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**ATTORNEYS FOR THE DEBTORS**

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

<b>IN RE:</b>	§	
	§	
<b>VARTEC TELECOM, INC., et al.,</b>	§	<b>CASE NO. 04-81694-HDH-11</b>
	§	
<b>DEBTORS.</b>	§	<b>(Chapter 11)</b>
	§	<b>(Jointly Administered)</b>
	§	
	§	<b>Hearing Set for January 3, 2006</b>
	§	<b>at 1:30 p.m.</b>

**MOTION TO APPROVE AMENDMENT TO ATLANTA SWITCH  
SITE LEASE WITH BANK BUILDING LIMITED PARTNERSHIP**

**A HEARING WILL BE CONDUCTED ON THIS MATTER ON JANUARY 3, 2006 AT 1:30 P.M. IN THE COURTROOM OF THE HONORABLE HARLIN D. HALE, UNITED STATES BANKRUPTCY JUDGE, 1100 COMMERCE STREET, 14TH FLOOR, DALLAS, TEXAS. IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING, SPECIFICALLY ANSWERING EACH PARAGRAPH OF THIS PLEADING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY (20) DAYS FROM THE DATE YOU WERE SERVED WITH THIS PLEADING. YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.**

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

The above-referenced debtors and debtors in possession (collectively, the

“Debtors”<sup>1</sup> file this Motion to Approve Amendment to Atlanta Switch Site Lease with Bank Building Limited Partnership (the “Motion”) and in support thereof the Debtors would show as follows:

### **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) and (M).

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. The Debtors’ Cases are jointly administered under the Case styled *In re VarTec Telecom, Inc.*; Case No. 04-81694-HDH-11.

6. On July 29, 2005, the Court entered its Order (A) Approving the Sale Free and Clear of All Liens, Claims, Rights, Interests and Encumbrances to Comtel Investments LLC and (B) Granting Related Relief (Substantially All of the Debtors’ Remaining Assets) [Docket No. 1663] in which it authorized the sale of substantially all

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<sup>1</sup> 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.

of the Debtors' remaining assets to Comtel Investments LLC ("Comtel") under the Asset Purchase Agreement dated July 25, 2005 by and among the Debtors and Comtel (the "APA").

### **FACTUAL BACKGROUND**

7. On June 17, 1996, VarTec Telecom, Inc. ("VarTec") and Bank Building Limited Partnership ("Landlord") entered into that certain lease agreement, as amended (the "Lease") for 3,558 rentable square feet located at 55 Marietta Street, NW, Suite 1620, Atlanta, Georgia (the "Premises"). The Debtors are using the Premises to house their Atlanta switch. The Lease expires by its own terms on February 28, 2006. The current rent under the Lease is \$6,523 per month.

8. The Debtors plan on continuing to need the Premises for their Atlanta switch after February 28, 2006. In furtherance of accommodating the Atlanta switch, the Debtors have negotiated an amendment to the Lease (the "Amendment"). A copy of the Amendment is attached hereto as **Exhibit A**. The Amendment extends the term of the Lease 3 years to February 28, 2009. There is only a 9% increase in rent to \$7,116 per month for the Premises.

9. The Landlord agreed to permit the Debtors to assume or reject the Lease and Amendment as if the Amendment was executed prior to the Petition Date. The Amendment limits the Landlord's administrative claims to only the actual use by the Debtors. Further, the Amendment permits the Debtors to assign the Lease and Amendment upon approval by this Court of such assignment.

10. Moving the Atlanta switch to a different location would be cost-prohibitive to the Debtors. According to the Debtors' employees who work with the Atlanta switch

site, the amount of rent for the entire term of the Amendment is less than the projected cost to move the Atlanta switch.

### **RELIEF REQUESTED**

11. Pursuant to Bankruptcy Code §§ 105, 363, and 364, the Debtors request approval of the execution of the Amendment. Bankruptcy Code § 363(b)(1) provides, “The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1).

12. The proposed use, sale or lease of property of the estate may be approved under Bankruptcy Code § 363(b) if it is supported by sound business justification. *See, e.g., In re Crutcher Resources Corp.*, 72 B.R. 628, 631 (Bankr. N.D. Tex. 1987); *The Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines)*, 780 F.2d 1223, 1226 (5th Cir. 1986) (“[F]or a debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business”).

