

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](mailto:VarTec@velaw.com)

**PROPOSED 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-SAF-11</b>
	§	
<b>DEBTORS.</b>	§	<b>(Chapter 11)</b>
	§	<b>(Joint Administration Requested)</b>

**MOTION TO AUTHORIZE REJECTION OF INDEPENDENT  
REPRESENTATIVE AGREEMENTS AND BRIEF IN SUPPORT**

**NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT EARL CABELL BUILDING, UNITED STATES COURTHOUSE, 1100 COMMERCE STREET, ROOM 1254, DALLAS, TEXAS 75242 BEFORE CLOSE OF BUSINESS ON NOVEMBER 24, 2004, WHICH IS TWENTY (20) DAYS FROM THE DATE OF SERVICE HEREOF.**

**ANY RESPONSE MUST BE IN WRITING AND FILED WITH THE CLERK, AND A COPY MUST BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED A HEARING WILL BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.**

**IF NO HEARING ON SUCH NOTICE OR MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT OR THE NOTICED ACTION MAY BE TAKEN.**

**TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:**

The above-referenced debtors and debtors in possession (collectively, the “Debtors”)<sup>1</sup> file this Motion to Authorize Rejection of Independent Representative Agreements and Brief in Support (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).

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 Dates, 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.

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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.

## **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 received 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.<sup>2</sup> 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

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<sup>2</sup> 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.

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 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.<sup>3</sup>

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 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

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<sup>3</sup> A long distance carrier can also be an ILEC or a CLEC.

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 disputes<sup>4</sup> 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 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.

### **Independent Representative Agreements**

19. As previously stated, through the Multi-Level Marketing channel, the Debtors utilized the services of over 130,000 independent contractors (collectively, the "Independent Representatives") who marketed Excel's products and services to small business and residential consumers and recruited new Independent Representatives to market such products and services. A list of the Independent Representatives is attached hereto as **Exhibit A**. The relationship between the Independent Representatives and the Debtors are evidenced by certain agreements with certain of

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



the Debtors, including Excel Telecommunication, Inc. and Excel Communications Marketing, Inc. (the “IR Agreements”).

20. The IR Agreements fall into three categories. The first (and largest) category involves traditional Independent Representatives, which enter an IR Agreement substantially similar to that attached hereto as **Exhibit B** (the “Category 1 Agreements”). These Independent Representatives receive commissions and bonuses based on, among other things, the success of the Independent Representatives they recruit and a portion of the success of their Downline and the usage of Excel products and services by customers of the Independent Representative and a portion of their Downline.

21. The second category involves training directors, which enter an IR Agreement substantially similar to that attached hereto as **Exhibit C** (the “Category 2 Agreements”). These Independent Representatives receive compensation in consideration for training other Independent Representatives.

22. The third category involves ambassadors, which enter an IR Agreement substantially similar to that attached hereto as **Exhibit D** (the “Category 3 Agreements”). These Independent Representatives receive commissions and bonuses under the Category 1 Agreements plus they may be entitled to a share of a revenue pool.

23. An Independent Representative can be a party to multiple IR Agreements. For instance, a traditional Independent Representative which is a party to a Category 1 Agreement also could be an ambassador which is a party to a Category 3 Agreement and/or a training director which is a party to a Category 2 Agreement.

## **RELIEF REQUESTED**

24. The Debtors have determined to decrease their dependence on the Multi-Level Marketing channel; and therefore, they do not need the services of the Independent Representatives. Pursuant to Bankruptcy Code § 365, the Debtors request authority to reject all of the IR Agreements.

25. Bankruptcy Code § 365 provides that the Debtors, “subject to the Court’s approval, may assume or reject any executory contract and unexpired lease of the debtor.” 11 U.S.C. § 365(a). A debtor operating its business pursuant to Bankruptcy Code §§ 1107 and 1108 must use reasonable judgment in ordinary business matters in its determination of whether to reject executory contracts and unexpired leases.

