, which is managed by Excelcom, Inc. and certain of its subsidiaries (collectively, "Excel"), Excel offers telecommunications products and services to small business and residential consumers similar to those offered by VarTec to its customers. Excel, which was acquired by VarTec in 2002, has an international network of over 130,000 independent representatives who market Excel's products and services to small business and residential consumers and recruit new independent representatives to market such products and services. Each independent representative receives commissions and bonuses based on, among other things, the success of the independent representatives recruited and a portion of the success of their recruits (referred to as a "downline"), the

usage of Excel products and services by customers of the independent representative and a portion of their downline.

Secured Debt

11. VarTec is a borrower and the other Debtors (except VarTec Telecom of Virginia, Inc. and Excel Telecommunications of Virginia, Inc.) are guarantors under that certain First Amended and Restated Credit Agreement (the “Pre-Petition Loan Agreement”) with the Rural Telephone Finance Cooperative (the “RTFC”), pursuant to which the existing secured indebtedness owing to the RTFC was restructured in the form of a secured term loan and a secured line of credit to the Debtor.² The secured line of credit is in the form of a revolving credit facility, for the working capital, credit, and liquidity needed by the Debtor to conduct general business operations. As of the Petition Date, the total outstanding obligation to the RTFC consist of (a) a term loan of approximately \$154,000,000 and (b) a revolving line of credit with a total commitment of \$70,000,000.

The Industry

12. Prior to 1996, local telecommunications services were provided exclusively by traditional, monopoly providers, or incumbent local exchange carriers (the “ILECs”). Pursuant to the Telecommunications Act of 1996 (the “Telecommunications Act”), which was enacted to promote competition in the local telecommunications industry, ILECs were required to provide competitors, such as the Debtors, access to their networks to allow those competitive local exchange carriers (the “CLECs”) to offer

² The capital stock of VarTec Telecom of Virginia, Inc. and Excel Telecommunications of Virginia, Inc. was pledged to the Rural Telephone Finance Cooperative under transactions completed in conjunction with the Credit Agreement.

local telecommunications services. The terms, conditions, and prices charged by ILECs to CLECs are provided in agreements – referenced as interconnection agreements – governed by rules and regulations promulgated by the FCC and various state agencies or public utility commissions. As consideration for relinquishing their monopoly positions, the ILECs were authorized to offer long distance telecommunications services, both out-of-region and in-region (where they were an ILEC) provided certain terms and conditions were satisfied.

13. ILECs, CLECs, and long distance carriers utilize each other's networks to transmit the voice and data traffic of their customers. The framework and pricing of the exchange of voice and data traffic between ILECs and CLECs, on the one hand, and long distance carriers, on the other hand, is governed by multiple laws, regulations, tariffs, and interconnection agreements. For example, if an ILEC or a CLEC's customer originates a call that is carried to its destination by one of the Debtors, the respective Debtor will bill the CLEC or ILEC on a minute of use basis; if a customer of one of the Debtors originates a call that is carried to its destination by an ILEC or a CLEC, the ILEC or CLEC will bill the respective Debtor on a minute of use basis. This is known as reciprocated or intercarrier compensation.³

14. To effectuate the billing, collection, and maintenance of account information, the Debtors often entered into agreements with various ILEC and CLEC, under which such ILEC or CLEC bills customers for the services provided by the

³ A long distance carrier can also be an ILEC or a CLEC.

Debtors, collects the billed amount for the Debtors, and pays or remits to the Debtors the collected amounts periodically.

15. The deregulation of local and long distance telecommunication services pursuant to the Telecommunications Act resulted in increased competition and decreased local and long distance rates. Despite successfully competing in the telecommunications industry for almost fifteen years, (i) VarTec's lack of brand name recognition comparable to some of its competitors in the more intensively competitive telecommunications market, (ii) customer attrition exacerbated by aggressive customer win-back campaigns by the dominant telco providers, and (iii) the margin compromises caused by increasing wholesale rates while retail rates are suffering, have all made it difficult for VarTec to maintain its historical revenue and profitability levels.

Challenges

16. In the weeks preceding the Petition Date, several ILECs, CLECs, and long distance carriers with whom the Debtors have interconnection or access agreements have (i) threatened to terminate services provided to the Debtors, (ii) requested security deposits, and/or (iii) offset amounts owed to the Debtors. The actions of the ILECs, CLECs, and long distance carriers have impaired the Debtors' liquidity.

