

ORIGINAL

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BEFORE THE ARIZONA CORPORATION C

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2006 NOV 13 P 4:20

Arizona Corporation Commission

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IN THE MATTER OF THE JOINT
APPLICATION OF

DOCKET NO. T-20423A-05-0677
DOCKET NO. T-03401A-05-0677
DOCKET NO. T-02584A-05-0677
DOCKET NO. T-03188A-05-0677

COMTEL TELCOM ASSETS LP

AND

VARTEC TELECOM, INC., EXCEL
TELECOMMUNICATIONS, INC., AND
VARTEC SOLUTIONS, INC.

EXCEPTIONS TO RECOMMENDED
OPINION AND ORDER

FOR APPROVAL OF A TRANSFER OF
ASSETS

Snell & Wilmer

LLP
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-0000

On November 2, 2006, the Arizona Corporation Commission's ("Commission") administrative law judge ("ALJ") issued a recommended opinion and order ("ROO") in the above-captioned docket. Applicant Comtel Telcom Assets LP ("Comtel" or the "Company") submits its exceptions to the ROO.

I. The 90-Day Opt-Out Condition.

In the ROO,¹ the ALJ recommends that Comtel provide notice (within 30 days of the date of a decision in this docket) that the customers of VarTec Telecom, Inc., Excel Telecommunications, Inc., and VarTec Solutions, Inc. (collectively, the "VarTec Companies") with term contracts have 90 days from the date of the notice to express their intent to transfer to another carrier without prejudice or regard to their contractual obligations. Comtel requests that the Commission delete this condition from the ROO for the following reasons:

(1) The VarTec Companies provided notice of this transaction via letter to their customers in March 2006, nearly eight months ago. A second notice was published in *The*

¹ ROO at Ordering Paragraph 3.

1 *Arizona Republic* on July 10, 2006, regarding the application and the hearing in this case. No
2 customers have contacted the VarTec Companies or Comtel to oppose the transaction or to
3 request any change in service. (August 14, 2006, Hearing Transcript ("Tr.") 31:14-20). Thus,
4 Comtel submits that there is no need to incur the additional cost of providing a third notice in this
5 case, especially in light of the small number of business and wireless customers who have term
6 contracts at this time. Further, because the transfer of customers from the VarTec Companies to
7 Comtel arose as a result of the bankruptcy of the VarTec Companies, a third notice could create
8 customer confusion regarding the on-going status of their telephone service.

9 (2) The VarTec Companies are bankrupt and insolvent. Thus, the former customers of
10 the VarTec Companies are in all cases better off as customers of Comtel, a financially sound
11 company committed to growth and the further enhancement of services. (Tr. 31:21-32:12).
12 Comtel has worked to ensure a seamless transition of customers from the VarTec Companies to
13 Comtel, and Comtel offers the same rates, services and support as the VarTec Companies. (Tr.
14 43:7-22). In a case where the customers are demonstrably better off with the new carrier, there is
15 no good reason to allow customers with term contracts to terminate their contracts.

16 (3) Comtel believes that a 90-day opt-out condition in cases involving a bankrupt
17 telecommunications provider does not serve the public interest because it discourages companies
18 from acquiring assets out of bankruptcy. As part of the process of formulating an offer, Comtel
19 calculated how much it was willing to pay for the assets of the VarTec Companies based on the
20 anticipated future revenues from the customers, including the business and wireless customers
21 with term contracts. (Tr. 32:18-33:20). It is already difficult to evaluate anticipated revenues in a
22 bankruptcy scenario, let alone trying to evaluate this same scenario with the additional
23 complexity of allowing term customers to opt out of contracts. While the Utilities Division Staff
24 witness expressed his presumption that buyers usually take into account the potential loss of
25 contractual customers in their bids to acquire assets, he provided no evidence to support this
26 presumption in the context of a bankruptcy. (Tr. 90:3-25). Comtel submits that by excusing the
27 90-day opt-out condition in the case of a company which is acquiring the assets of a bankrupt
28

1 telecommunications company, the Commission will encourage the acquisition of such assets,
2 which promotes the public interest.

