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PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

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MATTHEW T. CONNOLLY
ANDREW D. KANG
MATTHEW J. GINSBURG
CHRISTINE M ANTONELLI
C. NATHAN DEE

ONE FEDERAL STREET
BOSTON, MASSACHUSETTS 02110-2007
TELEPHONE (617) 423-0400
TELEFAX (617) 423-0498

August 6, 2001

BY HAND

Clerk's Office
United States Bankruptcy Court
Thomas P. O'Neill Federal Building
10 Causeway Street
Boston, MA 02222-1074

Re: Essential.com, Inc.
<u>Chapter 11 Case No. 01-15339-WCH</u>

Dear Sir or Madam:

Enclosed for filing please find the following documents:

1. Motion by Debtor For Authorization to Implement Key Employee Retention Program and For Authority To Reject Employment Agreements Nunc Pro Tunc;

2. Motion for Expedited Determination on Motion by Debtor For Authorization to Implement Key Employee Retention Program and For Authority To Reject Employment Agreements Nunc Pro Tunc; and

3. Certificate of Service.

Kindly file these documents and return a time-stamped copy to the awaiting messenger. Thank you in advance for your assistance.

Very truly yours,

C. Nathan Dee

CND/jxs
Enclosures
310702

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re:	)	
ESSENTIAL.COM, INC.,	)	**Chapter 11**
	)	**Case No. 01-15339-WCH**
Debtor.	)	

MOTION FOR EXPEDITED HEARING ON DEBTOR'S MOTION FOR AUTHORIZATION TO IMPLEMENT KEY EMPLOYEE RETENTION PROGRAM AND FOR AUTHORITY TO REJECT EMPLOYMENT AGREEMENTS *NUNC PRO TUNC*

To the Honorable William C. Hillman, United States Bankruptcy Chief Judge:

Pursuant to MLBR 9013-1(g), Essential.com, Inc., the debtor and debtor in possession (the "Debtor"), hereby moves this Court to schedule an expedited hearing on *Debtor's Motion for Authorization to Implement Key Employee Retention Program and for Authority to Reject Employment Agreement* (the "KERP Motion"). **Subject to the Court's calendar, the Debtor respectfully requests that the Court schedule a hearing on the KERP Motion on August 9, 2001 at the same time as the hearing on the sale of the Debtor's Customer Base.** In further support of this Motion, the Debtor states as follows:

1. Simultaneously with the filing of this motion, the Debtor has filed the KERP Motion.

2. Pursuant to the KERP Motion, the Debtor requests authority to implement a retention and severance program for certain critical employees.

3. In light of the hearing on the proposed sales of the Debtor's Customer Base on August 9, 2001, the Debtor requests that this Court schedule an expedited hearing on the KERP Motion.

4. Prompt action on the KERP Motion is necessary because the Debtor anticipates that certain of its remaining employees will depart unless assurances are made regarding compensation for their services. Absent the retention of the Debtor's remaining critical employees, the Debtor will be unable to, among other things, close on the Private Sales, monitor the billing and collection of its accounts receivables and process postpetition accounts payable.

5. The retention incentive measures described in the KERP Motion have been designed to ensure the retention of the Debtor's key employees. The KERP Motion is based upon competitive conditions, industry-wide standards and the Debtor's past practices, and were developed with the assistance of the Debtor's senior management. The proposed measures have been designed with the overarching objective of improving the retention of key employees to the maximum extent possible, at the lowest possible cost.

6. The retention plan eligibility includes its four (4) senior managers (the "Senior Management") and thirty-four (34) key employees (the "Key Employees") whom the Debtor has requested to remain in its employ (collectively, the "Eligible Employees"). Absent the continued service of the Debtor's employees pending and in closing the Private Sales ("Winding Down Period"), the most substantial asset of the estate is in jeopardy. Furthermore, the Debtor's employees continue to process and collect on the Debtor's accounts receivable to the benefit of the Estate.

7. The Debtor submits that granting the relief requested herein is in the best interests of the estate.

WHEREFORE, Essential.com, Inc., respectfully requests that the Court enter an Order:

A. Scheduling an expedite hearing on the KERP Motion for August 9, 2001; and

B. Granting it such other and further relief as the Court may deem proper.

Respectfully Submitted,

ESSENTIAL.COM, INC.,

By its counsel,

Harold B. Murphy (BBO #362610)
Alex M. Rodolakis (BBO #567781)
C. Nathan Dee (BBO # 626641)
Hanify & King
Professional Corporation
One Federal Street
Boston, MA 02110
(617) 423-0400
Fax: (617) 565-8985

Dated: August 6, 2001

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re:	
ESSENTIAL.COM, INC.,	**Chapter 11**
Debtor.	**Case No. 01-15339-WCH**