13. In the exercise of their business judgment, the Debtors have determined that the execution of the Amendment will benefit their estates. The Debtors will continue to need the Premises for the Atlanta switch after the Lease expires. Further, the Amendment’s provisions minimize the risks a debtor typically faces in executing a postpetition agreement. The Amendment is assignable with this Court’s approval. The Debtors have the same ability to reject the Amendment if unforeseen circumstances arise. Lastly, the administrative expenses are limited to the Debtors’ actual usage.

14. Other viable alternatives to the Amendment do not exist. The cost to move the Atlanta switch exceeds the cost for the entire term of the Amendment. These costs would be prohibitive. The execution of the Amendment is the most cost-effective solution available to the Debtors at this time.

15. The Debtors have discussed the Amendment with Comtel Telcom Assets, L.P. ("Comtel"), the purchaser of substantially all of the Debtors' assets subject to regulatory approval, and Comtel agrees that the Amendment should be executed.

16. For these reasons, the Debtors have determined in their business judgment that the Amendment should be executed.

**PRAYER**

The Debtors respectfully request that the Court enter an Order approving VarTec's execution of the Amendment and granting them such other and further relief to which they may be justly entitled.

Dated: December 9, 2005

Respectfully submitted,

**VINSON & ELKINS L.L.P.**  
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By: /s/ Holly J. Warrington  
Daniel C. Stewart, SBT #19206500  
William L. Wallander, SBT #20780750  
Holly J. Warrington, SBT #24037671

**ATTORNEYS FOR THE DEBTORS**

## CERTIFICATE OF SERVICE

This is to certify that on December 9, 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.

Further, this is to certify that on December 9, 2005, a copy of the foregoing document was served by first class mail postage prepaid on the Landlord at the address below.

Bank Building Limited Partnership  
c/o Ultima Holdings, Ltd.  
Building 700  
2255 Cumberland Parkway  
Atlanta, GA 30339

/s/ Holly J. Warrington  
One of Counsel

1043264\_1.DOC

## SECOND AMENDMENT TO LEASE

This agreement is made as of the \_\_\_\_ day of November, 2005, by and between BANK BUILDING LIMITED PARTNERSHIP, a Georgia Limited Partnership ("Landlord") and VARTEC TELECOM, INC. ("Tenant").

### WITNESSETH:

WHEREAS, VARTEC TELECOM, INC. as Tenant and BANK BUILDING LIMITED PARTNERSHIP as Landlord, entered into a Lease agreement dated June 17, 1996, as amended by the First Amendment to Lease Agreement dated February 27, 2001, whereby Landlord demised to Tenant certain premises ("Premises") consisting of 3,558 Rentable Square Feet in the Building ("Building") located on the 16<sup>th</sup> floor (Suite 1620) at 55 Marietta Street, NW in Atlanta (Fulton County), Georgia.

WHEREAS, Landlord is the owner of the building in which the Premises is situated;

WHEREAS, the parties are mutually desirous of extending and amending the aforesaid lease in the particulars hereinafter set forth;

NOW, THEREFORE, for and in consideration of the Premises and of the mutual covenants and conditions herein contained, Landlord and Tenant hereby agree that the Lease shall be amended as follows:

1. The term "Commencement" shall be amended by deleting "March 1, 2001" and substituting the following:

March 1, 2006

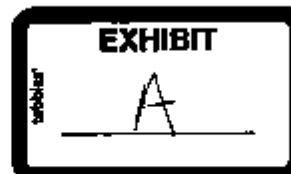
2. The term "Expiration" shall be amended by deleting "February 28, 2005" and substituting the following:

February 28, 2009

3. The "Base Monthly Rental" shall be amended by substituting by the following:

<u>YEAR</u>	<u>\$/PSF</u>	<u>MONTHLY</u>
03/01/06 - 02/28/09	\$24.00	\$7,116.00

4. The effective date of this Third Amendment shall be March 1, 2006.
5. Except as expressly amended hereby, the Lease shall remain in full force and effect between Landlord and Tenant; all terms shall have the same meanings and definitions as ascribed to them in the original agreement; and Tenant's use of the Premises shall be subject to all the terms and conditions thereof. As modified and amended herein, the Lease Agreement is hereby ratified and confirmed by the parties hereto.