26. Bankruptcy Code § 365 does not provide a standard for determining when a debtor’s rejection of an executory contract is appropriate. *In re Monarch Tool & Manufacturing Co.*, 114 B.R. 134 (Bankr. S.D. Ohio 1990). However, most courts acknowledge that the business judgment standard should be applied to determine “whether to authorize the rejection of executory contracts”. *In re Federated Department Stores, Inc.*, 131 B.R. 808, 811 (Bankr. S.D. Ohio 1991) (citing, *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 523, 104 S.Ct. 1188, 1194-95, 79 L.Ed.2d 482 (1984), and *Group of Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U.S. 523, 63 S.Ct. 727, 87 L.Ed. 959 (1943)). As one court stated:

[A] bankruptcy court . . . need determine only . . . whether disaffirmance would be advantageous to the debtor. The burden or hardship which rejection would impose on other parties to such a contract *is not* a factor to be weighed by the bankruptcy court in ruling upon the debtor’s application.

*Borman’s, Inc. v. Allied Supermarkets, Inc.*, 706 F.2d 187, 189 (6th Cir.) (dicta), *cert. denied*, 464 U.S. 908, 104 S.Ct. 263, 78 L.Ed.2d 247 (1983) (emphasis added).

Therefore, the Debtors may reject any executory contract provided that they determine, in their business judgment, that rejection would be advantageous to them.

27. To maximize the value of the Excel line of business, the Debtors have determined that they should cease operating that channel under the Multi-Level Marketing model. The commissions paid to the Independent Representatives are not cost effective, and those commissions, in addition to other costs of maintaining the Multi-Level Marketing channel, prevent the Debtors from operating the Excel line of business profitably.

28. To not reject the IR Agreements could result in the incurrence of unnecessary expense; and therefore, the IR Agreements are unnecessary and burdensome.

29. As such, the Debtors request that the Court authorize the rejection of each of the IR Agreements with the Independent Representatives listed on Exhibit A.

### **PRAYER**

The Debtors respectfully request that the Court enter an Order authorizing the rejection of the IR Agreements effective upon the date of entry of an Order on this Motion. 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**

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## **EXHIBIT A**

**PURSUANT TO THE EXPEDITED MOTION TO FILE  
DOCUMENTS UNDER SEAL (INDEPENDENT  
REPRESENTATIVE INFORMATION) - THE DEBTORS  
HAVE REQUESTED THAT THIS EXHIBIT BE FILED  
UNDER SEAL**

## **EXHIBIT B**

# REF CONTROL NO. 8001-1003 INDEPENDENT REPRESENTATIVE APPLICATION AND AGREEMENT U.S.



Excel Telecommunications, Inc.  
P.O. Box 650582, Dallas, TX 75265-0582

**1** SOCIAL SECURITY OR FEIN NUMBER DATE OF BIRTH E-MAIL ADDRESS

THIS NUMBER WILL BE USED FOR TAX REPORTING INFORMATION.

**2** HOME TELEPHONE NUMBER BUSINESS TELEPHONE NUMBER MOBILE PHONE NUMBER

**3** LAST NAME FIRST NAME (enter one name only on this line) M.I.

SPOUSE'S LAST NAME SPOUSE'S FIRST NAME M.I.

BUSINESS NAME *Stop: Complete only if you're signing up as a business entity. Additional documentation is required. See below.*

MAILING ADDRESS (This will be your shipping address for all commissions, correspondence and kits. No P. O. Boxes, please) APARTMENT/SUITE

CITY STATE ZIP CODE

**STOP:** All applications will be verified through Positive Identification. This process matches the name on the application with the Social Security number. To avoid delay, please ensure the name on the application matches the name on the Social Security Card.