MOTION BY DEBTOR FOR AUTHORIZATION TO IMPLEMENT KEY EMPLOYEE RETENTION PROGRAM AND FOR AUTHORITY TO REJECT EMPLOYMENT AGREEMENTS *NUNC PRO TUNC*
(Expedited Hearing Requested)

To the Honorable William C. Hillman, Chief United States Bankruptcy Judge:

Essential.com, Inc., the debtor and debtor-in-possession (the "Debtor"), respectfully moves that this Court enter an order authorizing the implementation of a Key Employee Retention Program ("KERP"). Simultaneously, the Debtor requests authority to reject any employment agreements or contracts with its employees and that such rejection be effective *nunc pro tunc* to the date of the filing of this Motion. Pursuant to MLBR 9013-1(g), by separate motion, the Debtor has requested expedited hearing on this Motion. In support thereof, the Debtor states as follows:

I. BACKGROUND

1. On June 29, 2001 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code ("Code") in this Court.

2. The Debtor continues to operate as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Code.

3. On July 18, 2001, the United States Trustee appointed an official committee of unsecured creditors (the "Committee").

4. The Debtor is in the business of reselling telecommunications services. The Debtor has been in the business of reselling telecommunications services, including long distance and local telephone service and internet service. As of the Petition Date, the Debtor had approximately 70,000 active subscribers in its Customer Base consisting predominately of households and small businesses.

II. SALE OF THE DEBTOR'S ASSETS AND WIND DOWN OF OPERATIONS

5. Prior to the Petition Date, the Debtor undertook efforts to sell all or substantially all of its business. The Debtor's primary asset is its active Customer Base of over 70,000 households and small businesses that subscribe to its services. The Debtor has ceased soliciting new customers and reduced its business operations to the minimum level necessary to preserve its assets pending an orderly liquidation.

6. On or about June 25, 2001, because of financial difficulties precipitated by the challenging capital markets, the Debtor was forced to layoff a substantial portion of its workforce. The Debtor reduced its work force from eighty-four (84) employees to thirty-eight (38) current employees working at its Burlington corporate headquarters The Debtor has retained these critical employees to assist in the orderly wind-down of its business affairs and to attempt to administer its assets in a manner that will maximize value for parties in interest.

7. On August 1, 2001, the Court approved certain sale procedures associated with the Debtor's proposed private sales ("Private Sales") of all of the Debtor's Customer Base to certain third parties, subject to higher and better offers. Pursuant to the Private Sales, the Debtor has entered into agreements for the transfer of its Customer Base designed to generate, at least, $925,000 for the estate, The hearing on the approval of the Private Sales is scheduled for August 9, 2001.

8. The Debtor has retained certain critical employees to maintain continuation of the Debtor's vital services to its Customer Base, assist in the orderly wind-down of its business affairs, to maintain the Customer Base and to finalize the Private Sales. The Debtor's current operations are required to insure that the transfer of its Customer Base and/or cessation of the services it provides to its Customer Base will occur as smoothly as possible and with the least amount of damage or harm to the Customer Base. Absent the retention of these critical employees, the Debtor will be unable to, among other things, close on the Private Sales, monitor the billing and collection of its accounts receivables and process postpetition accounts payable.

9. Following the consummation of the Private Sales, the Debtor intends to substantially cease its operations and significantly reduce its workforce in order to minimize the costs of further administering its assets.

III. SUMMARY OF REQUESTED RELIEF AND NEED FOR RETENTION PROGRAM

10. One of the keys to the Debtor's successful maintenance and transition of vital services to its customers, timely and successfully closing on the Private Sales, and for achieving maximum realization of estate value is its senior management and customer support employees. Since the Petition Date, the Debtor's employees have performed numerous critical functions, including:

(i) interfacing with key service providers and customers to ensure minimum interruption in the receipt of energy and telecommunications services and to minimize customer defection;

(ii) maintaining communication with, and supervision of, experienced staff and direct customer service personnel to ensure that the Debtor is able to continue the delivery of its services at a high level and in a timely manner;

(iii) ensuring proper compliance with federal and state telecommunications laws and regulations, and financial and accounting procedures;

(iv) operations and administration;

(v) billing and collecting accounts receivable, including receivables generated from the continuation of services;

(vi) reconciliation of services and charges with key vendors; and

(vii) providing essential understanding of the Debtor's business and recent difficulties.

11. In light of the Private Sales and proposed termination of all but the most critical employees, the Debtor's senior management personnel and customer service employees are may consider exploring other employment alternatives. Moreover, given the competitive environment in which the Debtor operates, it is believed that critical employees can readily locate suitable alternative employment.

