

Decision 05-12-032 December 15, 2005

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Application of Comtel  
Telcom Assets LP and VarTec Telecom, Inc.  
(U-5384-C and U-4338-C), Excel  
Telecommunications, Inc., (U-5196-C and  
U-4345-C) and VarTec Solutions, Inc. (U-5526-C)  
for Approval of a Transfer of Assets

Application 05-09-026  
(Filed September 14, 2005)

**OPINION AUTHORIZING TRANSFER OF ASSETS**

**Summary**

This decision grants the joint application of Comtel Telcom Assets LP (Comtel) and VarTec Telecom, Inc. (VarTec), Excel Telecommunications, Inc. (Excel)<sup>1</sup> and VarTec Solutions, Inc. (VarTec Solutions) (the VarTec Companies) for approval to transfer to Comtel the certificates of public convenience and necessity (CPCN) to provide services currently held by the VarTec Companies and the related assets and customers of the VarTec Companies. The transfer is part of an asset purchase agreement approved by the U. S. Bankruptcy Court for the Northern District of Texas.

**Parties to the Transaction**

Comtel is a newly formed Texas limited partnership whose principal business will be telecommunications. Its general partner Comtel Assets Inc., a

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<sup>1</sup> We approved the transfer of control of Excel to VarTec in Decision (D.) 02-04-021.

Texas corporation, owns 1% of its equity, and its limited partner Comtel Assets Corp., a Delaware corporation, owns 99% of its equity. Sowood Commodity Partners Fund III LP, an investment company organized in Delaware, owns Comtel Assets Inc. and Comtel Assets Corp. The equity of Sowood Commodity Partners Fund III LP is owned by its general partner Sowood Commodity Partners GP III LP (.2%), a Delaware limited partnership, and Harvard Private Capital Holdings, a passive institutional investor owned and controlled by the President and Fellows of Harvard University, a tax-exempt educational and research institution based in Cambridge, Massachusetts. The general partner of Sowood Commodity Partners GP III LP, with a 1% interest and operating control, is Sowood GP III LLC, a Delaware limited liability company. The sole managing member of Sowood GP III LLC is Jeff Larson. Sowood GP III LLC's three non-managing members are Stu Porter, Rick Dowd and Megan Kelleher.

VarTec and Excel are Texas corporations. VarTec Solutions is a Delaware corporation. They are privately-held corporations. VarTec Telecom Holding Company, a Delaware corporation and wholly-owned subsidiary of VarTec, holds 100% of the stock of Excelcom, Inc., a Delaware corporation, and Telco Communications Group, Inc., organized in Virginia. Excelcom, Inc. is the direct and sole shareholder of Excel, and Telco Communications Group, Inc. is the direct and sole shareholder of VarTec Solutions.

We authorized the VarTec Companies to provide competitive local exchange and interexchange services in California. We granted VarTec (U-5384-C) and Excel (U-5196-C) the authority to provide limited facilities-based and resold local exchange services in Decision (D.) 02-04-020 and D.02-09-013, respectively. We granted VarTec and Excel the authority to provide resold interLATA services in D.94-05-053 and D.90-02-028, respectively, and to provide

resold intraLATA services in D.95-01-011 and D.97-05-023, respectively.<sup>2</sup> We granted VarTec Solutions (U-5526-C) the authority to provide resold local exchange services and resold interLATA and intraLATA services under its former name, Dial & Save, in D.96-02-072 and D.95-10-009, respectively.

VarTec and Excel primarily provide telecommunications services to residential customers, and VarTec Solutions services commercial customers. We have authorized VarTec to provide interexchange services under the name Clear Choice Communications.

The VarTec Companies voluntarily filed for Chapter 11 bankruptcy on November 1, 2004 in the Dallas Division of the United States Bankruptcy Court for the Northern District of Texas, consolidated under Case No. 04-81694-HDH-11. As part of the bankruptcy process, the VarTec Companies have entered into a July 25, 2005 asset purchase agreement with Comtel Investments LLC. Comtel Investments, which is wholly owned by the same parties who own and control Comtel, has assigned its rights and obligations under the asset purchase agreement to Comtel as of August 1, 2005. The Court approved the asset purchase agreement on July 27, 2005.