- TAX ID Information will be verified with the name on this application. Requirements for Positive Identification follow.
- Corporations – Additional documentation required:**
- Copy of Articles of Incorporation filed stamped by the Secretary of State in the state of Incorporation
  - Full name, address, and Social Security Number of (i) each shareholder of the corporation who owns more than 5% of the outstanding stock of the corporation; (ii) each officer of the corporation; and (iii) each director of the corporation
  - A copy of the official notification from the Internal Revenue Service issuing the Federal Employer Identification Number (FEIN) for the corporation
  - A copy of the corporate resolution authorizing the corporation to enter into the IR Agreement
  - Letter of designation from the corporation designating one individual, who must be at least 18 years of age, as the responsible party for the corporation's operations and sales
- Partnerships – Additional documentation required:**
- A copy of the partnership agreement executed by all partners
  - Full name, address, and Social Security Number of each partner
  - A copy of the official notification from the Internal Revenue Service issuing the Federal Employer Identification Number (FEIN) for the partnership
  - A copy of the consent of the partnership to enter into the IR Agreement with Excel
  - Letter of designation from the partnership designating one individual, who must be at least 18 years of age, as the responsible party for the partnership's operations
- Trusts – Additional documentation required:**
- A complete copy of the trust agreement
  - Full name, address, and Social Security Number of all trustees and beneficiaries
  - A copy of the official notification from the Internal Revenue Service issuing the Federal Employer Identification Number (FEIN) for the trust
  - Letter of designation from the trustees designating one individual, who must be at least 18 years of age, as the responsible party for the trust's operations and sales
- Individuals – Social Security Number and name will be verified.**

**4** **INDEPENDENT REPRESENTATIVE ENROLLMENT** (One box in this section must be selected – please select only one box in section 4.)

**INITIALS** **A. OPTIONAL MANAGEMENT SERVICES PROGRAM.** I elect to enroll in Excel's Optional Management Services Program for \$399. Please waive the fully refundable \$199 deposit. I understand this program includes the Managing Representative Package, the Excel Managing Representative Training Program and Corporate Office Support Services for all current products. In addition, I will receive downline reports and the company newsletter for the entire year. I understand that it is my responsibility to locate and attend an MR training class and that I may call 972-930-0695 for assistance. The training is up to 4 hours in duration regarding Excel customer services, regulatory compliance, and IR procedures and techniques and is conducted by trainers equipped, certified and paid by Excel. (Residents of Connecticut pay \$200, residents of South Carolina and South Dakota pay \$249, and residents of Louisiana and Washington pay \$299.) I UNDERSTAND THAT MY PURCHASE OF THE OPTIONAL MANAGEMENT SERVICES PROGRAM IS NON-REFUNDABLE AFTER 10 DAYS FROM THE DATE THIS AGREEMENT IS RECEIVED BY EXCEL.

**OR**

**INITIALS** **B. SALES ASSOCIATE.** My sponsor has informed me that I may become an Excel Independent Representative by placing a fully refundable \$199.00 deposit and that payment of the \$199.00 refundable deposit is waived if I enroll in Excel's Optional Management Services Program (Option A). (This refundable deposit does not apply to residents of Alabama, Georgia, Kentucky, Louisiana, Minnesota, Nebraska, North Dakota, Pennsylvania, South Dakota, West Virginia, or where prohibited by law.) I understand if I elect not to purchase the Optional Management Services Program, Excel will supply, at no cost, a basic kit with necessary literature and Sales Aids to start my Excel business, including regulatory compliance information. Upon termination of my distributorship and for a period of 90 days thereafter, and upon my written request, Excel will unconditionally refund this \$199 application deposit within 30 days from the date requested.

**5** I hereby apply to become an Independent Representative for Excel Telecommunications, Inc. (Excel) as indicated in the initialed box above in section 4. I have read carefully and agree to be bound by all provisions of the terms and conditions which are printed on the reverse side of this application and all published Policies and Procedures of Excel. My sponsor has explained to me that purchase of the Management Services Program is optional, is not required and is non-refundable after 10 days from the date of this Agreement and that becoming a customer of Excel Telecommunications, Inc. is not required to participate as an Independent Representative.

