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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-HDH-11**
	§	
DEBTORS.	§	**(Chapter 11)**
	§	**(Jointly Administered)**
	§	
	§	**Hearing Requested for September 7,**
	§	**2005 at 2:30 p.m.**

MOTION TO FURTHER EXTEND FOR THIRTY DAYS THE EXCLUSIVE PERIODS DURING WHICH DEBTORS MAY FILE, AND SOLICIT ACCEPTANCES OF, A PLAN AND REPORT PURSUANT TO LOCAL BANKRUPTCY RULE 3016.1

TO THE HONORABLE HARLIN D. HALE, UNITED STATES BANKRUPTCY JUDGE:

The above-referenced debtors and debtors in possession (collectively, the "Debtors")[1] file this Motion to Further Extend for Thirty Days the Exclusive Periods During Which Debtors May File, and Solicit Acceptances of, a Plan and Report Pursuant to Local Bankruptcy Rule 3016.1 (the "Motion") and show as follows:

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[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 estates; 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”) pursuant to 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. The Cases are jointly administered under the Case styled *In re VarTec Telecom, Inc., et al.*, Case No. 04-81694-HDH-11.

FACTUAL BACKGROUND AND REPORT PURSUANT TO LOCAL BANKRUPTCY RULE 3016.1

6. On July 8, 2005 (the “Extension Request Date”), the Debtors filed their Motion to Further Extend for Sixty Days the Exclusive Periods During Which Debtors May File, and Solicit Acceptances of, a Plan and Report Pursuant to Local Bankruptcy Rule 3016.1[Docket No. 1471] (the “Extension Motion”) in which they requested authority to extend the exclusive periods for the Debtors to file a plan through and including October 3, 2005 (the “Exclusive Plan Period”) and for the Debtors to solicit acceptances of such plan through and including December 1, 2005 (the “Exclusive Solicitation Period” and together with the Exclusive Plan Period, the “Exclusive Periods”).

7. After a contested hearing on July 22, 2005, the Court entered its Fourth Order Granting Extension of Exclusive Periods during which Debtors May File and Solicit Acceptances of Plan [Docket No. 1625] in which it extended the Exclusive Plan Period through and including September 7, 2005 and the Exclusive Solicitation Period through and including November 7, 2005.[2]

8. Since the Extension Request Date, the Debtors have focused extensively on, among other things, (i) the sale of substantially all of their remaining assets (collectively, the "Acquired Assets") to Comtel Investments, L.L.C. ("Comtel") under that certain Asset Purchase Agreement dated July 25, 2005 (the "Comtel APA") by and among the Debtors and Comtel; and (ii) issues relating to debtor in possession financing on a going forward basis.[3]

9. After an extensive marketing effort and negotiations with numerous potential stalking horse bidders, on June 17, 2005, the Debtors filed their Motion for Authority to Sell Assets Free and Clear of All Liens, Claims, Rights, Interests, and Encumbrances and for Related Relief (Substantially All of Debtors' Remaining Assets) [Docket No. 1399] (the "Sale Motion"), in which they requested, among other things, approval of the sale of the Acquired Assets (the "Sale") to Leucadia National Corporation ("Leucadia"), or another successful bidder, under an Asset Purchase Agreement (the "Leucadia APA"), or such other agreement executed by the successful

[2] The Court previously extended the Exclusive Periods by various Orders [Docket No. 988, 1366, and 1415].

[3] For a discussion of tasks on which the Debtors focused between the Petition Date and the Extension Request Date, reference is made to the motions at Docket Nos. 900, 1300, and 1471.

bidder. Under the Leucadia APA, Leucadia agreed to pay $61,500,000 subject to a working capital adjustment and to assume certain liabilities.

10. Pursuant to the Court's Order (A) Approving Sale Procedures and Bid Protections in Connection with Sale of Certain Acquired Assets, (B) Scheduling an Auction and Hearing to Consider Approval of the Sale; (C) Approving Notice Relating to Sale; and (D) Granting Related Relief (Substantially All of the Debtors' Remaining Assets) [Docket No. 1446], an auction of the Acquired Assets was held on July 25, 2005. At that auction, the Debtors identified Comtel, with a bid of $82,100,000, as the successful bidder, and after a contested hearing on July 27 and 28, 2005, the Court entered its Order [Docket No. 1663] (the "Sale Order") in which it approved the sale of the Acquired Assets to Comtel under the Comtel APA.

