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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 Set for June 1, 2006**
	§	**at 1:30 p.m.**

MOTION TO APPROVE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES (VARIOUS CONTRACTS)

A HEARING WILL BE CONDUCTED ON THIS MATTER ON JUNE 1, 2006 AT 1:30 P.M. IN THE COURTROOM OF THE HONORABLE HARLIN D. HALE, 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")[1] file this Motion to Approve Assumption and Assignment of Executory Contracts and Unexpired Leases (Various Contracts) (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 matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

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 have been jointly administered under Case No. 04-81964-HDH-11.

STATEMENT OF FACTS

Sale of the Acquired Assets to Comtel

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

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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.

Investments LLC and (B) Granting Related Relief (Substantially All of the Debtors' Remaining Assets) [Docket No. 1663] (the "Comtel Sale Order") in which it approved the sale to Comtel Investments LLC of substantially all of the Debtors' remaining operating assets (the "Acquired Assets") pursuant to the Asset Purchase Agreement dated July 25, 2005 (the "Comtel APA")[2] by and among the Debtors and Comtel Investments LLC. Comtel Telcom Assets, LP ("Comtel") is the assignee of Comtel Investments LLC with respect to the Comtel APA. Because of the need to obtain various regulatory approvals, the closing of the Comtel APA will take place in three steps, which will culminate in the Final Closing.

7. Section 5.11(c) of the Comtel APA provides, in relevant part,

> Prior to the Final Closing, Buyer shall, from time to time, designate in writing to Parent those Assumed Contracts which Buyer desires to have assumed by the Sellers and assigned to Buyer by Sellers which designation shall include the maximum Cure Cost for each such Assumed Contract (each a "Designation"). Sellers shall, promptly after receiving the Designation and upon the satisfaction of the conditions set forth in Section 6.6(a), file a motion pursuant to Section 365 of the Bankruptcy Code to assume and assign the Assumed Contracts identified in the Designation as of the Final Closing Date, and shall use its commercially reasonable efforts to obtain the approval of such assumption and assignment on such terms and conditions designated by Buyer. In the event that any Contract designated by Buyer is not assumable on the terms and conditions set forth in the Designation, including the maximum Cure Costs, then, at Buyer's sole option, such Contract shall not be an Assumed Contract.

Comtel APA, § 5.11(c).

8. Under the Comtel APA, "Assumed Contracts" generally include all of the Debtors' executory contracts and unexpired leases that existed as of the date of the execution of the Comtel APA and those agreements that have been and will be entered

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[2] Capitalized terms not defined herein shall have the meaning given to them in the Comtel APA.

into between the date of the execution of the Comtel APA and the Final Closing Date. *Comtel APA*, § 2.1(d).

Designation of Assumed Contracts

9. The Debtors and Comtel are involved in the process of identifying Assumed Contracts designated to be assumed by the Debtors and assigned to Comtel as of the Final Closing. To that end, Comtel has made the Designation of the Assumed Contracts identified on the table attached hereto as **Exhibit A** (collectively, the "Designated Contracts"). The Designation identifies the names and addresses of the parties to the Designated Contracts, descriptions of the Designated Contracts, and the proposed cure payment to be made to the respective parties to the Designated Contracts. In those circumstances in which the proposed cure payment is identified as $0.00 on Exhibit A, either the actual arrearage is $0.00 or the respective party to the Designated Contract has agreed to waive any claims against the Debtors and/or Comtel.

RELIEF REQUESTED

Assumption and Assignment of the Designated Contracts

10. Pursuant to Bankruptcy Code § 365, the Debtors request authority to simultaneously assume the Designated Contracts and assign the same to Comtel effective upon the Final Closing.

11. A debtor in possession may assign an executory contract and unexpired lease only if it first assumes that contract or lease. 11 U.S.C. § 365(f)(2). Bankruptcy Code § 365(a) provides a debtor in possession authority to assume an executory contract or unexpired lease under certain circumstances: "[T]he trustee, subject to the

Court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a).

