

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	Case No. 01-10005 (RJN)
AXISTEL COMMUNICATIONS, INC.,	)	Jointly Administered
NOVO NETWORKS GLOBAL SERVICES, INC.,	)	
NOVO NETWORKS INTERNATIONAL SERVICES, INC.,	)	Objection deadline: to be determined
E.VOLVE TECHNOLOGY GROUP, INC.,	)	
NOVO NETWORKS OPERATING CORP.,	)	Hearing date: to be determined
	)	
Debtors.	)	

**EXPEDITED MOTION FOR ENTRY OF AN ORDER  
AUTHORIZING THE REJECTION OF DEBTORS' OBLIGATIONS  
WITH RESPECT TO PREPAID CALLING CARDS AND  
THE TERMINATION OF PREPAID CALLING CARD BUSINESS**

The above-captioned debtors and debtors-in-possession (the "Debtors"), by their undersigned counsel, hereby file this expedited motion for entry of an order authorizing the rejection of the Debtors' obligations with respect to prepaid calling cards and the termination of prepaid calling card business (the "Motion"), and in support thereof state as follows<sup>1</sup>:

**Background**

1. On July 30, 2001 (the "Petition Date"), each of the Debtors, AxisTel Communications Inc. ("AxisTel"), e.Volve Technology Group, Inc. ("e.Volve"), Novo

<sup>1</sup> On August 21, 2001, RSL Com U.S.A., Inc. ("RSL") filed a motion for relief from automatic stay in these cases in order to move in its chapter 11 case in the Southern District of New York to reject a certain executory contract with Novo Networks International Services, Inc. RSL has requested an emergency hearing. In light of the direct impact such action will have on the Debtors' prepaid calling card business, by necessity the Debtors request that this Motion be considered on an expedited basis.

APP \_\_\_\_\_  
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CMP \_\_\_\_\_  
COM \_\_\_\_\_  
CTR \_\_\_\_\_  
ECR \_\_\_\_\_  
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Networks Global Services, Inc. ("NN Global"), Novo Networks International Services, Inc. ("NN International"), and Novo Networks Operating Corp. ("NNOC"), filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors are continuing in possession of their respective properties and operating their businesses as debtors-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code in these chapter 11 cases (the "Cases").

### **The Prepaid Calling Card Business**

2. Since 1998, NN International (and affiliates) has operated a prepaid calling card business. NN International sold to wholesale distributors prepaid calling cards which, in turn, were widely distributed in the marketplace to consumers throughout the United States. The prepaid calling cards were sold for a stated face value. Customers use the calling cards by dialing a local or toll-free number (the "Dial-In-Number"), entering a pin code printed on the cards and then dialing a telephone number. The charges for the local and long distance calls are debited against the calling cards. The calls are transferred to a RSL switch, after which they are routed to a NN International switch and terminated through vendors such as RSL. Such services were provided pursuant to a carrier services agreement (the "Agreement") between NN International and RSL.

3. Historically, RSL COM U.S.A., Inc. ("RSL") provided (i) inbound 800 service; (ii) outbound domestic termination services; and (iii) outbound international termination services. Unfortunately, beginning approximately two weeks prior to the Petition Date, RSL began to intentionally back up the Debtors' traffic (known in the industry as "squeezing down", "choking" or "throttling"). This action had a very negative effect on NN International's ability to service its calling card customers. When

the Debtors demanded that RSL discontinue this practice, RSL insisted upon a payment for billed and unbilled services. Under the circumstances, the Debtors had no choice but to pay to RSL “ransom” - in particular, \$454,367.84 on July 24, 2001, only six days prior to the Petition Date.

4. After such payment, the Debtors reasonably expected that regular, uninterrupted provision of services would resume. To the contrary, RSL began taking even more drastic measures that first crippled the phone card business, and ultimately destroyed it. It soon became painfully clear why RSL was engaging in this outrageous behavior.