11. Under the Comtel APA, to transfer certain Acquired Assets, including certain executory contracts and unexpired leases, the Debtors will require regulatory approvals, from entities including the Federal Communications Commission ("FCC") and numerous public utility or public service commissions for each State in which the Debtors conduct business ("PUCs"). The Debtors estimate that they will be able to obtain FCC approval within two months after the Sale Hearing (by approximately October 1, 2005) and PUC approval within six months after the Sale Hearing (by approximately February 1, 2006). Promptly after obtaining the necessary FCC and PUC approvals, the Debtors anticipate filing a motion to assume and assign certain executory contracts and unexpired leases. Within a week after the Court hears that

motion (by approximately March 1, 2006), the Debtors expect to have a final closing of the sale of the Assets (the "Final Closing").[4]

12. Pursuant to the Sale Order, it was contemplated that the Rural Telephone Finance Cooperative (the "RTFC") and Comtel would enter into a 100% participation of the existing debtor in possession financing facility. Paragraph 17 of the Sale Order provides,

> RTFC and Buyer have indicated that Buyer will purchase a 100% participation (the "Participation") in the existing debtor in possession financing previously approved by this Court (the "DIP Financing"). Future advances under the Participation shall be used solely for Business Expenses (as defined in the Agreement). Buyer and RTFC agree that, so long as the RTFC interest in the DIP Financing has been satisfied through the Participation, (i) only a default in payment shall be a default under the DIP Financing, (ii) Debtors will be entitled to written notice of any default under the DIP Financing and five business days opportunity to cure same, and (iii) Debtors shall be entitled to seek additional relief from this Court as may be appropriate on an expedited basis. RTFC, Buyer and the Debtors further agree that within 30 days after the purchase of the Participation, unless extended in writing by the Buyer, Debtors and the RTFC (the "Participation Period"), the Buyer and the Debtors intend to enter into a replacement debtor in possession financing facility as contemplated in the Agreement. The expiration of the Participation Period shall not entitle Buyer to pursue rights and remedies against the Debtors and the Debtors may seek such relief from this Court in the event of same to effectuate the debtor in possession financing facility as contemplated in the Agreement.

13. As contemplated in the Sale Order, effective as of August 1, 2005, the RTFC and Comtel Telcom Assets LP ("Comtel Telcom") executed that certain Participation Agreement (the "Participation Agreement")[5] under which Comtel Telcom

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[4] The timeline set forth herein is provided for illustrative purposes only, and it shall not be binding in any respect.

[5] The Debtors executed an Acknowledgement and Consent in connection with the Participation Agreement.

agreed to purchase a 100% participation in the past and future loans made under the Debtor in Possession Financing Agreement (the "Loans").

14. Since the effective date of the Participation Agreement, the Debtors have focused on negotiating separate debtor in possession financing facilities to enable them to finance Business Expenses (as defined in the Comtel APA) and non-Business Expenses. After significant analysis, the Debtors have determined that the implementation of a debtor in possession financing facility to pay Business Expenses will be unnecessary for the time being; sufficient cash flow exists to fund such expenses.

15. However, the Debtors continue to negotiate with the RTFC and Official Committee of Unsecured Creditors (the "Official Committee") to obtain a source of funding for non-Business Expenses, including professional fees and United States Trustee fees, associated with the administration of the Cases. As the Debtors have represented at prior hearings, they view the procurement of a debtor in possession financing facility to pay non-Business Expenses as critical to the future of these Cases, including the filing and confirmation of any plan and the settlement of the claims asserted by independent representatives (collectively, the "IRs").

16. The Debtors continue to believe that the Final Closing Date and the effective date of a plan (the "Effective Date") should occur on or around the same date. To accomplish that objective and to provide the Debtors flexibility in case the FCC and PUC approvals are obtained sooner than expected, the Debtors propose to extend the Exclusive Plan Period through and including October 7, 2005 and the Exclusive Solicitation Period through and including December 9, 2005.

RELIEF REQUESTED

Basis for Relief

17. The Debtors request extensions of the expirations of the Exclusive Plan Period through and including October 7, 2005, and of the Exclusive Solicitation Period through and including December 9, 2005 (collectively, the "Extensions"), without prejudice to their rights to seek further extensions.

18. Bankruptcy Code § 1121(b) states, "Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter." 11 U.S.C. § 1121(b). Pursuant to Bankruptcy Code § 1121(c)(3), upon the expiration of the 120-day exclusive period, a debtor is granted the exclusive right to solicit acceptances of such plan for an additional 60 days.

19. Pursuant to Bankruptcy Code § 1121(d), the Court previously increased the Debtors' exclusive periods as set forth above. *See* 11 U.S.C. § 1121(d) ("On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.").