12. Bankruptcy Code § 365(b)(1) further states:

> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
>
> > (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
> >
> > (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
> >
> > (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

13. Bankruptcy Code § 365 does not provide a standard for determining when a debtor in possession can assume an unexpired lease. Courts have held that "the act of assumption must be grounded, at least in part, in the conclusion that maintenance of the contract is more beneficial to the estate than doing without the other party's services." *See MMR Holding Corp. v. C & C Consultants, Inc. (In re MMR Holding Corp.)*, 203 B.R. 605, 612 (Bankr. M.D. La. 1996).

14. To assess whether the unexpired agreement is beneficial to the estate, the debtor in possession must "take full account" of the cost incurred to cure the existing defaults. *See Century Indemnity Co. v. NGC Settlement Trust (In re National Gypsum Co.)*, 208 F.3d 498, 506 (5th Cir. 2000) (citing *Three Sisters Partners, L.L.C. v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843, 849 (4th Cir. 1999)).

15. Under the Comtel APA, as approved by the Court, Comtel has a right to identify executory contracts and unexpired leases to be assumed and assigned to it by the Debtors. *Comtel APA*, §5.11(c). After receiving a Designation and the satisfaction of other conditions set forth in the Comtel APA, the Debtors are obligated to file a motion to assume and assign those executory contracts and unexpired leases designated by Comtel, which assumption and assignment should be effective as of the Final Closing. *Id*. The Comtel APA further provides that the following constitute an Assumed Liability payable by Comtel: "all liabilities, obligations and commitments of each Seller for all cure, compensation and reinstatement costs or expenses of or relating to the assumption and assignment of the Assumed Contracts, as and to the extent required under Section 365 of the Bankruptcy Code." *Comtel APA*, § 2.3(a)(v).

16. As the Comtel APA has been approved by the Court and the Comtel APA provides Comtel the right to designate certain executory contracts and unexpired leases for assumption and assignment, the Debtors can demonstrate the requisite benefit to their estates to justify the assumption of the Designated Contracts. Because the costs to cure any arrearages under the Designated Contracts – which have been identified in the attached Exhibit A – will be borne by Comtel and the Designated Contracts will not be assumed until the Final Closing, the assumption of the Designated Contracts will not be detrimental to the Debtors. In fact, the Debtors will benefit from the assumption of the Designated Contracts because a number of potential general unsecured claims will be extinguished as a result of such assumption.[3]

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[3] The providing of adequate assurance of future performance, as required under Bankruptcy Code § 365(b)(1)(C), is discussed in further detail below.

17. A debtor in possession may assign an unexpired lease under Bankruptcy Code § 365(f)(2) only if:

> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
>
> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

18. Comtel provides the parties to the Designated Contracts adequate assurance of future performance. The Court in *In re Texas Health Enterprises, Inc.* stated, "Adequate assurance of future performance 'is to be given a practical, pragmatic construction based upon . . . the circumstances of [the] case.'" 246 B.R. 832, 834 (Bankr. E.D. Tex. 2000) (quoting *In re Prime Motor Inns, Inc.*, 166 B.R. 993, 997 (Bankr. S.D. Fla. 1994)). The *Texas Health* court continued, "Assurance of future performance is adequate if performance is likely (i.e. more probable than not) and the degree of assurance necessary to be deemed adequate 'falls considerably short of an absolute guaranty." *Id*. (citing *In re PRK Enterprises, Inc.*, 235 B.R. 597, 603 (Bankr. S.D. Tex. 1999)) (internal citations omitted).

19. Comtel is a financially stable entity that is familiar with the Debtors' operations. For the past several months, Comtel has served as manager of the Debtors' business. Many of the employees responsible for overseeing the performance under the Designated Contracts post-Final Closing will be the same as the employees performing that task pre-Final Closing. Therefore, the employees and Comtel are familiar with their obligations under the Designated Contracts.

20. For the reasons discussed above, the assumption of the Designated Contracts and assignment of the same to Comtel should be approved effective as of the Final Closing.