12. Based upon the foregoing, the Debtor has worked with its professionals to develop a KERP that provides the incentives necessary for key employees to remain with the Debtor during this critical transition period, while adhering to the financial constraints and obligations to creditors that the Debtor faces as a Chapter 11 debtor.

13. The KERP is designed to provide the Debtor's critical employees with competitive financial incentives to, among other things, (a) remain in the Debtor's employ through at least the finalization of the Private Sales, (b) assume the additional administrative and operational burdens imposed on the Debtor by its Chapter 11 case and (c) use their best efforts to ensure the maximization of estate assets for the benefit of creditors.

14. Pending the hearing on the Private Sales, the Eligible Employees will need to expend additional effort to attempt to solicit and attract counteroffers. Further, in light of publicity surrounding the Debtor's Chapter 11 filing, the Eligible Employees must redouble their efforts in responding to customer and creditor inquiries and concerns.

15. The Debtor believes that the implementation of the KERP will be beneficial to its estate and creditors, and is essential to maximizing creditors' recoveries in this case.

IV. Description Of The KERP Program

16. The retention incentive measures described in this motion have been designed to ensure the retention of the Debtor's key employees. These proposals are based upon competitive conditions, industry-wide standards and the Debtor's past practices, and were developed with the assistance of the Debtor's senior management. The proposed measures have been designed with the overarching objective of improving the retention of key employees to the maximum extent possible, at the lowest possible cost.

17. The retention plan eligibility includes its four (4) senior managers (the "Senior Management") and thirty-four (34) key employees (the "Key Employees") whom the Debtor has requested to remain in its employ (collectively, the "Eligible Employees"). Absent the continued service of the Debtor's employees pending and in closing the Private Sales ("Winding Down Period"), the most substantial asset of the estate is in jeopardy. Furthermore, the Debtor's employees continue to process and collect on the Debtor's accounts receivable to the benefit of the Estate.

18. The Winding Down Period shall be defined to include the following:

(i) the date the Company entirely ceases operations; or

(ii) The date the Company terminates the Key Employees' or Senior Managers' employment for reasons other than Cause which is herein defined as:

a. a deliberate failure or refusal to adequately perform the employees job duties and responsibilities;

b. the employees conviction of a felony, either in connection with the performance of the employees obligations to the company or which adversely affect the employee's ability to perform such obligations;

c. willful disloyalty, deliberate dishonesty or breach of fiduciary duty to the Company;

d. the commission of an act of embezzlement, fraud, misappropriation, theft or deliberate disregard of the rules or policies of the Company which results in loss, damage or injury to the Company; and

e. any unauthorized use or disclosure of any trade secret or confidential information of the Company, which could reasonably be expected to adversely affect the Company.

19. The Debtor proposes to substitute the KERP for any prepetition retention or performance incentive plans, employment agreements or contracts or severance benefits that were made applicable to any of the Eligible Employees pursuant to contract or otherwise.

20. By participation in the KERP, each Eligible Employee shall therefore be deemed to have waived any rights or claims arising under such prepetition agreements with the Debtor. Any Eligible Employee electing not to participate in the KERP will retain any rights or claims arising under such prepetition agreements with the Debtor.

A. Key Employee Provisions

21. The Key Employees consist of: (a) executive personnel; (b) customer service personnel, regulatory personnel, IT managers; and (c) key financial and administrative personnel. The Key Employees are critical to the Debtor since they perform all the necessary functions to maintain the Customer List on a daily basis.

22. Under the KERP, the Key Employees will be eligible to receive a retention bonus (the "Retention Bonus") of between four (4) to six (6) of current salary upon satisfaction of certain conditions. The Retention Bonus shall be earned in the event the Eligible Employee provides continued service to the Debtor through the conclusion of the Winding Down Period.

23. A schedule of each of the Debtor's Key Employees subject to the KERP, their position and their base salary is attached as Exhibit A. The attached Exhibit A also sets forth the proposed Retention Bonus for each Key Employee. The total cost to the estate, in the event all Key Employees were to earn the Retention Bonus, is approximately $184,170.

B. Senior Management Provisions

24. Under the KERP, the Senior Management will be eligible to receive a Retention Bonus of eight (8) weeks of their of current salary upon satisfaction of certain conditions. The conditions include, among other things, the continued employment with the Debtor through the end of the Winding Down Period. Therefore, the Retention Bonus shall only be earned in the event that the Senior Management provides continued service to the Debtor through the sale of substantially all of the Debtor's assets and until the completion of the Winding Down Period.

25. A schedule of each of the Debtor's Senior Management subject to the KERP, their position and their base salary attached as Exhibit A. The Exhibit A also sets forth the proposed Retention Bonus for each Senior Manager. The total cost to the estate, in the event all Senior Managers were to earn the Retention Bonus, is approximately $150,385. The Senior Management has been instrumental in soliciting prospective buyers and preparing for the Private Sales. The total cost of to the estate, in the event that all Eligible Employees were to earn their Retention Bonus, is approximately $334,555.