**Individual – Agreement must be signed** by the individual whose Social Security Number appears on this agreement.

**Corporation – Agreement must be signed** by an authorized officer of the corporation.

**Partnership – Agreement must be signed** by partner authorized to sign on behalf of the partnership.

**Trusts – Agreement must be signed** by all trustees of the trust.

**PrivaCash – I request a prepaid Excel PrivaCash® MasterCard® Card be issued to me and authorize Excel to pay all commissions and/or bonuses due me to the Card and to deduct applicable charges, subject to my acceptance of the Card and Cardholder Agreement.**

APPLICANT'S SIGNATURE

SPOUSE/PARTNER'S SIGNATURE (IF BUSINESS IS CO-OWNED)

**6** SPONSOR'S LAST NAME OR BUSINESS NAME SPONSOR'S FIRST NAME

SPONSOR'S EXCEL GLOBAL ID#

INITIALS

Option: The MR Kit may be shipped to the Sponsor. The new MR whose name appears in Section 3 must approve by initialing here.

## 8 PLEASE INDICATE PAYMENT METHOD AND TOTAL AMOUNT PAID

**7** PLEASE INDICATE OPTION CHOSEN FROM SECTION 4 ABOVE

MR \$399 MR Program \$299 MR Program (WA/LA only) \$249 MR Program (SC/SD only) \$200 MR Program (CT only) SA \$199 SA Deposit

MAKE PAYABLE TO: EXCEL TELECOMMUNICATIONS, INC.

CASHIER'S CHECK CHECK MONEY ORDER CREDIT CARD VISA MASTERCARD AMERICAN EXPRESS

Authorization to Convert Your Check — By sending your completed, signed check to us, you authorize us to copy your check and use the account information to convert it into an electronic fund transfer from your account for the same amount as the check. If the electronic fund transfer cannot be processed for technical reasons, you authorize us to process the copy of your check. DO NOT SEND CASH.

CREDIT CARD ACCOUNT, CHECK OR MONEY ORDER NUMBER EXPIRES

I authorize Excel to charge any amounts owed by me to Excel pursuant to this Agreement against the credit card account listed above. If such credit card account expires or is terminated, I agree to promptly provide Excel with an alternate credit card account number issued by a credit card company acceptable to Excel.

