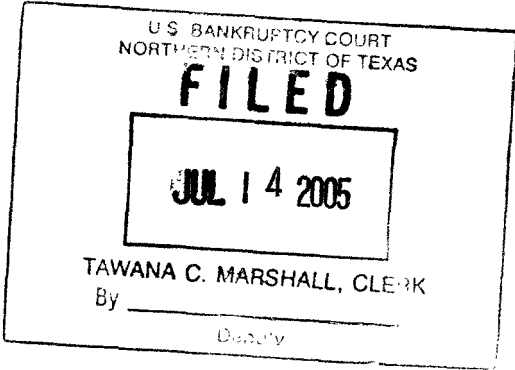


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IN THE UNITED BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: §
§ CASE NO. 04-81694-SAF-11
VARTEC TELECOM, INC., ET AL., § (Chapter 11)
§
§ Debtors.

MOTION TO COMPEL ASSUMPTION OR REJECTION OF EXECUTORY CONTRACTS AND JOINDER IN MOTIONS FILED BY QWEST COMMUNICATIONS CORPORATION AND BELL SOUTH TELECOMMUNICATIONS, INC.

VALOR TELECOMMUNICATIONS OF TEXAS, LP (“Valor”) and KERRVILLE TELECOMMUNICATIONS COMPANY (“Kerrville”) hereby move to compel assumption or rejection of executory contracts and also file this joinder to the (a) Motion of Qwest Communications Corporation (“QCC”) and Qwest Corporation for Order Compelling Immediate Assumption or Rejection of Executory Contracts [Docket No. 1459] and (b) Motion of Bellsouth Telecommunications, Inc. (“Bellsouth”) for Order Compelling Debtor to Assume or Reject Executory Contracts [Docket No. 1452], as follows:

BACKGROUND

1. As of the petition date, Valor was providing approximately \$98,000.00 of telecommunications services to the above captioned debtors and debtors-in-possession

(collectively, “Debtors”) each month. As of the filing of the Debtors’ chapter 11 petition on November 1, 2004, the Debtors owed Valor approximately \$346,164.69, subject to certain offset rights of Valor. As of the petition date, Kerrville was owed \$31,454.03.

2. Valor and Kerrville provided telecommunication services to the Debtors pursuant to certain tariffs (collectively the “Contracts”).

3. To date, the Debtors have moved to reject some, but not all, of the Contracts.

4. On June 17, 2005, the Debtors filed the Motion for Authority to Sell Assets Free and Clear of All Liens, Claims, Rights, Interests, and Encumbrances and for Related Relief (Substantially All of the Debtors’ Remaining Assets) (the “Sale Motion”). By the Sale Motion, the Debtors propose to sell “substantially all” of the Debtors’ assets to Leucadia National Corporation.

5. Pursuant to the Asset Purchase Agreement (“APA”), Leucadia will have sole and exclusive management responsibilities and will acquire control of the Debtors’ business and assets. As a result, Leucadia will receive the benefit of all of the Debtors’ contracts, including the Valor & Kerrville Contracts.

ARGUMENT

The Contracts Must be Immediately Assumed and Assigned

6. A debtor-in-possession may generally elect to assume or assign an executory agreement¹ "at any time before the confirmation of a plan[.]" 11 U.S.C. §365(d)(2). A non-debtor party to an executory contract, however, may request an order fixing a specified period of

¹ Debtors have argued that not only written agreements, but agreements created by the Debtors opting into tariffs, both constitute executory contracts. *See, e.g.*, Debtors’ Motion to Authorize Rejections of Circuit Agreements, D.I. #1395.

time within which the trustee or debtor-in-possession must elect whether to assume or reject the Contracts. See 11 U.S.C. §365(d)(2).

7. A debtor has only a reasonable amount of time under the facts and circumstances of the case in which to make the decision either to assume or reject a contract. In the Matter of Holly's, Inc., 140 B.R. 643, 682 (Bankr. W.D. Mich. 1992). What is a reasonable time period in a given case is left to the discretion of the bankruptcy court. In the matter of Dunes Casino Hotel, 63 B.R. 939, 949 (D.N.J. 1986) (citing, Theatre Holding Corp. v. Mauro, 681 F.2d 102, 105 (2d Cir. 1982)). In determining what is a "reasonable time," the Court should consider the following four factors: "[t]he nature of the interests at stake, the balance of the hurt to the litigants, the good to be achieved, the safeguards afforded those litigants, and whether the action to be taken is so in derogation of Congress' scheme that the court may be said to be arbitrary." Id. (quoting, In re GHR Energy Corp., 41 B.R. 668, 676 (Bankr. D. Mass. 1984)). (citations omitted).