No Post-Final Closing Liability of the Debtors' Estates

21. The proposed cure payment identified in **Exhibit A** shall be in ***full and final satisfaction of all arrearages under the respective Designated Contracts***. Further, pursuant to Bankruptcy Code § 365(k), after the assignment of the Designated Contracts, the Debtors and their estates shall be relieved "from any liability for any breach of such contract or lease occurring after such assignment." 11 U.S.C. § 365(k).

Reservation of Rights

22. At any time prior to the Court's entry of an Order approving this Motion, if Comtel revokes its designation with respect to any Designated Contract prior to Final Closing, the Debtors reserve the right to remove such executory contract or unexpired lease from the list of Designated Contracts to be assumed and assigned to Comtel effective as of the Final Closing. Thereafter, the Debtors may choose to assume, assume and assign, or reject such removed Designated Contract.

Waiver of Bankruptcy Rule 6006(d)

23. In contemplation of a prompt Final Closing of the sale of the Acquired Assets, the Debtors request that the Court waive the 10-day stay of Rule 6006(d) of the Federal Rules of Bankruptcy Procedure.

Service of Motion

24. As approved by the Court, a copy of this Motion will be served via the Court's electronic case filing system and United States mail, postage prepaid upon the

parties identified on the Debtors' master service list and on the Electronic Case Filing system. A notice, which will be substantially in the form that has been approved by the Court, will be served via United States mail, postage prepaid upon the parties to Designated Contracts.

PRAYER

The Debtors respectfully request that the Court enter an Order authorizing them to simultaneously assume Designated Contracts and assign the same to Comtel effective as of the Final Closing and granting the Debtors such other and further relief to which they may be justly entitled.

Dated: May 8, 2006

Respectfully submitted,

VINSON & ELKINS L.L.P.
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Tel: 214.220.7700
Fax: 214.220.7716

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 May 8, 2006, 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.

/s/ Holly J. Warrington
One of Counsel

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EXHIBIT A

No.	Supplier Name	Address	Contract Description	Maximum Cure Cost	Assignment Fee
1	Micromuse, Inc.	139 Townsend St. San Francisco, CA 94107	License Agreement SB 980106, all associated Download Certificates, amendments and Purchase Orders related thereto	$0	
2	Nortel Networks Inc.	200 Summit Lake Dr., 4th Floor Valhalla, NY 10595	Purchase and License Agreement effective August 25, 2000, Technical Information Agreement effective January 11, 2001, Software License Prism - Englewood, CO effective May 9, 2001, Software License Prism - Houston effective May 10, 2001, all associated amendments and Purchase Orders related thereto	$0	$650,000 Settlement Fee
3	DPAC, LLC d/b/a PacificNet (IP Applications (Canada) Corp.)	601 Sixth St., Suite 400 New Westminster, B.C. V3L, 3C1	Master Services Agreement dated April 1, 2003, all amendments and Purchase Orders related thereto	$0	
4	Lufkin-Conroe Telephone Exchange, Inc.	P. O. Box 909 321 N. First Lufkin, TX 75902	Billing and Collection Agreement dated June 6, 1996, Billing and Collection Agreement dated June 17, 1997, Billing and Collections Agreement dated July 19, 1997, Account Maintenance Service Agreement dated August 20, 1997, Account Maintenance Service Agreement dated June 6, 1996 and all amendments related to those agreement	$0	
5	NECA Services, Inc.	80 South Jefferson Road Whippany, NJ 07981	Agreement for the Provision of Billing and Collection Services effective July 1, 2001	$0	
6	Fujitsu Network Communications, Inc.	2801 Telcom Parkway Richardson, TX 75082	NetSmart License Agreement	$0	$5,000 assignment fee
7	Hyperion	900 Long Ridge Road Stamford, CT 06902	Software License and Services Agreement dated September 5, 2002, all amendments and Purchase Orders related thereto	$7,828	
8	CyberCity Teleservices, LTD	401 Hackensack Ave. Hackensack, NJ 07601	Statement of Work # 2 for Outbound Residential Collections/Calling Services dated May 1, 2006 and Statement of Work # 3 for Back-Office Correspondence and Invoice Reprints effective May 8, 2006	$0	