Name on Card (print exactly as on card) Authorized Cardholder Signature

## INDEPENDENT REPRESENTATIVE TERMS OF AGREEMENT

1. I am at least 18 years old and I am legally authorized to work in the United States. I understand that this Agreement is not binding until received and accepted by Excel Telecommunications, Inc. ("Excel"), at its home office in Dallas, Texas. I agree that my relationship with Excel as an Independent Representative ("IR") is that of independent contractor and that I alone determine the nature and extent of my activities and hours. I am not an agent, legal representative, or employee of Excel and I will not misrepresent that I am otherwise. I understand that I may not make purchases or enter into any agreements that will bind Excel. I am responsible for the payment of all federal and state self-employment taxes and any other tax required under any federal, state regulatory or taxing agency. If a Texas resident, I will remit applicable sales taxes with each Sales Aids order.
2. I understand that in order to become an Independent Representative, I do not have to become an Excel customer.
3. As an Excel IR, my primary emphasis is to obtain customers for Excel products and services. I understand that those customers must reach active status within, and remain active for, a specified period of time as a condition of Excel's paying me commissions, bonuses and other payments.
4. As an Excel IR, I understand I am responsible for supporting IRs I sponsor. I agree to maintain monthly support to those IRs in my commissionable down line by way of any of the following, or combination thereof: personal contact, telephone communication, written and/or e-mail communication and attendance at IR meetings.
5. I understand that I will be eligible to receive compensation from Excel as described in the Excel Compensation Plan. I understand that I will only receive commissions from Excel for selling Excel products and services to customers and that neither sponsoring of a new Excel Representative nor the purchase of an Optional Management Services Program results in commissions or bonuses being paid.
6. I understand that purchase of Excel Optional Management Services Program(s) is/are not mandatory and that the programs include an Independent Representative's current sales materials and tools. I UNDERSTAND THAT NO PORTION OF THE PURCHASE PRICE OF AN OPTIONAL MANAGEMENT SERVICES PROGRAM IS REFUNDABLE AFTER TEN (10) DAYS FROM THE DATE OF RECEIPT OF THIS AGREEMENT BY EXCEL. CANCELLATION MUST BE POSTMARKED OR RECEIVED BY EXCEL NO LATER THAN MIDNIGHT OF THE TENTH DAY AFTER THE DATE OF EXCEL'S RECEIPT OF THIS AGREEMENT. ADDRESS ANY OVERNIGHT DELIVERY SERVICE OR WESTERN UNION TELEGRAM TO: EXCEL TELECOMMUNICATIONS INC., CUSTOMER RELATIONS, 16675 ADDISON ROAD, ADDISON, TEXAS 75001. I UNDERSTAND THAT VERBAL CANCELLATION REQUESTS AND CANCELLATION REQUESTS MADE TO AN EXCEL INDEPENDENT REPRESENTATIVE WILL NOT BE ACCEPTED. Special refund provisions for Sales Aids purchased from Excel's Corporate Headquarters apply to me if I am a Georgia resident and an Excel Independent Representative. I can call Excel Representative Services for details. Other Sales Aids purchased from Excel's Corporate Headquarters will be repurchased by Excel at 90% of the purchase price if a request for repurchase is made in writing and such Sales Aids are returned to Excel in a commercially re-usable condition within 30 days of purchase. (For New Mexico and Montana resident Representatives, the time limit is one year; for Georgia and Wyoming Representatives, there is no time limit. Limited refund provisions may apply as to Georgia residents regarding the purchase of training and other services.)
7. Whether or not I enroll in an Optional Management Services Program, Excel will provide me (1) training on telecommunications regulatory requirements, including state and federal law regarding slamming, cramming and customer privacy, including Customer Proprietary Network Information (CPNI); (2) training regarding ethical business and sales practices; (3) a new IR packet of sales literature; and (4) information regarding calculation and payment of IR commissions and other payments and bonuses. I must attend and certify my attendance at the above-referenced training in order to earn commissions and other payments, if applicable. Excel will pay me pursuant to the Excel Compensation Plan, which is incorporated herein by reference.
8. If I enrolled in an Excel Optional Management Services Program, I will receive the corresponding Managing Representative Package(s) of literature and Sales Aids, downline reports and Excel newsletters for the next twelve (12) months and I will be provided training. I understand and agree that the annual renewal fee for the Optional Management Services Program(s) is currently \$199.00. I also understand and agree that if I choose not to enroll in an Excel Optional Management Services Program at this time, I will be charged for these services when and as I request them and they are provided to me.
9. I will not make purchases from Excel as an IR, in excess of \$495.00 during the first six (6) months of this Agreement if I am a resident of the states of Georgia, Indiana, Iowa, Maine, Michigan, North Dakota, or West Virginia. If there is a conflict between a policy concerning purchases from Excel and any law, such law shall govern and Excel's remaining policies shall continue in full force and effect at Excel's option. Permissible purchases shall be automatically modified to comply with the exemption requirements set forth in any states' laws regulating business opportunities.