3 (4) At the hearing, the Staff witness testified that he recommended the 90-day opt-out
4 condition because the Commission has previously included such conditions in cases involving
5 transfers of assets. However, Staff acknowledged that a 90-day opt-out is not required in cases
6 involving stock transfers. It is unclear what policy is served by requiring a 90-day opt-out in
7 cases of asset transfers but not in cases of stock transfers—where the end result (*i.e.*, a change in
8 control of the provider of service) is substantially the same. Staff was unable to provide a policy
9 explanation for differentiating the two situations, other than the obvious difference that one
10 involves a stock transfer and the other involves an asset transfer. (Tr. 91:11-95:15). Comtel
11 submits that there is no good policy basis for differentiating the two situations, and that for the
12 reasons stated above, the condition should be deleted from the ROO.

13 (5) This transaction involves 49 states and the District of Columbia. No other state or
14 the District of Columbia has imposed the 90-day opt-out condition or any other opt-out period.
15 (Tr. 33:21-25, 34:1).

16 (6) Finally, with regard to the wireless customers, the 90-day opt-out condition
17 constitutes the regulation of market entry and exit which has been prohibited by Congress. 47
18 U.S.C. § 332(c)(3)(A) (stating “no State or local government shall have any authority to regulate
19 the entry of or the rates charged by any commercial mobile service or any private mobile
20 service...”). Thus, to the extent that the Commission retains the 90-day opt-out condition, it
21 should only apply to the business customers and not the wireless customers. No other customers
22 of Comtel have term contracts.

23 For these reasons, Comtel respectfully requests that the 90-day opt-out condition be
24 excluded from the order adopted by the Commission. In the alternative, Comtel requests that the
25 Commission exclude wireless customers from the condition.

26 **II. OWNERSHIP PERCENTAGES.**

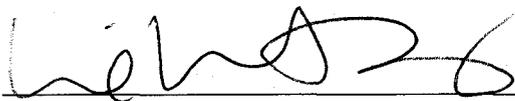
27 Since the Company’s filing of its Supplement to Joint Application for Approval to
28 Transfer Assets, the ownership percentages of Comtel have changed slightly, and the percentages

1 listed in footnote 1 on page 3 of the ROO should be modified. Comtel's ownership percentages
2 should read: Comtel's general partner, Comtel Assets, Inc., owns 1% of Comtel; Comtel's limited
3 partner, Comtel Assets Corporation, owns 85.7% of Comtel; and the Management Voting Interest
4 holds 13.3% of equity in Comtel. Comtel requests that the Commission's final order include the
5 updated ownership percentages of Comtel.

6 Comtel supports the ROO in all other respects.

7 DATED this 13th day of November, 2006.

8 SNELL & WILMER

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11 Jeffrey W. Crockett, Esq.
12 Marcie Montgomery, Esq.
13 One Arizona Center
14 400 East Van Buren
15 Phoenix, Arizona 85004-2202
16 Attorneys for Comtel Telecom Assets LP

17 ORIGINAL and twenty (20) copies
18 filed with Docket Control this 13th
19 day of November, 2006.

20 COPY of the foregoing hand-delivered
21 this 13th day of November, 2006, to:

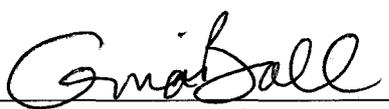
22 Yvette B. Kinsey, Administrative Law Judge
23 Hearing Division
24 ARIZONA CORPORATION COMMISSION
25 1200 West Washington Street
Phoenix, Arizona 85007

Chris Kempley, Chief Counsel
Legal Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

26
27
28

1 Ernest G. Johnson, Director
2 Utilities Division
3 ARIZONA CORPORATION COMMISSION
4 1200 West Washington Street
5 Phoenix, Arizona 85007

6 Maureen Scott, Staff Attorney
7 Legal Division
8 ARIZONA CORPORATION COMMISSION
9 1200 West Washington Street
10 Phoenix, Arizona 85007

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13 _____
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Snell & Wilmer
LLP
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2102
(602) 382-6000

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