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**SPECIAL COUNSEL TO THE DEBTORS**

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

**IN RE:**

**VARTEC TELECOM, INC., *et al.*,**

**DEBTORS.**

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**CASE NO. 04-81694-HDH-11**

**(Chapter 11)  
(Jointly Administered)**

**DEBTORS' NINTH MOTION TO AUTHORIZE REJECTION OF CERTAIN  
CIRCUIT AGREEMENTS WITH SBC TELEPHONE COMPANIES**

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

**Notice Under Rules for Complex Chapter 11 Cases**

**A HEARING WILL BE CONDUCTED ON THIS MATTER ON JANUARY 23, 2006 AT 1:30 P.M. IN JUDGE HALE'S COURTROOM, UNITED STATES BANKRUPTCY COURT, 1100 COMMERCE STREET, 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.**

The above-referenced debtors and debtors in possession (collectively, the "Debtors")<sup>1</sup> file Debtors' Ninth Motion to Authorize Rejection of Certain Circuit Agreements with SBC Telephone Companies (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 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.

### **STATEMENT OF FACTS**

#### **VarTec and Its Businesses**

6. VarTec Telecom, Inc., a Texas corporation, ("VarTec") along with its sixteen direct and indirect domestic subsidiaries, each of which is a Debtor, and two remaining non-

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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.

debtor direct and indirect foreign subsidiaries, is among the largest privately held companies providing telecommunications services in North America. As of the Petition Date, VarTec's revenues had been derived primarily from three sale-distribution channels: (a) Direct Marketing; (b) Commercial Services; and (c) Multi-Level Marketing.

### **Circuit Agreements**

7. Under various agreements, certain telecommunication service providers lease or provide the Debtors access to a number of telecommunication circuits that are used to transmit voice and data (collectively, the "Circuits"). The majority of such agreements were created through one of the Debtors opting into tariffs that were filed with the respective state public utilities commission by certain ILECs. Accordingly, the ILECs' tariffs that created the ILEC agreements are of public record as filed in each respective state. The Debtors have identified 18 Circuits (collectively, the "Designated Circuits") in Exhibit A attached to this Motion. The Designated Circuits have disconnection dates ("Disconnection Dates") that are specified in Exhibit A.<sup>2</sup>

8. The Designated Circuits are not necessary to the Debtors' reorganization or continued operations. Accordingly, the Debtors request authority to reject the executory contracts under which these Designated Circuits are provided (collectively, the "Agreements") effective as of the Disconnection Dates listed in Exhibit A.

### **RELIEF REQUESTED**

9. Pursuant to Bankruptcy Code § 365, the Debtors seek authority to reject the

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<sup>2</sup> The Providers notified the Debtors of the Disconnection Dates listed in Exhibits A, or the Debtors have otherwise verified the Disconnection Dates listed. The dates were those on which the respective Designated Circuits were, were to have been, or are to be disconnected according to the Providers.

Agreements effective as of the Disconnection Dates described above.<sup>3</sup> 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.

10. Bankruptcy Code § 365 does not provide a standard for determining when a debtor's rejection of an executory contract or unexpired lease 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 and unexpired leases." *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 (1984) and *Group of Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U.S. 523 (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 (1983) (emphasis added). Therefore, the Debtors may reject any executory contract or unexpired lease provided that they determine, in their business judgment, that rejection would be advantageous to them.

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<sup>3</sup> Rejection is restricted to Agreements for the Designated Circuits. By this Motion, the Debtors are not rejecting agreements for any Circuits other than Designated Circuits.

11. The Debtors have determined, in their business judgment, that the Agreements for Designated Circuits are unnecessary to their operations or to effect successful reorganization of their businesses, and the failure to reject the Agreements in the manner described in this Motion could result in unnecessary expense to the estates. The Agreements do not benefit any of the Debtors' estates.

**PRAYER**

The Debtors respectfully request that the Court enter an order authorizing the rejection of the Agreements effective as of their respective Disconnection Dates as more particularly described in this Motion, with any costs of retrieval of any SBC equipment to be borne by SBC. The Debtors also request such other and further relief to which they may be justly entitled.

Dated: December 29, 2005.

Respectfully submitted,

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By:     /s/ Michael L. Scanlon      
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**SPECIAL COUNSEL TO THE DEBTORS**

**CERTIFICATE OF SERVICE**

This is to certify that on December 29, 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 will be filed with respect to those parties on the Master Service List who do not receive e-mail service.

*/s/Michael L. Scanlon* \_\_\_\_\_

Michael L. Scanlon