10. I agree to abide by and act in accordance with the Excel Policies and Procedures, and all other Excel terms and conditions of use for any Excel product and/or service (referred to collectively as "Policies and Procedures"), all of which are incorporated into and made a part of this Agreement. Excel reserves the right to modify its Policies and Procedures, IR Compensation Plan, and applicable program and renewal fees. Such modifications shall become a binding part of this Agreement. Publication of such changes in MyExcel for Representatives or by other means as Excel determines is appropriate shall be deemed notice to me. I agree that I will periodically review such Policies and Procedures to be aware of such modifications. My representation myself as an Excel IR and/or continuing to receive commissions and other payments from Excel will be deemed my conclusive acceptance of the modified Excel Policies and Procedures. I agree, in carrying out the duties and responsibilities set forth in this Agreement, that all expenses incurred arising out of the performance of this Agreement will be my sole responsibility.
11. "Slamming" is the unauthorized conversion of telephone service from a customer's current carrier to a new carrier. "Cramming" is the placement of unauthorized, misleading or deceptive charges on a customer's telephone bill. I understand that slamming a customer to Excel service, and cramming, are strictly prohibited by Excel's Policies and Procedures and will result in the immediate termination of Representative status and forfeiture of all commissions, pending and future. Slamming and cramming are illegal under federal law and in every state and may carry criminal penalties. I further understand that Excel may refer Representatives who slam or cram customers for criminal prosecution. If Excel determines that I have slammed or crammed a customer, Excel will terminate my IR position immediately and withhold from me all commissions and other payments, pending and future. I shall indemnify and hold harmless Excel and its parents, subsidiaries and affiliated companies, and their respective officers, directors, shareholders and employees, from any liability resulting therefrom, including any legal fees, fines or penalties.
12. I hereby acknowledge and agree to fully explain the three (3) day cancellation policy (five (5) days in Alaska), as well as any cancellation policy applicable to any Excel product and/or service, to each potential Excel customer prior to selling any product and/or services to such customer.
13. I understand that without prior approval in writing from Excel, I may not create or disseminate audio or video recordings, develop materials, or place advertisements of any kind in any medium regarding Excel products or services or the Excel Opportunity for use in soliciting or attracting customers and/or Independent Representative(s) and/or Training Director(s). I understand that all proprietary rights in the names, logos, trademarks, service marks, business methods and copyrighted materials of Excel and/or its parents, subsidiaries and affiliated companies are expressly reserved to Excel and/or such companies, and I agree that I will not use, reproduce, modify, distribute or display such proprietary materials in any manner except as permitted by Excel's Policies and Procedures or as otherwise pre-approved in writing by Excel.
14. I agree that I will not divulge, in whole or in part, the business secrets of Excel Telecommunications, Inc., Excel Communications Marketing, Inc., or of any of its parents, subsidiaries or affiliated companies to third persons, nor shall I utilize such business secrets for any purpose. The term "business secrets," as utilized in this Agreement, includes but is not limited to the names and addresses of Excel customers, Independent Representatives and Training Directors and all lists associated therewith; the present and planned products, services and pricing thereof of Excel; the present and future organizational, compensation and sales programs of Excel; and non-public financial information and data concerning Excel and/or its parent, subsidiaries or affiliated companies and their respective officers, directors, employees and shareholders.
15. I understand and agree that customers I procure as an Excel Independent Representative are customers of Excel and/or its affiliates. In consideration of the commissions, bonuses, training, administrative support, and other benefits I receive as an Excel IR, I agree that during the term of my IR relationship with Excel, and for one year thereafter, I will not, directly or indirectly, on behalf of myself or any company that offers telecommunications services via a network marketing sales channel, offer or sell services that compete with those offered by Excel and/or its affiliates, or otherwise solicit, direct, take away or interfere with any of the customers, Independent Representatives, employees, trade or patronage of Excel or of its parents, subsidiaries or affiliated companies that offer telecommunications services. I understand and agree that violation of this provision will result in forfeiture of my IR rights, including all pending and future commissions, bonuses and payments of any kind.