20. The requested Extensions are necessary to promote the objectives of the Bankruptcy Code. The exclusive periods represent Congress's recognition that the debtor in possession is in the best position to understand and address the interests of all parties involved in a chapter 11 case and that a successful reorganization is most likely when the debtor is given the initial opportunity to balance the interests of creditors and equity holders. *See In re Aspen Limousine Serv., Inc.*, 187 B.R. 989, 993 (Bankr. D. Colo. 1995), *aff'd*, 193 B.R. 325 (D. Colo. 1996) ("[A]n honest and diligent debtor

should be given a first opportunity to get a plan confirmed . . . ."). To achieve this objective and to prepare a balanced and successful plan, a debtor should be given a reasonable opportunity to analyze its assets and liabilities and to formulate and negotiate a feasible plan. Extending a debtor's exclusive periods so that it may negotiate an effective plan with its creditors and allow such creditors input into the process should be beneficial to that debtor's estate.

21. The legislative history indicates that the term "cause" in Bankruptcy Code § 1121(d) "is to be viewed flexibly 'in order to allow the debtor to reach an agreement.'" *In re McLean Indus., Inc.*, 87 B.R. 830, 833 (Bankr. S.D.N.Y. 1987) (citing H.R. Rep. No. 595, 95th Cong., 2d Sess. 231, *reprinted* in 1978 U.S.C.C.A.N. 5963, 6190); *see also In re Public Service Co. of New Hampshire*, 88 B.R. 521, 534 (Bankr. D.N.H. 1988) (stating that chapter 11 was drafted to "afford maximum flexibility to the parties in structuring a plan of reorganization").

22. In determining whether to extend a debtor's exclusive periods under Bankruptcy Code § 1121(d), courts should be guided by the following nine factors: (i) the size of the case; (ii) the necessity for sufficient time to permit the debtor to negotiate the plan and prepare adequate information; (iii) good faith progress towards reorganization; (iv) whether the debtor is paying its bills on time; (v) whether the debtor has demonstrated reasonable prospects for filing a feasible plan; (vi) whether progress has been made in the negotiations between the debtor and its creditors; (vii) the time that has elapsed in the case; (viii) whether an extension of exclusivity is sought to pressure creditors to submit to the debtor's demands; and (ix) whether there are unresolved contingencies. *See In re Express One Int'l, Inc.*, 194 B.R. 98, 100 (Bankr.

E.D. Tex. 1996); *In re Dow Corning Corporation*, 208 B.R. 661, 664-65 (Bankr. E.D. Mich. 1997).

23. Taken as a whole, the above-listed factors overwhelmingly favor granting the further Extensions; and therefore, the Debtors have demonstrated cause to do so.

<u>Factor 1. Size and Complexity</u>

24. The most common basis for granting extensions of the expirations of the exclusive periods under Bankruptcy Code § 1121(d) is the size and complexity of the chapter 11 case. *See Express One*, 194 B.R. at 100; *McClean*, 87 B.R. at 833-35; *In re Texaco, Inc.*, 76 B.R. 322, 326 (Bankr. S.D.N.Y. 1987). The *Pine Run* court stated, "The traditional ground for cause [is] the large size of the debtor and the concomitant difficulty in formulating a plan of reorganization." *In re Pine Run Trust, Inc.*, 67 B.R. 432, 435 (Bankr. E.D. Pa. 1986).

25. The size and complexity of the Cases support the request for the Extensions. As of the Petition Date, the Debtors' schedules identified assets in excess of $800,000,000, liabilities in excess of $590,000,000, and 14,000 creditors (excluding over 104,000 IRs). Among the complicated tasks that the Debtors have addressed and/or are addressing since the Extension Request Date include issues relating to the (i) sale of the Acquired Assets (which generated proceeds in excess of $82,000,000), including the negotiation of the Participation Agreement and the completion of the first closing of such sale, and (ii) debtor in possession financing on a going forward basis.

26. Due to the size of the Debtors and the difficult issues which required their attention prior to the formulation and vetting of a plan, the Debtors need additional time

to file a plan. On that basis, the Debtors respectfully submit that this factor, in and of itself, provides a sufficient basis for the requested Extensions.

Factors 2 and 3. Sufficient Time to Negotiate a Plan and
<u>Good Faith Progress Toward Reorganization</u>

27. A debtor's good faith progress towards reorganization within the "exclusivity" period furnishes objective evidence that the request for extensions is not motivated by ulterior motives, but rather, by a desire to pursue to fruition efforts which may have been initiated and diligently pursued since the commencement of the case. The requisite showing of good faith progress may involve efforts to restructure the business or to engage in negotiations. *In re AMKO Plastics, Inc.*, 197 B.R. 74, 77 (Bankr. S.D. Ohio 1996).