17. In addition to the matters discussed above, because of various disputes⁴ with Teleglobe Inc. ("Teleglobe") regarding VarTec's acquisition of certain of the companies now associated with Excel and VarTec Solutions (the "Acquired Companies"), VarTec has had to spend millions of dollars in the past several years

⁴ Such disputes have spawned considerable litigation, including an arbitration between VarTec and Teleglobe's bankruptcy estate.

supporting the Excel companies (for which it had anticipated reimbursement), which has financially weakened the Debtors.

18. The combination of these economic and financial events has impaired the Debtors' liquidity and compelled the Debtors to commence these Cases in order to maximize the value of their assets for the benefit of their creditors and other constituencies under chapter 11 of the Bankruptcy Code.

RELIEF REQUESTED

19. The Debtors seek the entry of an order pursuant to Bankruptcy Code § 366 (i) prohibiting entities (collectively, the "Utility Companies") that provide gas, water, electric, telephone, and other services (collectively, the "Utility Services") from altering, refusing or discontinuing Utility Services to, or discriminating against, the Debtors on account of the commencement of these Cases or an unpaid debt owed by the Debtors to such Utility Companies for Utility Services rendered prior to the Petition Date; and (ii) deeming the Utility Companies to be adequately assured of payment until further order of this Court or an agreement between any of the Utility Companies and the Debtors.⁵

20. Pursuant to Bankruptcy Code § 366, within twenty days after the commencement of a case, a utility company may not alter, refuse, or discontinue utility services to, or discriminate against, a debtor solely on the basis of the commencement of a case or the existence of prepetition debts owed. However, following the twenty-day

⁵ To the extent that a Utility Company provides services that are not Utility Services, adequate assurance is not to be provided and that Utility Company's agreement with one or more of the Debtors shall not be deemed assumed or rejected.

period, a utility company arguably may discontinue service if a debtor does not provide adequate assurance of payment of its postpetition obligations.

21. Under the terms of Bankruptcy Code § 366(b), this Court may determine the standards for adequate assurance of payments for utility services. Bankruptcy courts have the exclusive responsibility for determining what constitutes adequate assurance of payment for postpetition utility charges and are not bound by local or state regulations. *In re Adelpia Bus. Solutions*, 290 B.R. 63, 80 (Bankr. S.D.N.Y. 2002); *Tarrant v. City of Douglas (In re Tarrant)*, 190 B.R. 704, 708 (Bankr. S.D. Ga. 1995); *In re Begley*, 41 B.R. 402, 405-06 (E.D. Pa. 1984), *aff'd*, 760 F.2d 46 (3d Cir. 1985).

22. "Adequate assurance" under Bankruptcy Code § 366 is not synonymous with "adequate protection." In determining adequate assurance, this Court is not required to give utility companies the equivalent of a guaranty of payment, but must only determine that a utility company is not subject to an unreasonable risk of nonpayment for postpetition services. *In re Caldor, Inc.*, 199 B.R. 1, 3 (S.D.N.Y. 1996).

23. Where there are no prepetition payment defaults (other than those resulting from the commencement of the chapter 11 case), a debtor in possession's agreement to pay its utilities as an administrative expense constitutes "adequate assurance" of payment within the meaning of Bankruptcy Code § 366. *Virginia Elec. & Power Co. v. Caldor, Inc.*, 117 F.3d 646, 650 (2d Cir. 1997); *In re Penn Jersey Corp.*, 72 B.R. 981, 987 (Bankr. E.D. Pa. 1987); *In re Demp*, 22 B.R. 331, 332 (Bankr. E.D. Pa. 1982); *In re George C. Frye Co.*, 7 B.R. 856, 858 (Bankr. D. Me. 1980).

24. The Debtors propose to provide the Utility Companies with adequate assurance of payment by timely paying all undisputed Utility Service invoices, whether

prepetition or post-petition, and by providing them with an administrative expense claim for any unpaid Utility Services pursuant to Bankruptcy Code §§ 503(b)(1) and 507(a)(1). Given the Debtors' history of timely payments to the Utility Companies, and the fact that the aggregate prepetition utility expense is de minimis relative to the overall debt owed by the Debtors, the Utility Companies are adequately assured of payment in accordance with Bankruptcy Code § 366.