6. This Agreement shall be governed by, construed, interpreted and enforced in accordance with the laws of the State of Georgia.
7. This Agreement shall be binding upon, and shall inure to the benefit of the parties hereto and their respective successors, legal representatives and assigns.

IN WITNESS WHEREOF, Landlord has caused this Second Amendment of Lease to be executed under seal by its duly authorized officers and Tenant has executed this Agreement, as of the date first written above.

As to Tenant:  
Signed, sealed and delivered  
In the presence of:

VARTEC TELECOM, INC.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
By \_\_\_\_\_

Its: \_\_\_\_\_

\_\_\_\_\_  
Notary Public

My Commission Expires:

\_\_\_\_\_

As to Landlord:  
Signed, sealed and delivered  
In the presence of:

BANK BUILDING LIMITED PARTNERSHIP,  
a Georgia Limited Liability Partnership

By: Ultima Marietta Holdings, Ltd., general partner

\_\_\_\_\_  
Witness

\_\_\_\_\_  
By: Thomas J. Bauer  
Its: Attorney in Fact

\_\_\_\_\_  
Notary Public

My Commission Expires:





**Addendum A**

This Addendum A is made a part of that certain Lease Agreement, dated as of 17 June, 1966 (the "Agreement") and is incorporated therein by reference.

1. **Bankruptcy Filing.** On November 1, 2004, VarTec and its domestic subsidiaries (the "Debtors" and each a "Debtor") filed petitions under Chapter 11 of the United States Code with the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Cases"). The Bankruptcy Cases are currently being jointly administered under bankruptcy case No. 04-81694-HDH-11 pending before the Honorable Harlin D. Hale, Judge of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court").
2. **Bankruptcy Court Approval.** An express condition to the effectiveness of the Agreement is entry of an Order by the Bankruptcy Court approving this Agreement after notice and hearing, and the Debtors may take all steps necessary to obtain such approval. As used herein the "Effective Date" is the date on which the Bankruptcy Court enters such Order.
3. **Assumption/Rejection.** The Debtors may assume or reject the Agreement upon notice and hearing before the Bankruptcy Court. Any assumption or rejection of the Agreement shall have the same effect as if the Agreement had been entered into prior to the date the Debtors filed their petitions commencing their respective Bankruptcy Cases.
4. **Assignment.** Subject to the assumption provisions above, notwithstanding anything to the contrary herein or in the Agreement, if so authorized by Order of the Bankruptcy Court in the Bankruptcy Cases, VarTec may assign this Agreement, in whole or in part, to any entity into which VarTec may merge or consolidate or that acquires substantially all of VarTec's assets or stock.
5. **Limitation on Administrative Claims.** So long as the Debtors remain under supervision of the Bankruptcy Court and the Agreement shall not have been assigned by the Debtors as provided hereunder, the Debtors and the estates of the Debtors shall incur no claim under or related to the Agreement of an administrative expense priority other than for actual amounts due for the lease actually provided to the Debtors under the Agreement. By way of example, if the Debtors cease utilization of the premises under the Agreement, the Debtors shall be obligated to pay for the term actually used by the Debtors at that point in time, but shall incur no other claim or liability (whether for liquidated damages, general damages, punitive damages, penalties, fees, costs, charges, or otherwise).
6. **Confidentiality.** Nothing in the Agreement shall prevent any Debtor from disclosing the Agreement to the Rural Telephone Finance Corporation, the Official Committee of Unsecured Creditors, or third parties in connection with the reorganization or sale, provided the recipient has entered into a confidentiality agreement with such Debtor prior to such disclosure.

IN WITNESS WHEREOF, Supplier and VarTec have each caused this Addendum A to be signed and delivered by its duly authorized representative.

**BANK BUILDING LIMITED PARTNERSHIP**

**VARTEC TELECOM, INC**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_