5. Earlier (June 2001), without providing any notice to the Debtors, RSL obtained approval in its bankruptcy case in the Southern District of New York of a sale of its wholesale carrier business to an entity named Dancris Telecom (“Dancris”). Thereafter, RSL did not disclose this pending transaction to the Debtors, despite its numerous opportunities to do so. The Debtors were severely harmed by RSL’s action for obvious reasons. Once the deal to Dancris closed, RSL would no longer be able to perform under the Agreement. It would no longer have a wholesale business. The Debtors would not even be able to look for an alternative service provider until RSL suddenly disclosed the sale – literally on the eve of the closing and the day the Debtors filed for bankruptcy! Remarkably, RSL did not even bother to move to reject the Agreement.<sup>2</sup>

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<sup>2</sup> As noted previously, RSL finally took action to reject the Agreement by filing an “emergency” motion in this Court to lift the automatic stay in these cases in order to move to reject the Agreement in RSL’s case in the Southern District of New York. Why the delay, even after RSL finally disclosed the [Dancris] sale, is a mystery.

6. RSL's reasons for acting like this until the final hour before the closing have become painfully transparent – to leverage its position as a service provider until the end in order to collect a prepetition debt. This clever conduct benefited RSL, at the cost of destroying NN International's prepaid calling card business as it entered chapter 11. To make matters even worse, immediately after learning that the Debtors filed for bankruptcy, RSL did everything it could to put the final nail in the coffin. RSL renewed its earlier tactics by backing up and "looping" traffic and immediately tripling its rates. The Debtors' motion for contempt for RSL's violation of this Court's first day orders, filed contemporaneous herewith, describes in greater detail RSL's conduct before and after the Petition Date and the damaging impact of its behavior. The Debtors reserve all rights in connection with the devastation caused by RSL.

7. By necessity NN International stopped distributing new calling cards into the marketplace. It is estimated that there are currently 1.7 million "activated" calling cards outstanding in the marketplace. The average face value of such cards was approximately \$10.00 when issued (\$16 million in the aggregate). However, after accounting for estimated average usage, the average remaining unused value is probably closer to \$1.00 (\$2 million in the aggregate).

8. Because monies paid for the calling cards have already been invoiced and collected (when possible), the Debtors will receive no additional income from continuing to fulfill services in connection with the outstanding unused cards. While no monies will be received, the Debtors will continue to incur expenses of approximately \$20,000 per day from servicing the cards. If the Debtors were to continue performing until each card was fully utilized, it could take up to six months for the bleeding to finally stop.

9. Calling cards were widely distributed in the marketplace by NN International. Generally, calling cards were sold to wholesale distributors, who then sold them to either subdistributors or retailers, e.g., local delicatessens, supermarkets or convenience stores, who then sold the cards to customers. As a result, it is not possible for the Debtors to identify the consumers who purchased calling cards from these retailers. It is also not possible to track any subsequent transfers to determine who currently holds calling cards. Nevertheless, the Debtors have devised a method of informing holders of calling cards of the termination of service.

10. There is an existing toll-free 800 number that holders of calling cards may call for customer service. That number is written on the back of the card. The Debtors intend to record a message, in both Spanish and English, for such toll-free 800 number within 24 hours after the Court approves this Motion which informs card holders of (i) the filing of those chapter 11 cases; (ii) the termination of services to prepaid calling card customers, and (iii) a phone number of the Debtors' claims agent so that customers may inquire about how to file a proof of claim.

#### **Relief Requested**

11. By this Motion, the Debtors respectfully request pursuant to Section 365(a) of the Bankruptcy Code the entry of an order authorizing the rejection of all outstanding unused calling cards and the Debtors' obligations with respect thereto and the termination of the Debtors' prepaid calling card business.

#### **Basis for Relief**

12. Arguably, each calling card issued by NN International represents a contract between it and the ultimate purchaser of the calling card, pursuant to which NN International agreed to provide calling card services in exchange for cash consideration

(which has already been received). All that remains is for calling card purchasers with unused minutes to use their cards and for NN International to provide the services.