26. Additionally with respect to Senior Management, the KERP is in response to their existing employment agreements and incentive plans with the Debtor. Under these agreements, remaining Senior Management would be able to assert claims against the Debtor for between $36,250 and $260,000 based on the termination of their employment or provisions giving rise to payments based on the sale of the Debtor's assets. In the case of Senior Management, the proposed Retention Bonus is between 17% and 61% of what these agreements would require.

27. No portion of the Retention Bonus shall be earned except as provided above.

V. REQUEST FOR APPROVAL OF THE PROPOSED RETENTION PROGRAM

28. The measures included in the proposed KERP are designed to address specific employee retention needs. They are designed to keep key employees employed by the Debtor

and focused on the overarching goals of the smooth transition into Chapter 11 and ultimate reorganization. The Debtor believes that all of these proposed measures are necessary to maximize the effectiveness of its key employees. As to Senior Management, a essential incentive for involvement in the Debtor prior to the Petition Date, the potential for equity participation, is no longer present. Therefore, it is entirely reasonable and with the Debtor's business judgment to provide for some continuing incentive beyond merely their salary.

29. The Debtor accordingly seeks authority, pursuant to Sections 105(a) and 363(b) of the Code, to implement the KERP.

30. Section 105(a) of the Code provides that "[t] he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Section 363(b) of the Code provides that "[t] he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate", when a sound business purpose justifies such action. See, e.g., In re Delaware & Hudson Ry., 124 BR 169, 176 (D. Del. 1991)(explaining that the Third Circuit has adopted the "sound business purpose" test to evaluate motions brought pursuant to section 363(b)); see also Stephen Industries, Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986)(adopting the "sound business purpose" standard for sales proposed pursuant to section 363(b)); Titusville Country Club v. Pennebank (In re Titusville Country Club), 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991)(same).

31. As described in detail above, the Debtor believes that the implementation of the KERP will accomplish a "sound business purpose." Based on the Debtor's experience and evaluation of available alternatives, the Debtor has determined that the measures proposed herein will achieve its intended purpose of retaining its employees for a very brief period of time.

32. The implementation of key employee retention programs is commonly approved as the proper exercise of a debtor's business judgment. In re America West Airlines, Inc., 171

B.R. 674, 678 (Bankr. D. Ariz. 1994) (approving success bonuses to certain officers and employees as falling within debtor's sound business judgment); In re Interco Inc., 128 B.R. 229, 234 (Bankr. E.D. Mo. 1991) (authorizing debtor to assume prepetition severance contracts and approving performance based retention program to ensure that critical employees remained with the debtor); In re Edison Brothers Stores, Inc., Case No. 95-1354 (Bankr. D. Del. 1995); In re Barney's, Inc., Case No. 96-40113 (Bankr. S.D.N.Y. 1996); In re Bradlees Stores, Inc., et al, Case Nos. 95 B 42777 through 95 B 42784 (Bankr. S.D.N.Y. 1995) and In re Caldor, Inc. – NY, The Caldor Corporation, Caldor, Inc. – CT, et al., Case No. 95 B 44080 (Bankr. S.D.N.Y. 1995).

33. In light of the foregoing, the Debtor asserts that the incentives provided under the KERP are reasonable and appropriate and will enhance the Debtor's ability to retain all of its employees, including, in particular, those individuals who are most essential to the Debtor's stated goals. The Debtor submits that such measures should be approved.

VI. REQUEST FOR AUTHORITY TO REJECT EMPLOYMENT AGREEMENTS

34. Prior to the Petition Date, the Debtor entered into employment, severance and similar retention contracts ("Employment Contracts") with four (4) of its Senior Management. In general, the Employment Contracts provide between three (3) months to in excess of six (6) months of severance in the event of termination by the Debtor without cause or in the event certain change of control transactions including a sale of all or substantially all of the Debtor's assets. The Debtor's remaining employees with Employment Contracts are Paul O'Brien, Basil Pallone, John Duffy and Chris Kallaher.

35. The Debtor is in the process of attempting to orderly liquidate its assets. The Debtor only requires a minimum of staff for a brief period of time to assist in this objective. Accordingly, the long term retention and employment of the Debtor's employees is no longer necessary and rejection of the Employment Contracts is warranted.

36. Pursuant to Section 365 of the Code, the Debtor may assume or reject any executory contract. Accordingly, the Debtor requests rejection of the Employment Contracts in order to avoid any potential administrative costs against the estate in connection with the Contracts. In order to further avoid any potential administrative costs, the Debtor requests that rejection of the Employment Contracts be effective *nunc pro tunc* to the date of the filing of this Motion.