### **Proposed Transaction**

Through the asset purchase agreement and the Court-approved auction process and subject to necessary regulatory approvals, Comtel will acquire substantially all of the assets of the VarTec Companies, including all

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<sup>2</sup> Under our registration process, we authorized VarTec and Excel to provide wireless services. In Ordering Paragraph 3 of D.95-10-032, we exempted wireless carriers from §§ 851 and 854. If appropriate, Comtel and the VarTec Companies should update VarTec's and Excel's wireless registration information currently on file at the Commission.

telecommunications equipment, customer accounts and records, business records and licenses and permits. Pending consummation of the proposed transaction, Comtel also intends to obtain up to approximately \$20 to \$25 million in debt financing to fund working capital and similar needs of the VarTec Companies. Upon consummation of the proposed transaction, Comtel intends to replace such debt financing with a three to five-year debt instrument of approximately \$50 million.

Once the proposed transaction is completed, the VarTec Companies no longer will hold the authorizations to provide telecommunications services. These authorizations will be held by or assigned to Comtel, subject to regulatory approvals, so Comtel can step into the shoes of the VarTec Companies. The VarTec Companies' residential and commercial customers will continue to receive services without interruption. Comtel's initial business plans provide that Comtel's services and geographic areas served will mirror those provided by the VarTec Companies. Service enhancements will be within the existing authority transferred. Comtel will operate under the VarTec Companies' trade names, in addition to the Comtel name.

Following the consummation of the asset transfer, Comtel will be led by a combination of its own management members and certain members of the existing management team of the VarTec Companies, who the Applicants currently expect will continue in management roles for Comtel after consummation of the transaction.

### **Discussion**

Pub. Util. Code § 851 requires Commission authorization before a public utility may "sell, lease, assign or otherwise dispose of ...property necessary or useful in the performance of its duties to the public..." Pub. Util. Code § 854

requires Commission authorization before a company may “merge, acquire, or control . . . any public utility organized and doing business in this state . . .” The purpose of this and related sections is to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such action, as a condition of the transfer, as the public interest may require. (San Jose Water Co. (1916) 10 CRC 56.)

Where a company that does not possess a CPCN desires to acquire the assets, including the CPCN, of a company that does possess a CPCN, we will apply the same requirements as in the case of an applicant seeking a CPCN to exercise the type of authority held by the company being acquired. Since the VarTec Companies possess CPCNs to operate as limited facilities-based and resale providers of local exchange and resale providers of intraLATA and interexchange telecommunications services within California, we will apply the requirements for such authority to Comtel, as the proposed holder of the CPCN following completion of the transaction.

The Commission has established two major criteria for determining whether a CPCN should be granted. An applicant who desires to operate as a facilities-based and resale provider of local exchange and resale provider of intraLATA and interexchange services must demonstrate that it has a minimum of \$100,000 in cash or cash equivalent, reasonably liquid and readily available to meet the firm’s start-up costs. In addition, the applicant is required to make a reasonable showing of technical expertise in telecommunications or a related business.

The applicants provided financial statements of Sowood Community Partners Fund III LP that demonstrate that Comtel will have sufficient resources to meet our financial requirements. Comtel will operate using its own managers

and some managers of the VarTec Companies. The remaining VarTec managers include Vice Presidents in charge of billing services, network planning, customer service and the Deputy Chief Counsel. Although Comtel is entering the telecommunications business, Comtel's managers include individuals with energy and telecommunications experience. The combined experience of the Comtel and VarTec Companies managers is sufficient to find that our requirement for technical expertise is satisfied.

Comtel and the VarTec Companies request that in addition to approving the asset transfer we should grant a waiver of applicable anti-slamming regulations. Applicants intend to provide any required customer notice and agree to provide customers a description of the transaction that is easy to understand and to inform customers of all their service options going forward. Applicants intend to conform to our notice requirements for the transfer of a customer base from one carrier to another, as adopted in D.97-06-096. We will condition approval of this application on the provision of this customer notice to the VarTec Companies' customers. Because this order approves the customer transfer, our anti-slamming regulations do not apply.

After the transaction is completed, the VarTec Companies' current customers will receive their services from a financially stronger telecommunications company in place of their currently bankrupt service provider. In addition, the transaction will be transparent to the customers with no change in rates or services. Because the proposed transaction provides net benefits to the public, it is in the public interest and we will grant it. We will authorize the transfer of the VarTec Companies' CPCNs to Comtel.

### **Procedural Matters**

In Resolution ALJ 176-3160, dated October 6, 2005, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. Therefore, a public hearing is not necessary, and it is not necessary to alter the preliminary determinations.

This is an uncontested matter in which the decision grants the requested relief. Therefore, pursuant to Section 311(g)(2) of the Public Utilities Code, the otherwise applicable 30-day period for public review and comment is being waived.