EXHIBIT A

No.	Supplier Name	Address	Contract Description	Maximum Cure Cost	Assignment Fee
9	ILD	16200 Addison Rd., Suite 100 Addison, TX 75001	Operator Services Agreement dated July 21, 2003, all amendments and P.O.s related thereto	$0	
10	Voicecom Telecommunications, LLC d/b/a Intelliverse	5900 Windward Parkway, Suite 500 Atlanta, GA 30005	Wholesale Services Agreement and all related Purchase Orders	$0	
11	ILOG, Inc.	1080 Linda Vista Ave. Mountain View, CA 94043	License Agreement, dated May 31, 2002, all amendments and P.O.s related thereto	$0	
12	Actuate Corporation	999 Baker Way, Suite 200 San Mateo, CA 94404	Software License Agreement For Actuate Software, dated December 4, 2000	$0	
13	EMC2, Inc.	171 South Hopkinton, MA 01784	Terms and Conditions for Continuous Coverage Product Maintenance effective March 5, 2004, Basic Ordering Agreement reference Number 205990 effective September 27, 2001all amendments and Purchase Orders related thereto	$0	
14	Equifax Information Services, LLC	1550 Peachtree St. NW Atlanta, GA 30309	Small Business Enterprise (SBE) Data Access Agreement effective April 25, 2006	$0	
15	C T Cube LP d/b/a West Central Wireless	P.O. Box 991 San Angelo, TX 76902	Traffic Termination Agreement dated April 26, 2006	$0	
16	Covista Communications, Inc.	771 Broad St., 3rd. Floor Chattanooga, TN 37402	First Amendment to Traffic Termination Agreement, dated April 26, 2006	$0	
17	Cross Fire and Security Co., Inc.	1756 86th Street Brooklyn, NY 11214	Mutual Non Disclosure Agreement dated January 1, 2006	$0	
18	The Rand Group, LLC	6575 West Loop South, Suite 215 Bellaire, TX 77401	Master Services Agreement dated November 14, 2005	$0	
19	Complete Communications Services, Inc.	197 Cahaba Valley Parkway Pelham, AL 35124	Agreement for Inside Wiring Services dated February 3, 2006 and all Purchase Orders related thereto	$0	
20	Ulticom Software Advancing Communications	1020 Briggs Road Mt. Laurel, NJ 08054	Assignment of Licenses effective February 2, 2004, Sublicense #s DP505A02D082001, DP505A02D082002, SP504A01D060672, SP504A01D060673 for Signalware on Solaris	$0	

EXHIBIT A

No.	Supplier Name	Address	Contract Description	Maximum Cure Cost	Assignment Fee
21	American Teleconferencing Services, Ltd. d/b/a Premier Global Services	3399 Peachtree Road, Suite 700 Atlanta, GA 30326	Premier Global Wholesale Agreement dated March 15, 2006 and all associated amendments thereto	$0	
22	Constellation New Energy, Inc.	1221 Lamar St., Suite 750 Houston, TX 77010	Schedule A, Proposal # 51014103217763073, effective October 14, 2005	$0	
23	Constellation New Energy, Inc.	1221 Lamar St., Suite 750 Houston, TX 77010	Master Electricity Supply Agreement, effective May 31, 2005 and General Terms and Conditions for Electricity Supply, effective May 31, 2005	$0	
24	UCN, Inc.	14870 S. Pony Express Road Bluffdale, UT 84605	Traffic Termination Agreement dated February 6, 2006	$0	
25	Communications Distributors, Inc.	1408-B Stonehollow Sr., Suite 100 Kingwood, TX 77339	Telecommunications Service Agreement dated May 17, 2005	$0	
26	Citizens Telecom Services LLC	180 South Clinton Ave. Rochester, NY 14646	Mutual Non Disclosure Agreement dated May 1, 2006	$0	
27	Kevin Pringle	2740 Road S. Admire, KS 66830	Master Consulting Agreement dated May 1, 2006	$0	
28	Sybase	5000 Hacienda Dr. Dublin, CA 94568	Software License Agreement dated April 2, 2003	$53,735	