NOTICE

37. The Debtor has served this motion, and will serve the notice of the hearing on this motion, on the United States Trustee, the Debtor's 20 largest creditors, counsel to the Official Committee of Unsecured Creditors, the parties to the Employment Contracts, and other parties who have filed an appearance and request for notice. The Debtor believes that such service provides sufficient notice in light of the nature of the relief requested.

WHEREFORE, Essential.com, Inc., respectfully requests that the Court enter an Order:

(i) Authorizing the Debtor, pursuant to sections 105 and 363 of the Bankruptcy Code, to implement the Key Employee Retention Program;

(ii) Providing that the Eligible Employees, as a condition to participation under the KERP, waive any rights or claims which may exist pursuant to existing prepetition employment agreements;

(iii) Authorizing the Debtor to reject any prepetition Employment Agreements *nunc pro tunc* to the date of the filing of this Motion; and

(iv) Granting it such other and further relief as the Court may deem proper.

Respectfully Submitted,

ESSENTIAL.COM, INC.,

By its counsel,

Harold B. Murphy (BBO #362610)
Alex M. Rodolakis (BBO #567781)
C. Nathan Dee (BBO #626641)
Hanify & King
Professional Corporation
One Federal Street
Boston, MA 02110
(617) 423-0400
Fax: (617) 565-8985

Dated: August 6, 2001

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EXHIBIT A

Finance				
Stacey Chandler	$	57,000	4	$4,385
Stephanie Bergeron	$	85,000	6	$9,808
Steve Scopetski	$	92,500	6	$10,673
Regulatory				
Peter Mills	$	90,000	6	$10,385
Human Resources				
Arlene Belleville	$	90,000	6	$10,385
Billing				
Fred Grimshaw	$	85,000	6	$9,808
Sharon O'Brien	$	37,000	4	$2,846
Ed Dube	$	65,000	4	$5,000
Mindy Parsons	$	35,000	4	$2,692
Sean Fowler	$	31,200	4	$2,400
Collections				
Rose Collanni	$	34,000	4	$2,615
Khalil Sogoba	$	30,000	4	$2,308
Customer Service				
Scott Sherman	$	100,000	6	$11,538
Aaron Perna	$	65,000	4	$5,000
Jonathan Wade	$	40,000	4	$3,077
Katya Gurin	$	39,000	4	$3,000
Patrick Carey	$	35,000	4	$2,692
Peter Kelly	$	34,000	4	$2,615
Kevin Keenan	$	35,000	4	$2,692
Erika Standke	$	28,300	4	$2,177
Maria Quintel-Didonna	$	28,400	4	$2,185
Service Delivery				
David MacWhinnie	$	47,200	4	$3,631
Tom Tripp	$	31,200	4	$2,400
IT				
Dan Javlekar	$	115,000	6	$13,269
Dennis Mercer	$	135,000	6	$15,577
Kenny Chan	$	56,160	4	$4,320
Chand Anne	$	32,000	4	$2,462
Ben Swain	$	55,000	4	$4,231
Branimir Davidovic	$	58,000	4	$4,462
Mike Benjamin	$	55,000	4	$4,231
Tony Rosa	$	65,000	4	$5,000
Kathy Bassilakis	$	64,000	4	$4,923
Ann Hall	$	78,000	4	$6,000
Sam Delibasic	$	70,000	4	$5,385
				$184,170
Senior Management				
Chris Kallaher (1)	$	147,500	8	$22,692
John Duffy (1)	$	145,000	8	$22,308
Basil Pallone (2)	$	165,000	8	$25,385
Paul O'Brien (3)	$	520,000	8	$80,000
				$150,385
Group Total:		38		$334,555

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re: ESSENTIAL.COM, INC. Debtor.	Chapter 11 Case No. 01-15339-WCH

CERTIFICATE OF SERVICE

I, C. Nathan Dee, hereby certify that on August 6, 2001, I caused to be served a copy of the ***Motion by Debtor for Authorization to Implement Key Employee Retention Program and For Authority to Reject Employment Agreements Nunc Pro Tunc*** and ***Motion for Expedited Determination on Motion by Debtor for Authorization to Implement Key Employee Retention Program and For Authority to Reject Employment Agreements Nunc Pro Tunc*** by first class mail, postage prepaid mail, unless otherwise indicated, to the parties listed on the attached list.