### **Motion for Confidential Treatment of Proprietary Information**

Comtel and the VarTec Companies request confidential treatment of the financial statements submitted under seal with the application as Exhibit F. These financial documents contain highly sensitive and proprietary information, which, if public, would place Comtel and the VarTec Companies at an unfair business disadvantage. We have granted similar requests for confidential treatment. We will issue an appropriate protective order.

### **Assignment of Proceeding**

Susan P. Kennedy is the Assigned Commissioner, and Janice Grau is the assigned Administrative Law Judge in this proceeding.

### **Findings of Fact**

1. By D.02-04-020 and D.02-09-013, VarTec and Excel were granted CPCNs to operate in California as providers of limited facilities-based and resold local exchange services. By D.94-05-053 and D.90-02-028, VarTec and Excel were granted CPCNs to operate in California as providers of resold interLATA services, and by D.95-01-011 and D.97-05-023 to operate as providers of resold

intraLATA services. By D.96-02-072 and D.95-10-009, VarTec Solutions was granted CPCNs to operate in California as a provider of resold local exchange services and resold interLATA and intraLATA services under its former name, Dial & Save.

2. As a result of the transaction, Comtel will acquire substantially all of the assets of VarTec, Excel and VarTec Solutions, including all telecommunications equipment, customer accounts and records, business records and licenses and permits.

3. Comtel will retain some of the managers of VarTec, Excel, and VarTec Solutions. Some of Comtel's managers have telecommunications and energy expertise.

4. Customers will continue to receive service under the same rates, terms, and conditions of service after approval of the transaction.

5. Comtel and the VarTec Companies will provide notice to customers of the transfer.

6. Comtel has sufficient financial resources to meet the Commission's requirements to provide facilities-based and resold interexchange services.

7. Comtel possesses the necessary technical expertise required by the Commission.

8. Notice of this application appeared on the Commission's Daily Calendar on October 6, 2005.

9. There were no protests to this application.

10. No hearings are necessary.

11. Due to the confidential and proprietary nature of certain materials contained in the confidential Exhibit F, it is reasonable that they remain under

seal for two years unless a request made prior to the expiration of that time demonstrates a need for further protection.

**Conclusions of Law**

1. The Commission will apply the same requirements to a request for approval of an agreement to acquire the assets, including the CPCN, of a provider of limited facilities-based and resold local exchange and resold intraLATA and interexchange telecommunications services within California as it does to an applicant for authority to provide such services.

2. Comtel meets the Commission's requirements for the issuance of a CPCN to provide limited facilities-based and resold local exchange and resold intraLATA and interLATA telecommunications services.

3. Approval should be conditioned on Comtel and the VarTec Companies' provision of appropriate notice to the VarTec Companies' customers as described in this order.

4. The transaction provides net benefits to the public and is, therefore, in the public interest.

5. In order to avoid delaying this transaction, the approval of the application should be made effective immediately.

**O R D E R**

**IT IS ORDERED** that:

1. Pursuant to Public Utilities Code Sections 851 and 854, the joint application of Comtel Telcom Assets LP (Comtel) and VarTec Telecom, Inc. (VarTec), Excel Telecommunications, Inc. (Excel) and VarTec Solutions, Inc. (VarTec Solutions) (the VarTec Companies) for approval of the transfer of the assets, customers and

certificates of public convenience and necessity of the VarTec Companies to Comtel is approved.

2. Comtel and the VarTec Companies shall comply with D.97-06-096's customer notice requirements.

3. Within 30 days after the transfer of authority authorized herein, Comtel shall notify the Director of the Telecommunications Division in writing of the completion of the transfer.

4. Comtel and the VarTec companies shall make all books and records applicable to the transfer available for review and inspection upon Commission staff request.

5. Comtel and the VarTec Companies' motion for confidential treatment of proprietary information contained in Exhibit F is granted. Exhibit F shall remain under seal and shall not be accessible or disclosed to persons other than the Commission staff absent an order of the Commission, the assigned Commissioner or administrative law judge (ALJ) or the law and motion ALJ, for a period of two years. If protection beyond that date is required, Comtel shall file a motion prior to the expiration of that period, explaining why further protection is needed.

6. Application 05-09-026 is closed.

This order is effective today.

Dated December 15, 2005, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
SUSAN P. KENNEDY

DIAN M. GRUENEICH  
JOHN A. BOHN  
Commissioners