13. It is in the best interests of these estates for NN International to reject without delay its obligations under the calling cards and terminate its prepaid calling card business. As set forth in the Affidavit of David N. Link submitted herewith, it costs approximately \$20,000 per day to continue to provide the services, while the business no longer generates any revenue. When weighed against the size of NN International's estate and the universe of existing claims against the Debtors, this administrative drain is extremely burdensome. It is a sound exercise of the Debtors' business judgment to terminate this burden now.

14. Section 365(a) of the Bankruptcy Code provides that "the 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). Section 365(a) does not provide a standard for determining when assumption or rejection of an executory contract is appropriate. In re Federated Department Stores, inc. and Allied Stores Corporation, 131 B.R. 808, 811 (S.D. Ohio 1991) citing, In re Monarch Tool & Mfg. Co., 114 Bankr. 134 (Bankr. S.D. Ohio 1990). Courts traditionally have applied the business judgment standard in determining whether to authorize the assumption of executory contracts. See id. citing N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 523, 79 L.Ed. 2d 482, 104 S. Ct. 1188 (1984) and Group of Investors of Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 318 U.S. 523, 87 L. Ed. 959, 63 S. Ct. 727 (1943).

15. Once an agreement is determined to be executory, "it is incumbent upon the debtor to pass the 'business judgment' test in order to demonstrate that the contract will benefit the estate as a condition to allow it to assume or reject the contract." Id.

(citing In re Tilco, Inc., 558 F.2d 1369 (10<sup>th</sup> Ci. 1977); In re Anglo Energy, Ltd., 41 B. R. 337 (Bankr. S.D.N.Y. 1992); Cohen v. The Drexel Burnham Lambert Group Inc. (In Re The Drexel Burnham Lambert Group, Inc.) 138 B.R. 687 (Bankr. S.D.N.Y. 1992); Leibinger-Roberts, 105 B.R. at 211; In re United Press International, Inc., 55 B.R. 63 (Bankr. D.D.C. 1985).

16. It is not clear whether the calling cards represent “executory contracts”. Most cases decided under Bankruptcy Code Section 365 concern situations where both parties to the contract have not fully performed. Courts, however, have allowed a debtor to reject its obligations under a contract, where the non-debtor party has fully performed, when it is in the best interests of the estate. See In re The Drexel Burnham Lambert Group, 138 B.R. 687; and Sipes v. General Development Corp. (The General Development Corp.), 177 B.R. 1000 (D.S.D. Fla. 1995).

17. In the Drexel Burham case, the Court extensively analyzed cases and legal scholarship interpreting Bankruptcy Code Section 365 and ultimately adopting a “functional test,” requiring, in essence, a balance of interests and a determination as to whether the estate will benefit more from a breach or by performance. 138 B.R. at 709. Similarly, in the General Development case, the court used an expanded definition of “executoriness” beyond the static definition articulated by Professor Countryman,” and allowed for rejection, even if one of the parties had fully performed, if the rejection would benefit the estate. 177 B.R. 1011-1012, citing In re Arrow Air, Inc., 60 B.R. 117-121-22 (Bankr. S.D. Fla. 1986).

18. Termination of the prepaid calling card business and rejection of the calling cards is clearly in the best interest of these estates. The continued servicing of the calling cards is costing NN International’s estate approximately \$20,000 per day without

any corresponding generation of cash. In fact, in substantial part because of the actions taken by RSL, NN International no longer operates the calling card business other than to service existing calling cards. At this juncture, there is no business justification for continuing to provide any services. Certain parties (calling card customers) benefit from this costly operation, but at a significant burden to others. Some creditors must not be favored over others by preserving a business literally on its deathbed.

19. Because of the substantial burden of continuing to operate the prepaid calling card business, the Debtors request that the relief requested in this Motion be approved on an expedited basis. Such relief will facilitate the Debtors' reorganization. Because this Motion does not reflect a relinquishment or significant compromise of the Debtors' rights, creditors and other parties in interests should not be disadvantaged by the expedited notice requested.