C. Nathan Dee
HANIFY & KING
Professional Corporation
One Federal Street
Boston, MA 02110
(617) 423-0400

Dated: August 6, 2001
::ODMA\PCDOCS\DOCS\310698\1

Evan Smiley, Esq.
Albert, Weilard, and Golden
650 Town Center Drive
Costa Mesa, Ca 92626

Office of the United States Trustee
Federal Building, Room 1184
10 Causeway Street
Boston, MA 02222

Peter Butler
Senior Attorney
1600 7th Avenue, #3206
Seattle, WA 98191

Don Mason
Director – Oregon Regulatory
421 SW Oak Street, #8S9
Portland, OR 97204

USW
Director Interconnection Compliance
1801 California, Room 2410
Denver, CO 80202

U S WEST Law Department
Attn: General Counsel, Interconnection
1801 California Street, 51st Street
Denver, CO 80202

Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147

Contract Administration
Attn: Contract Management
Four Bell Plaza, 9th Floor
311 S. Akard Street
Dallas, TX 75202-5398

Douglas L. Smart, President & CEO
MDI, Inc. d/b/a NorthWay Internet
11 Hodges Street
North Andover, MA 01895

Contract Administration
Attn: Notices Manager
311 S. Akard, 9th Floor
Dallas, TX 75202-5398

Verizon
Tracey George
Bankruptcy Department
185 Franklin Street, Room 903
Boston, MA 02110

Vicki Harry
Account Executive
AT&T Corp.
300 Atrium Drive, Room 3W079
Somerset, NJ 08873

Tom Connor, President
500 A Abbott Drive
Bromall, PA 19008

COMDISCO, INC.
6111 North River Road
Rosemont, IL 60018
Attn: Venture Group

Dennis A. Clarke
Cummings Properties LLC
200 West Cummings Park
Woburn, MA 01803

Burlington Woods Office Trust No. 1
C/o Finard & Company, LLC
Three Burlington Woods Drive
Burlington, MA 01803

Lucent Technologies Inc.
100 Burtt Road
Andover, MA 01810

StorageNetworks
100 Fifth Avenue
Waltham, MA 02451
Attn: Chief Financial Advisor

Debbie Howard
Contract Administrator
Exodus Communications, Inc.
2831 Mission College Blvd.
Santa Clara, CA 95054-1838

New England Copy Specialists Inc.
39 Sixth Road
Woburn, MA 01888

Share Group, Inc.
99 Dover Street
Somerville, MA 02144

August Fromuth
AGF Direct Gas Sales & Servicing, Inc.
1000 Elm Street, 12th Floor
Manchester, NH 03101

Linda Monico
NYSEG Solutions, Inc.
2 Court Street
Binghamton, NY 13901

Mr. Michael Fusco
ServicEdge Partners, Inc.
62 Second Avenue
Burlington, MA 01803

Shell Energy
1221 Lamar St., Suite 1000
Houston, TX 77010

Bernie Bilski, President
WeatherWise USA Inc.
One North Shore Center
Pittsburgh, PA 15212

EarthLink Network, Inc.
3100 New York Drive
Pasadena, CA 91107

Julie S. Mantis
EarthLink Networks, Inc.
3100 New York Drive
Pasadena, CA 91107

Mr. Raymond E. Disch, President
Power Works, L.L.C.
160 West State Street
Trenton, NJ 08608

Linkshare Corporation
215 Park Avenue South, Eight Floor
New York, NY 10003

Gerald N. Rhodes, President
Exelon Energy
2600 Monroe Blvd.
Norristown, PA 19403

Linda G. Applestein
Director, Marketing
Exelon Energy
2600 Monroe Blvd.
Norristown, PA 19403

Mr. David Cuthbert
Nexus EnergyGuide, Inc.
16 Laurel Avenue, Suite 100
Wellesley Hills, MA 02481

Ms. Rebecca L. Lynch
Consolidated Edison Co. of New York, Inc.
9 Irving Place, 9th Floor South
New York, NY 10003

Jon Sorenson
SmartEnergy.com
81-10 Courtland Avenue, Suite 97
Stamford, CT 06902

Petroleum Heat & Power
385 University Ave
Westwood, MA 02090

Valerie F. Finneran
Suburban Propane, L.P.
240 Route 10 West
Whippany, NJ 07981

Michael DeBerdine III
Rhodes Energy Corporation
1300 Loop Road
Lancaster, PA 17601

Mr. Dave Manly
EnergyUSA
2000 West Park Drive, Suite 300
Westborough, MA 01581

Mr. John Sutherland
KeySpan Energy Services, Inc.
14-04 111 Street
College Point, NY 11356

Mr. Rick Kohl
Preferred Energy Services, Inc.
151 Bernal Road, Suite 1
San Jose, CA 95119

Ms. Linda D. Ratchford
Conectiv
252 Chapman Road
P.O. Box 6066
Newark, DE 19714

Consolidated Edison Company of New York, Inc.
4 Irving Place, 9th Floor
New York, NY 10017
Attn: Section Manager

Mantiss, an Extant Company (Extant, Inc.)
Suite 2450
200 North LaSalle
Chicago, IL 60601
Attn: President