8. With regard to the above referenced factors, Movants respectfully submit that the balance weighs in favor of compelling Debtors to immediately assume or reject the Contracts. Debtors incurred substantial pre -petition expenses for services provided pursuant to the Contracts. As a result, Valor & Kerrville have sustained large economic losses due to Debtors' failure to pay for the services provided. Congress did not intend for debtors, such as Vartec, to continue to incur debts at a substantial rate without compensation to the creditor for its loss. As such, the Debtors should be forced to immediately assume or reject the Valor and Kerrville Contracts.

9. Moreover, if the APA is approved, a third-party, likely Leucadia, will have the right to receive all benefits under the Contracts. This is equivalent to an assumption and

assignment of the Contracts and must be recognized as such. If the Debtors intend to sell all of the assets, including any rights under the Contracts, then they must be compelled to assume and assign the Contracts at the time of the sale. The Debtors cannot be permitted to circumvent the requirements of Section 365. Furthermore, upon assumption and assignment of the Contracts, the Debtors must cure all defaults, including payment in full of all pre-petition and post-petition amounts owed to Valor and Kerrville.

Even if the Contracts are Rejected, the Debtors are Required to Make Payment to Valor

10. Until the Debtors have elected to assume or reject the contracts, the debtor-in-possession must continue perform its post-petition obligations under the contract. *See, e.g., Philadelphia Co. v. Dipple*, 312 U.S. 168, 174, 61 S.Ct. 538, 85 L. Ed.2d 651 (1941). Valor and Kerrville continue to provide ongoing services to Debtors in accordance with the Contracts. As of the petition date, Debtors owed Valor approximately \$336,164 and Kerrville \$31,454 for pre-petition services rendered. Debtors continue to accrue monthly charges for services rendered post-petition. If Leucadia receives the benefit of those services, it must also be required to promptly pay for the services which are continuously being provided to Debtors (or Leucadia) on an ongoing basis.

11. The post-petition amounts owed should be paid in full and in cash. Section 503(b) of Title 11 of the Bankruptcy Code provides that “[a]fter notice and a hearing, there shall be allowed administrative expenses, ... including -- the actual, necessary costs and expenses of preserving the estate....” 11 U.S.C. §503(b)(1)(A). While the Bankruptcy Code does not itself elaborate on what constitutes an actual, necessary cost or expense of preserving a debtor’s estate, “[i]f the debtor in possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor in

possession is obligated to pay for the reasonable value of those services which, depending on the circumstances of a particular contract, may be what is specified in the contract.” NLRB v. Bildisco and Bildisco, 465 U.S. 513, 531 (1984) (internal citations omitted).

12. The monthly usage amount is the presumed reasonable value of the services to the debtor in possession. In the absence of evidence to the contrary, Valor and Kerrville are entitled to the usage amount as the reasonable benefit to the Debtors of the use of the services. The Debtors (and Leucadia) should not be permitted to reap the benefit of the use of these services without compensating Valor and Kerrville for such use. Thus, Valor and Kerrville are entitled to payment of an administrative expense claim for the full value of the services rendered and which continue to accrue post-petition, under the Contracts. In addition, administrative expenses which arise under 11 U.S.C. §503(b) are entitled to first priority pursuant to 11 U.S.C. §507(a)(1). The Court has the discretion to order the Debtors to immediately pay an allowed administrative expense claim. See In re Continental Airlines, Inc., 146 B.R. 520, 531 (Bankr. D. Del. 1992). As such, Movants request that the Court enter an Order compelling the Debtors and/or Leucadia, to make immediate payment to Valor in the amount of any accrued post-petition payments as an administrative expense claim as and when they become due.

JOINDER

Because of the commonality of issues involved in determining assumption and rejection of contracts and tariffs, and to avoid duplication of similar pleadings, Valor joins in the motions filed by QCC and Bellsouth.

WHEREFORE, Valor and Kerrville respectfully request that this Court grant the relief requested in the above motion by (1) compelling the Debtors to immediately assume or reject the

Contracts; (2) compelling Debtors (or Leucadia) to cure all defaults under the assumed
Contracts; and (3) granting such other and further relief as deemed just and proper.



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was forwarded by first class mail, postage prepaid, to those persons on the attached service list on the 3rd day of July 2005.



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