16. I understand that Excel may audit my IR or Training Director Business Presentations and Trainings to ensure compliance with Excel's Policies and Procedures, and I agree and consent to such audits and to Excel's use of recording devices in connection with such audits, as well as to the taping of such business and training meetings, with or without prior notice.
17. I hereby give Excel unlimited, irrevocable, worldwide right, permission and license to use my name, likeness, biographical information and any statement that I may make, and those of my family, at its sole discretion and at any time without notice and without compensation in connection with Excel-related opportunities.
18. I agree to indemnify and hold harmless Excel Telecommunications, Inc., Excel Communications Marketing, Inc., and their parents, subsidiaries and affiliated companies, and their respective officers, directors, shareholders and employees, jointly and severally, from and against any and all alleged claims, damages, expenses, fines or penalties, including any attorney's fees, arising out of or relating to my actions or conduct in violation of this Agreement. I agree further that none of the aforementioned entities shall be liable, jointly or severally, to the Representative for: (a) any loss or damage incurred by the Representative arising in connection with the performance of Excel's obligations to its customers, including the provision of products or services; (b) economic loss, including without limitation loss of profits, revenues, or anticipated income; (c) loss of goodwill or business opportunity; or (d) for any indirect, special, punitive, incidental or consequential loss or damages, howsoever arising.
19. I understand this Agreement is non-transferable except as expressly set forth in the Policies and Procedures and that my performance as an IR may not be delegated to third persons, although from time to time I may have others assist me in my IR business as I wish.
20. I may terminate this Agreement for any reason, at any time, by giving Excel not less than 30 days written notice at the address below. Excel may terminate this Agreement pursuant to its Policies and Procedures or in the event that I breach any part of this Agreement.
21. All correspondence, except as otherwise stated herein, should be sent to Excel Telecommunications, Inc., P.O. Box 650582, Dallas, Texas, 75265-0582. Any overnight packages or certified mail should be addressed to EXCEL TELECOMMUNICATIONS, INC., 16675 ADDISON ROAD, ADDISON, TEXAS 75001.
22. IRs conducting business in foreign countries must adhere to the country specific Terms and Conditions of that country's IR Agreement and its Policies and Procedures. It is the IR's obligation to obtain the relevant Agreement Terms and Conditions and its Policies and Procedures. Compensation will be based upon the compensation plan of the specific country and be subject to conversion to U.S. funds.
23. I represent and affirm that I have not received any representation or statement from Excel or any other person upon which I have relied in entering into this Agreement in the effect that: the business may, can, or will generate income, or be profitable that any investment in training, product, services and/or Sales Aids or otherwise or any portion thereof may be earned back or through the operation of the position; that any present market exists for Excel training; that Excel will buy back any purchased inventory; or otherwise make up any financial losses which may occur; that any particular product will be offered; or that Excel or any person acting on behalf of Excel has outlets or sales for Excel training or will assist in obtaining outlet or sales for Excel training.
24. This Agreement or any related agreement shall be governed by and construed and enforced under the laws of the State of Texas without regard to conflicts of law principles. I understand and agree that any claim, dispute or other difference between me and Excel or its parents, subsidiaries and affiliated companies, including but not limited to those arising out of or relating to this Agreement or any related agreements, including those based on or arising from an alleged tort, shall be exclusively resolved by binding arbitration, with each party bearing its own costs, and shall be conducted pursuant to the Commercial Arbitration Rules of the American Arbitration Association, with arbitration to occur at Dallas, Texas, without regard to the Representative's state of residence. (For Louisiana resident Representatives only, arbitration is held in New Orleans, Louisiana.) In any action or proceeding arising out of this Agreement that is not submitted to binding arbitration, the party prevailing in such action shall be entitled to recover its reasonable attorney fees and costs. This provision shall not restrict Excel from seeking preliminary or permanent injunctive relief in any court of competent jurisdiction.
25. This Agreement, including the Excel Policies and Procedures as modified from time to time, and other terms and conditions of use which are incorporated herein by reference, constitutes the entire agreement between the parties hereto, supersedes prior or existing oral or written IR agreements between the parties, and no other additional promises, representations, guarantees, or agreements of any kind, whether oral or written, shall be valid unless expressly agreed to in writing and signed by an authorized officer from Excel's Corporate Headquarters. In the event of a conflict between the Excel Policies and Procedures and any provision(s) herein, the provision(s) herein shall be deemed controlling.