25. The Debtors have sufficient funds to satisfy all continuing postpetition Utility Service obligations. The Debtors estimate that the aggregate monthly amount paid to the Utility Companies for Utility Services is approximately \$545,113.00. A listing of the Utility Companies that provide Utility Services to the Debtors, together with account numbers, to the extent practicable, is included as **Exhibit A**.

26. The Debtors' cash resources (including their availability under their debtor in possession financing with the RTFC), the administrative expense priority accorded the Utility Companies under Bankruptcy Code §§ 503(b)(1) and 507(a)(1) and the Utility Companies' potential ability to setoff any of the Debtors' utility deposits (subject to subsequent Court approval) provide the Utility Companies with adequate assurance of payment under Bankruptcy Code § 366.

27. Accordingly, the Debtors request that this Court deem them to have provided "adequate assurance" of their future payments to the Utility Companies.

PRAYER

The Debtors respectfully request that this Court determine that the Debtors' continued payment of prepetition and postpetition Utility Services and the allowance of an administrative expense priority shall constitute adequate assurance of payment to

the Utility Companies pursuant to Bankruptcy Code § 366. The Debtors also request such other and further relief to which they may be justly entitled.

Respectfully submitted,

VINSON & ELKINS L.L.P.
2001 Ross Avenue
3700 Trammell Crow Center
Dallas, Texas 75201
Tel: 214-661-7299
Fax: 214-220-7716

By: /s/ Daniel C. Stewart (11/01/04)
Daniel C. Stewart, SBT #19206500
William L. Wallander, SBT #20780750
Richard H. London, SBT #24032678

**PROPOSED ATTORNEYS FOR
THE DEBTORS**

828297_7.DOC

EXHIBIT A
UTILITY VENDORS

<u>Utilities</u>	<u>Account Number</u>	<u>Address</u>
770 L Street Investment Group, Inc.**	N/A	770 L. Street Sacramento, CA 95814
Advertisers Reproduction, Inc.*	N/A	1627 Penn Avenue Pittsburgh, PA 15222-4315
All Service Refuse	1 30658 1	751 NW 31 st Ave Ft Lauderdale FL 33311
Antioch University Seattle*	N/A	2326 Sixth Avenue Seattle, WA 98121
Arizona State Retirement System*	N/A	c/o CB Rich Ellis Box 53038-08 Phoenix, AZ 85072-3038
B & L Disposal	3-344280/09	100 Vassar St Reno, NV 89520-2880
Bank Building Ltd. Partnership*	N/A	c/o Ultimate Holdings 2225 Cumberland Atlanta, GA 30339
Bryan Street Acquisitions LP*	N/A	Capstar Commercial Real Estate PO Box 730512 Dallas, TX 75373-0512
Carlyle One Wilshire II LP*	N/A	5180 Paysphere Circle Chicago, IL 60674
Carlyle One Wilshire LP*	N/A	PO Box 515360 Los Angeles, CA 90051-6660
City of Carrollton	600393-38222	PO Box 115120 Carrollton, TX 75011-5120
City of Fort Lauderdale	11317906002	PO Box 31687 Tampa, FL 33631-3687
City of New Smyrna Beach Utilities Commission	884AD0297 884AD0457 884AD0752 884AD0811	PO Box 100001 New Smyrna Beach, FL 32170
City of Reno	876332	PO Box 1900 Reno, NV 89505-1900
Coastal Utilities	035600752FA 035600457FGD	PO Box 585 Hinesville, GA 31310
Colliers International*	N/A	1621 Euclid PO Box 2359 Cincinnati, OH 45263-2359
COMED	213132033 1422013000 599154020	Bill Payment Center Chicago, IL 60668-0001
COMED	213132033 1422013000 599154020	Bill Payment Center Chicago, IL 60668-0001

* Landlords who are the Debtors' source of certain Utility Services.