#### Notice

20. No trustee, examiner or creditors' committee has been appointed in the Debtors' chapter 11 cases. Notice of the hearing on this Motion has been provided to (i) the Office of the United States Trustee, (ii) counsel to the postpetition lender, (iii) those parties requesting notices pursuant to Bankruptcy Rule 2002, (iv) the Federal Communications Commission, (v) the state regulatory agencies in the jurisdictions in which the Debtors are certified to conduct the calling card business. The Debtors submit that no other or further notice is necessary.

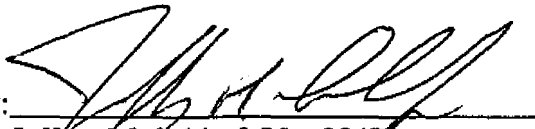
21. No previous request for the relief sought in this Motion has been made to this or any other court.



WHEREFORE, the Debtors respectfully request that the Court enter an order authorizing the relief requested herein and such other and further relief as is just and proper.

Dated: August 24, 2001

THE BAYARD FIRM

By:   
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Attorneys for the Debtors and  
Debtors-in Possession

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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In re: )  
 ) Chapter 11  
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AXISTEL COMMUNICATIONS, INC., ) Case No. 01- 10005 (RJN)  
NOVO NETWORKS GLOBAL SERVICES, INC., )  
NOVO NETWORKS INTERNATIONAL SERVICES, INC., ) Jointly Administered  
E.VOLVE TECHNOLOGY GROUP, INC., )  
NOVO NETWORKS OPERATING CORP., )  
 )  
 )  
Debtors. )

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**AFFIDAVIT OF DAVID N. LINK IN SUPPORT OF EXPEDITED  
MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE REJECTION  
OF THE DEBTORS' OBLIGATIONS WITH RESPECT TO PREPAID CALLING  
CARDS AND THE TERMINATION OF PREPAID CALLING CARD BUSINESS**

STATE OF TEXAS )  
 ) ss:  
COUNTY OF DALLAS )

David N. Link, being duly sworn, deposes and says:

1. I am the Executive Vice President – Global Operations of the above-captioned debtors (the “Debtors”), including Novo Networks International Services, Inc. (“NN International”).

2. I submit this affidavit in support of the Expedited Motion for Entry of an Order Authorizing the Rejection of Debtors’ Obligations With Respect to Prepaid Calling Cards and the Termination of Prepaid Calling Card Business (the “Motion”).

3. Since 1988, NN International (and affiliates) has operated a prepaid calling card business. NN International sold to wholesale distributors prepaid calling cards

which, in turn, were widely distributed in the marketplace to consumers throughout the United States. The prepaid calling cards were sold for a stated face value. Customers use the calling cards by dialing a local or toll-free number (the "Dial-In-Number), entering a pin code printed on the cards and then dialing a telephone number. The charges for the local and long distance calls are debited against the calling cards. The calls are transferred to a RSL switch, after which they are routed to a NN International switch and terminated through vendors such as RSL. Such services were provided pursuant to a carrier services agreement (the "Agreement") between NN International and RSL.

4. Historically, RSL COM U.S.A., Inc. ("RSL") provided (i) inbound 800 service; (ii) outbound domestic termination services; and (iii) outbound international termination services. Unfortunately, beginning approximately two weeks prior to the Petition Date, RSL began to intentionally back up the Debtors' traffic (known in the industry as "squeezing down", "choking" or "throttling"). This action had a very negative effect on NN International's ability to service its calling card customers.

5. After making a very large payment prior to the Petition Date, the Debtors reasonably expected that regular, uninterrupted provision of services would resume. To the contrary, RSL began taking even more drastic measures that first crippled the phone card business, and ultimately destroyed it.

6. Immediately after the Debtors filed for bankruptcy, I learned that RSL had not disclosed a pending sale of its [wholesale] business to an entity named [Dancris]. The Debtors were severely harmed by RSL's action for obvious reasons. Once the deal to Dancris closed, RSL would no longer be able to perform under the Agreement

since it would no longer have a wholesale business. The Debtors were not even able to look for an alternative service provider until RSL suddenly disclosed the sale, literally on the eve of the closing.

