070000

ORIGINAL

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

RECEIVED-FPSC
04 DEC -3 AM 10: 06
COMMISSION CLERK

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-SAF-11**
	§	
DEBTORS.	§	**(Chapter 11)**
	§	**(Jointly Administered)**
	§	
	§	**Hearing Requested for December**
	§	**7, 2004, at 9:30 a.m.**

EXPEDITED MOTION TO APPROVE SALE OF SURPLUS PERSONAL PROPERTY

TO THE HONORABLE STEVEN A. FELSENTHAL, CHIEF JUDGE:

The above-referenced debtors and debtors in possession (collectively, the "Debtors")[1] file this Expedited Motion to Approve Sale of Surplus Personal Property (the "Motion") and in support show as follows:

CMP ____
COM ____
CTR ____
ECR ____
GCL ____
OPC ____
MMS ____
RCA ____
SCR ____
SEC 1
OTH ____

[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.

DOCUMENT NUMBER-DATE
12838 DEC -3 8
FPSC-COMMISSION CLERK

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).

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-SAF-11.

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 receives 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. On November 1, 2004, the Debtors filed their motion to

reject agreements with these independent representatives. The hearing on that motion has been set for November 22, 2004.

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 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.[2] 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 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 –

[2] 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.

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.[3]

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

[3] A long distance carrier can also be an ILEC or a CLEC.

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 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[4] 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

[4] Such disputes have spawned considerable litigation, including an arbitration between VarTec and Teleglobe's bankruptcy estate.

maximize the value of their assets for the benefit of their creditors and other constituencies under chapter 11 of the Bankruptcy Code.

Proposed Dispositions of Personal Property

19. During the ordinary course of their businesses, the Debtors sell or otherwise dispose of aged or unnecessary personal property, including furniture, equipment, and inventory (the "Miscellaneous Property").

20. In addition to the ordinary course dispositions, the Debtors contemplate selling or otherwise disposing of certain personal property, including furniture, equipment, and inventory (the "Surplus Property" and together with the Miscellaneous Property, the "Property") in connection with their relocation from their corporate headquarters located at 1600 Viceroy Drive, Dallas, Texas, 75235 (the "Lease Premises"). The Debtors anticipate relocating from their Lease Premises by the middle of December, 2004 and disposing of the Surplus Property, by auction or otherwise, by the end of December 2004.[5] Upon their relocation, the Debtors will not need the Surplus Property.

21. The Debtors estimate that the cost to move the Property to the Debtors' new headquarters would exceed $320,000.

RELIEF REQUESTED

22. Pursuant to Bankruptcy Code §§ 105, 363, and 554, the Debtors request that the Court authorize them to (i) sell or otherwise dispose of the Miscellaneous Property from time to time, through auction, private sale, or internet sale, free and clear of all liens, encumbrances, and interests; and (ii) sell or otherwise dispose of the

[5] In the next few days, the Debtors anticipate filing a motion to reject the lease of the Lease Premises and an application seeking authority to retain a professional to auction the Property.

Surplus Property, through an auction or private sales, free and clear of all liens, encumbrances, and interests.

23. Bankruptcy Code § 363(b)(1) provides that "[t]he [debtor in possession], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1).

24. Bankruptcy Code § 363(f) authorizes a sale of property free and clear of all liens, interests, and encumbrances:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interests is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. §363(f); *Pelican Homestead v. Wooten (In re Gabel)* 61 B.R. 661, 667 (Bankr. W.D. La. 1985) (stating that a trustee may sell property of the estate for purposes other than in the ordinary course of business free and clear of all existing liens and encumbrances provided that any one of the conditions of § 363(f) are met). Because Bankruptcy Code § 363(f) is drafted in the disjunctive, only one of the conditions set forth in that statute needs to be met for a sale free and clear of liens, interests, and encumbrances to occur.

25. The RTFC is the only party which asserts a lien, interest, or encumbrance in the Property, and it has consented to the proposed disposition. Even absent consent from the RTFC, the Property could be sold free and clear of its interests (with such interests attaching to the sale proceeds) so long as the RTFC could be compelled to accept money satisfaction of its interests in the property. *See* 11 U.S.C. § 363(f)(5).