<u>Utilities</u>	<u>Account Number</u>	<u>Address</u>
Corban Communications, Inc.*	N/A	PO Box 869345 Plano, TX 75086
Corban Networks, Inc.*	N/A	901 Jupiter Road Suite 100 Dallas, TX 75074
Duncan Disposal	14 01391 2 14 22664 8 14 20988 4	PO Box 9001856 Louisville, KY 40290-1856
Electric Power Board of Chattanooga	262-0107.000 262-0804.000	PO Box 182253 Chattanooga, TN 37422-7253
First Capital*	N/A	1000 Pajaro St. Suite A Salinas, CA 93901
Florida Power & Light	22425-61328	PO Box 025576 Miami, FL 33102
Georgia Power	33313-26029	96 Annex Atlanta, GA 30396-0001
Harlan Municipal Utilities	5361HD0752	405 Chatburn Avenue Harlan, IA 51537
Hudson Telegraph Associates*	N/A	380 Madison Avenue New York, NY 10017-2513
KC Partners*	N/A	600 W. Jackson Blvd. Suite 200 Chicago, IL 60661
Laurens Municipal Comm. Utility	41153D0752	272 N. 3rd Street PO Box 148 Laurens, IA 50554
Lepercq Corporate Income Fund*	N/A	355 Lexington Avenue 14th Floor New York, NY 10017
NSTAR	25897391006	PO Box 4508 Woburn, MA 01888-4508
Orlando Utilities Commission	01251304-1200113	PO Box 31626 Tampa, FL 33631-3626
PEPCO	0111474003 0109531327	PO Box 97275 Washington, DC 20090-7275
Quinby Building LLC*	N/A	650 S. Grand Avenue Suite 502 Los Angeles, CA 90017
Rabanco Emerald City	3-0198-5861789	54 South Dawson Seattle, WA 98134
Reliant Energy Retail Services, LLC	10089010101 86168366100	PO Box 4932 Houston, TX 77210-4932
Republic Waste	1 63192 0	10554 Tanner Rd Houston, TX 77041
Sierra Pacific	1000034213402-695066	6100 Neil Road PO Box 10100 Reno, NV 89520

* Landlords who are the Debtors' source of certain Utility Services.

<u>Utilities</u>	<u>Account Number</u>	<u>Address</u>
SMUD-Sacramento Municipal Utility District Town of Addison	2000788	PO Box 1555 Sacramento, CA 95852
	290101	PO Box 9009
	290401	Addison, TX 75001-9009
	290501	
	290601	
	290201	
	292401	
Truckee Meadows Water Authority	685735	PO Box 4500 Scottsbluff, NE 69363-4500
TXU Electric	3668571188-3	PO Box 100001
	3668571188-3	Dallas, TX 75310-0001
	204-2933-82-6	
	204-1352-87-9	
	204-1600-87-1	
	204-3398-91-2	
	204-1383-81-7	
	204-3739-75-0	
	204-1507-92-8	
	204-1476-82-7	
	204-2096-82-2	
	204-2530-81-2	
	204-2809-84-4	
	204-1042-83-5	
	204-0980-86-0	
	204-0639-79-7	
	204-2623-89-8	
	204-2344-92-5	
	204-1879-82-2	
	204-0515-87-2	
TXU Energy	3668571188-3	PO Box 660161
	3668571188-3	Dallas, TX 75266-0161
	204-2933-82-6	
	204-1352-87-9	
	204-1600-87-1	
	204-3398-91-2	
	204-1383-81-7	
	204-3739-75-0	
	204-1507-92-8	
	204-1476-82-7	
	204-2096-82-2	
	204-2530-81-2	
	204-2809-84-4	
	204-1042-83-5	
	204-0980-86-0	
	204-0639-79-7	
	204-2623-89-8	
204-2344-92-5		
204-1879-82-2		
204-0515-87-2		

<u>Utilities</u>	<u>Account Number</u>	<u>Address</u>
TXU Gas	653-5286-99-8	PO Box 650654
	511-0959-99-5	Dallas, TX 75265-0654
Utah State Retirement Fund*	N/A	102 South Tejon Street
		Colorado Springs, CO 80903
Waste Management Inc.*	N/A	Lewisville Hauling
		PO Box 78251
		Phoenix, AZ 85062-8251
XCEL Energy Services, Inc.	8901114083	PO Box 9477
		Minneapolis, MN 55484-9477

* Landlords who are the Debtors' source of certain Utility Services.