PECO Energy Company
2301 Market Street
Philadelphia, PA 19103
Attn: Carlo L. Ciabattoni
Supplier Administration Group, N4-4

PJM Interconnection, LLC
955 Jefferson Avenue
Valley Forge Corporate Center
Norristown, PA 19403

Mr. James P. Townsend
Townsend Oil Company, Inc.
3 Oak Street
Beverly Farms, MA 01915

Energy Services Group, LLC
33 Riverside Drive, Suite 100
Pembroke, MA 02359

Mr. J. Leonard Bicknell
Alvin Hollis & Company, Inc.
1 Hollis Street
So. Weymouth, MA 02190

Mr. William G. O'Brien
AllEnergy Marketing Company, LLC
95 Sawyer Road
Waltham, MA 02453

Storage Networks, Inc.
Rep: Kara Sims, Esq.
225 Wyman Street
Waltham, MA 02154

Smart Energy, Inc.
Rep: Anna Blumkin, Esq.
300 Unicorn Park
Woburn, MA 01801

Info Directions, Inc.
Rep: Susan Sharp
833 Phillips Rd.
Victory, NY 14564

Mary L. Cottrell
Executive Secretary
Massachusetts Dept. of Telecommunications &
One South Station
Boston, MA 02110

Hon. Debra Renner
Secretary to the Commission
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
B-20 North Office Building
Harrisburg, PA 17120

Felecia L. Greer
Executive Secretary
Public Service Commission of the State of Maryland
6 St. Paul Street
Baltimore, MD 21202

Frances L. Smith, Secretary
New Jersey Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Ms. Karen Nickerson, Secretary
The Public Service Commission of Delaware
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, DE 19904

Jesse P. Clay, Jr., Commission Secretary
Public Service Commission of the District of Columbia
717 14th Street
Washington, D.C. 20005

Commonwealth of Massachusetts
Division of Employment & Training
Attn: Chief Counsel
Hurley Building-Government Center
Boston, MA 02114

Office of the Attorney General
Commonwealth of Massachusetts
Consumer Protection Division
One Ashburton Place
Boston, MA 02108

Massachusetts Department of Revenue
P.O. Box 7046
Boston, MA 02204

Office of the United States Trustee
O'Neill Federal Office Building
10 Causeway Street – Room 1184
Boston, MA 02222

Internal Revenue Service
James Spinale, MS 20800
JFK Federal Building
P.O. Box 9112
Boston, MA 02203

Qwest Communication Services
Wholesale Services
P.O. box 36481
Louisville, KY 40233-6481

TMNG
P.O. Box 911376
Dallas, TX 75391-1376

Verizon
P.O. Box 8585
Philadelphia, PA 1917-3007
(acct# VEROA56Y)

Finard & Company LLC
P.O. Box 845391
Boston, MA 02284-5394

Verizon
P.O. Box 8585
Philadelphia, PA 1917-3007
(acct# VEROA56Y)

Verizon
P.O. Box 15123
Albany, NY 12212-5123
(acct# VERMA056)

InfoDirections, Inc.
833 Phillips Road
Victor, NY 14564

Verizon
P.O. Box 15123
Albany, NY 12212-5123
(acct# VERNJ12Y)

Verizon
P.O. Box 4833
Trenton, NJ 08650-4833
(acct# VERNJ12Y)

Verizon
P.O. Box 17577
Baltimore, MD 21297-0513
(acct# VERMD41Y)

Smartenery
300 Unicorn Park Drive
Woburn, MA 01801

Exodus Communications, Inc.
Dept CH 10729
Palatine, IL 60055-0729

Storage Networks
100 Fifth Avenue
Waltham, MA 02451

Linkshare Corporation
215 Park Avenue South – 8th Floor
New York, NY 10003

Globe Tech, Inc.
76 Northestern Blvd.
Suite 30B
Nashua, NH 03062

ComDisco, Inc.
Attn: Carrie Loepke
6111 North River Road
Rosemont, IL 60018

Verisign
1600 Bridge Parkway
Suite 201
Redwood City, CA 94065

Verizon
P.O. Box 646
Baltimore, MD 21265-0646
(acct# VERMD930)

Steven D. Pohl, Esq.
Brown, Rudnick, Freed & Gesmer, P.C.
One Financial Center
Boston, MA 02111

Verizon
P.O. Box 15124
Albany, NY 12212-5124
(acct# VER090)

Securities & Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Securities and Exchange Commission
Boston District Office
73 Tremont Street – Suite 600
Boston, MA 02108

U.S. Attorney
U.S. Court House – Suite 9200
One Court House Way
Boston, MA 02210

William Baldiga
Attorney for Simplexity, Inc.
Brown, Rudnick, Freed & Gesmer
One Financial Center
Boston, MA 02111