28. Since the commencement of their Cases, the Debtors have been working diligently with the RTFC, the Official Committee, the Official Committee of Excel Independent Representatives, their carriers, and other parties in interest to achieve various tasks necessary to maximize the value of the Debtors' estates. The Debtors believe that the procurement of debtor in possession financing to pay for non-Business Expenses is a condition precedent to the filing of the plan. Without the availability of funds to finance the non-Business Expenses, the effectuation of a plan would be difficult.

29. Recently, the Debtors have had a number of discussions with the Official Committee concerning the prospective plan. The Debtors have solicited the input of the Official Committee and intend to work closely with it during the Exclusive Periods. Additional time to work with the Official Committee to formulate a hopefully consensual plan would benefit all creditors.

30. In light of the good faith efforts made to date, the Debtors respectfully submit that factors two and three favor granting the Extensions so that the Debtors' initial efforts to negotiate a successful plan may continue.

Factor 4. Whether the Debtor Is Paying Its Bills on Time

31. The Debtors are satisfying obligations to their employees, carriers, vendors, landlords, and utility providers in the ordinary course of business as those obligations become due. The Debtors have demonstrated that they can operate as debtors in possession, and the Extensions will not unjustifiably burden the Debtors' creditors.

Factor 7. The Amount of Time Elapsed in the Cases

32. Since the Petition Date, the Debtors have made great strides in maximizing the value of their estates by reducing overhead costs, rejecting executory contracts and unexpired leases, disposing of non-core assets, and obtaining Court approval of the sale of the Acquired Assets. Given the tasks that the Debtors have necessarily accomplished, and the complexity of those tasks, the timing of the filing of a plan as proposed herein is reasonable. Further, the Extensions would not cause unnecessary or undue delay or prejudice any party in interest.

Factor 8. Whether the Extension Is Requested to Pressure Creditors

33. The Debtors' request for the Extensions is not intended to pressure creditors to submit to the Debtors' demands and such Extensions would not prejudice creditors' respective interests. As discussed herein, the Debtors simply have not had adequate time or opportunity to work with the primary parties in interest to develop a thoughtful and effective plan; the Debtors believe the Extensions would allow them to do

just that. Thus, an analysis of this factor favors the grant of such Extensions. *In re Southwest Oil Co. of Jourdanton, Inc.*, 84 B.R. 448, 453 (Bankr. W.D. Tex. 1987).

Other Factors

34. The other three factors set forth in the *Dow Corning* case, *i.e.*, whether there are reasonable prospects for filing a feasible plan, the progress to date in negotiations with creditors and the existence of contingencies, are each discussed in connection with the other factors above. The Debtors respectfully submit that these factors weigh in favor of granting the requested Extensions. The Debtors have achieved a number of objectives since the Petition Date, and it is in the best interest of all parties in interest to permit them to continue their efforts with the exclusive right to file a plan and disclosure statement.

Conclusion

35. Given, among other things, the magnitude of the Debtors' Cases, the complex issues presented, and the progress made to date, ample cause exists for granting the Extensions of the expirations of the Exclusive Periods. Such Extensions are warranted and appropriate under the circumstances. The Debtors should be afforded an opportunity to negotiate, propose and confirm a plan in these Cases. The Debtors hope to use the requested Extensions to, among other things, negotiate debtor in possession financing which is acceptable to the Debtors, RTFC, and Official Committee and confer with the Official Committee concerning the formulation of the plan.

Previous Request

36. As discussed above, the Court previously entered Orders extending the Exclusive Periods.

PRAYER

The Debtors respectfully request that this Court enter an order substantially in the form attached hereto as **Exhibit A** (a) extending the expirations of the periods within which the Debtors may file a plan through and including October 7, 2005 and solicit acceptances thereof through and including December 9, 2005; and (b) granting such other and further relief as may be just and proper.

Dated: September 7, 2005

Respectfully submitted,

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ATTORNEYS FOR THE DEBTORS

CERTIFICATE OF SERVICE

This is to certify that on September 7, 2005, a copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Texas. A separate certificate of service shall be filed with respect to those parties on the Clerk's list who do not receive electronic e-mail service.

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One of Counsel

CERTIFICATE OF CONFERENCE

The Debtors have had telephone conferences with counsel for the RTFC and Official Committee concerning the relief requested herein. Those parties support the requested extensions of the Exclusive Periods.

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One of Counsel

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