26. Because certain of the Property may be of insignificant value, the Debtors also request authority to abandon or discard the property by any means as the Debtors may elect, including donating the Property to a charitable organization or removing the Property, as waste, in the exercise of their business judgment.

27. Bankruptcy Code § 554(a) provides, "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a). To prohibit such abandonment and disposal would burden the Debtors' estates, diminish the available distribution to their creditors, and interfere with the relocation of the Debtors' headquarters.

28. The continued storage, maintenance, and possible relocation of the Property is and will be burdensome to the estates of the Debtors. If the relief requested herein is not granted, the Debtors will be required to incur expenses related to the moving (and/or storage) and maintenance of the Property without a corresponding benefit to their estates.

29. Although the Debtors have not comprehensively studied the state and local laws, statutes, rules and/or ordinances that will govern any auction of the Property (the "Auction"), such laws may have licensing or permitting requirements, statutory or

regulatory waiting periods, and/or time limits that normally would govern auctions. Some of the localities may have statutes or regulations requiring creditor notification before bulk sales are conducted.

30. The Debtors submit that such requirements should not apply for the limited purpose of conducting the Auction. In this case, the Auction will be of limited duration and will not implicate any laws or regulations affecting public health or safety.

31. Bankruptcy courts have recognized that federal bankruptcy laws preempt state and local laws that conflict with the underlying policies of the Bankruptcy Code. *See In re Shenango Group, Inc.*, 186 B.R. 623, 628 (Bankr. W.D. Pa. 1995), *aff'd*, 112 F.3d 633 (3d Cir. 1997). Although preemption of state law is inappropriate when such law relates to the protection of public health and safety, *see In re Baker & Drake, Inc.*, 35 F.3d 1348, 1353-54 (9th Cir. 1994), preemption is appropriate when the state laws involved concern economic regulation. *See id.* at 1353; *see also In re Scott Housing Sys., Inc.*, 91 B.R. 190, 196-97 (Bankr. S.D. Ga. 1988). In this case, Bankruptcy Code § 363 would be undermined if the Court permitted state and local laws establishing licensing or permitting requirements, time limits or bulk sale restrictions to apply to the Auction because such laws would prevent, or at least significantly restrict, the Debtors' ability to maximize recoveries for all constituencies.

32. Accordingly, the Debtors request that the Court authorize them to conduct the Auction without the necessity of, and the delay associated with, obtaining various state licenses and/or satisfying any additional requirements in connection therewith. Likewise, the Debtors request that bulk sales laws, to the extent applicable, be waived

as creditors are protected by the notice of this Motion being provided and the jurisdiction of the Court.

33. The Debtors also request that no other person or entity, including, but not limited to, any lessor or federal, state or local agency, department or governmental authority, be permitted to take any action to prevent, interfere with, or otherwise hinder consummation of the Auction. *See, e.g., Missouri v. U.S. Bankruptcy Court for the E.D. of Arkansas*, 647 F.2d 768, 776 (8th Cir. 1981).

PRAYER

The Debtors request that the Court enter an Order authorizing them to (i) sell or otherwise dispose of the Miscellaneous Property from time to time, through auction, private sale, or internet sale, free and clear of all liens, encumbrances, and interests and (ii) sell or otherwise dispose of the Surplus Property, through an auction, free and clear of all liens, encumbrances, and interests. The Debtors also request any other general relief to which they are 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/ Richard H. London*
Daniel C. Stewart, SBT #19206500
William L. Wallander, SBT #20780750
Richard H. London, SBT #24032678

ATTORNEYS FOR THE DEBTORS

888259_2.DOC

CERTIFICATE OF CONFERENCE

I certify that on November 23, 2004, William L. Wallander and I conferenced with Toby Gerber, counsel for the RTFC, and Steve Goodwin, counsel for the Committee, each of which stated that they did not oppose the relief requested herein (although they reserved their rights).

/s/ Richard H. London
One of Counsel