John C. LaLiberte
Kenneth D. Small
Sherin & Logden, LLP
100 Summer Street
Boston, MA 02110

Darrel S. Laddin, Esq.
Felton E. Parrish, Esq.
Arnall Golden & Gregory, LLP
2800 One Atlantic Center
1201 W. Peachtree Street
Atlanta, GA 30309-3450

Federal Communications Commission
Office of the General Counsel
Jane E. Mago
445 12th St. S.W.
Washington, DC 20554

Richard Stubbs
EVulkan, Inc.
17 Massasoit Street
Northampton, MA 01060

John S. Rodman
180 Canal Street, Suite 400
Boston, MA 02114

Jeffrey A. Kitaeff
565 Turnpike
N. Andover, MA 01845

Edward A. Davis
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019

Public Utilities Commission
100 N. Union Street, Suite 850
Montgomery, Alabama 36104

Connecticut Department of Public Utility Control
Ten Franklin Square,
New Britain, CT 06051

Colorado Public Utilities Commission
1580 Logan Street, Office Level 2
Denver, CO 80203

Florida Public Service Commission
2540 Shumard Oak Blvd
Tallahassee, FL 32399-0850

Kentucky Public Service Commission
P.O Box 615
211 Sower Blvd
Frankfort, Kentucky 40602-0615

Rhode Island Division of Public Utilities
89 Jefferson BLvd
Warwick, Rhode Island 02888

Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Vermont Department of Public Service
112 State Street, Draw 20
Montepelier, VT

Office of Attorney General
Alabama State House
11 South Union Street, Third Floor
Montgomery, AL 36130

Office of Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203

Office of Attorney General
The Capitol
Tallahassee, FlA 32399-1050

Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601

Office of Attorney General
MS Attorney General's Office
P.O. Box 220
Jackson, MS 39205

Office of Attorney General
New York, The Capitol
Albany, NY 1222400341

Department of the Attorney General
150 South Main Street
Providence, Rhode Island 02903

Office of Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 501
Columbia, SC 29211

Office of Attorney General
425 5th Ave
Nashville, TN 37243

Utah State Attorney General
Administration Office
160 East 300 South, 6th Fl
Heber Wells Building,
Salt Lake City, UT 84114

James Cornblatt, Esq.
Servisense.com, Inc.
180 Wells Avenue
Newton, MA 02459

John S. Rodman, Esq
180 Canal Street
Suite 400
Boston, MA 02114

Shell Energy
1221 Lamar Street, Suite 1000
Houston, TX 77010

NY Telecommunications and Energy
120 Broadway
New York, New York 10271

Pennsylvania Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Office of the Attorney General
P.O. Box 080
Trenton, NJ 08625-0080

Department of Consumer and Regulatory Affairs
941 North Capitol Street, NE
Washington, DC 20002

Office of Attorney General
200 St. Paul Place
Baltimore, MD 21202

Office of the Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

William Baldiga
Counsel for Simplexity, Inc.
Brown, Rudnick Freed & Gesmer
One Financial Center
Boston, MA 02111

Darrel S. Laddin, Esq.
Counsel to Verizon
Arnall, Golden & Greegory, LLP
2800 One Atlantic Center
1201 W. Peachtree Street
Atlanta, GA 30309-3450

Jonathan D. Yellin, Esq.
Riemer & Braunstein LLP
Three Center Plaza
Boston, MA 02108

Shelley L. Forrest, Esq.
Missouri Department of Revenue
General Counsel's Office
301 W. High Street, Room 670
PO Box 475
Jefferson City, MO 65105-0475

Kana Communications, Inc.
Dept. CH 10825
Palatine, IL 60055-0825

BlanketMail.com, Inc.
200 E. Buffalo Street
Suite 301
Ithaca, NY 14850

Francis Morrissey, Esq.
Hutchins, Wheeler Dittmar
101 Federal Street
Boston, 02110

Pamela S. Kogut, Esq
Glenn Kaplan, Esq
Office of Attorney General
Consumer Protection and AntiTrust Division
One Ashburton Place
Boston, MA 02108

Kevin T. Lamb, Esq.
Testa Hurwitz & Thibeault, LLP
125 High Street
Boston, MA 02110

Jonathan M. Feigenbaum, Esq.
Phillips & Angley
One Bowdoin Square
Boston, MA 02114

Essex Communications, Inc.,
543 Main Street,
New Rochelle, NY 10801

TCN
Leigh Tucker
20 University Road
Cambridge, MA 02138

Alex Mattera
Gadsby Hannah LLP
225 Franklin Street
Boston, MA 02110

Christine Jagde, Esq.
Raniero D'Aversa Jr., Esq.
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019