7. To make matters even worse, immediately after learning that the Debtors filed for bankruptcy, RSL did everything it could to destroy NN International's prepaid calling business. For example, RSL renewed its earlier tactics by backing up and "looping" traffic and immediately tripling its rates. The Debtors' motion for contempt for RSL's violation of this Court's first day orders describes in greater detail RSL's devastating conduct before and after the Petition Date.

8. By necessity NN International stopped distributing new calling cards into the marketplace. It is estimated that there are currently 1.7 million "activated" calling cards outstanding in the marketplace. The average face value of such cards was approximately \$10.00 when issued (\$16 million in the aggregate). However, after accounting for estimated average usage, the average remaining unused value is probably closer to \$1.00 (\$2 million in the aggregate).

9. Because monies paid for the calling cards have already been invoiced and collected (when possible), the Debtors will receive no additional income from continuing to fulfill services in connection with the outstanding unused cards. While no monies will be received, the Debtors will continue to incur expenses of approximately \$20,000 per day from servicing the cards. If the Debtors were to continue performing until each card was fully utilized, it could take up to six months for the bleeding to finally stop.

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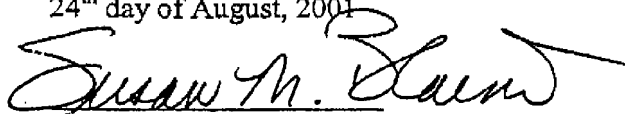
11. There is an existing toll-free 800 number that holders of calling cards may call for customer service. That number is written on the back of the card. The Debtors intend to record a message, in both Spanish and English, for such toll-free 800 number within 24 hours after the Court approves this Motion which informs card holders of certain information set forth in the Motion.

12. The Debtors have concluded that they can no longer sustain the cost of fulfilling their obligations relating to the calling cards. They have thus determined, in their business judgment, that the cessation of their prepaid calling card business is in the best interest of the Debtors' estates.

13. For these reasons, I respectfully request that this Court authorize the rejection of the calling card obligations and the termination of the prepaid calling card business, as described in the Motion.

  
DAVID N. LINK

Sworn to before me this  
24<sup>th</sup> day of August, 2001

  
Notary Public



**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re:	)	Chapter 11
	)	
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NOVO NETWORKS GLOBAL SERVICES, INC.,	)	
NOVO NETWORKS INTERNATIONAL SERVICES, INC.,	)	Jointly Administered
E.VOLVE TECHNOLOGY GROUP, INC.,	)	
NOVO NETWORKS OPERATING CORP.,	)	
	)	
Debtors.	)	

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**ORDER AUTHORIZING THE REJECTION OF  
DEBTORS' OBLIGATIONS WITH RESPECT  
TO PREPAID CALLING CARDS AND THE  
TERMINATION OF PREPAID CALLING CARD BUSINESS**

Upon the Expedited Motion for Entry of an Order Authorizing the Rejection of Debtors' Obligations With Respect to Prepaid Calling Cards and the Termination of Prepaid Calling Card Business (the "Motion"); and it appearing that this Court has jurisdiction over this Motion; and it appearing that due and proper notice of the Motion has been given under the circumstances; and after due deliberation and sufficient cause appearing therefor, it is

ORDERED that the Motion is hereby approved; and it is further

ORDERED that the Debtors are hereby authorized to reject all outstanding unused calling cards and the Debtors' obligation with respect thereto and to terminate their prepaid calling card business; and it is further

ORDERED that this Order shall be effective and enforceable immediately upon entry; and it is further

ORDERED that the Debtors are authorized to take all action necessary to carry out the terms of this Order; and it is further

ORDERED that this Court retains jurisdiction to enforce and implement the terms and provisions of this Order.

Dated: August \_\_\_\_\_, 2001

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UNITED STATES BANKRUPTCY JUDGE