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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Courier

Hon. William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: *Ex Parte* Response to Reply Comments of MCI Concerning Divestiture of Its Internet Business
CC Docket No. 97-211

Dear Chairman Kennard:

This is written on behalf of Australia's Telstra Corporation Limited ACN 051 775 556 (Telstra) to underscore our undiminished concern regarding the terms on which MCI Communications Corporation (MCI) proposes to divest its Internet business to Cable & Wireless plc. (C&W) prior to merging with WorldCom, Inc. (WorldCom).

Telstra is a major international private line (IPL) customer of MCI. Telstra's IPLs are primarily used to provide Internet service to U.S. as well as Australian subscribers. In addition, Telstra competes directly with MCI and C&W, which controls Optus Communications Pty Ltd., Australia's second largest communications provider, in the market for Internet and basic telecommunication services.

The revised divestiture plan described by MCI in its July 15 Reply Comments is, on its face, inconsistent with the Communications Act of 1934, as amended, and the Commission's tariff policies for exactly the same reasons as the divestiture first announced in May 1998: the plan blatantly discriminates against Telstra and similarly situated MCI private line customers. Under the divestiture "C&W will acquire rights to use not only the domestic portion of the MCI backbone service but also **(pursuant to a favorable two-year agreement with MCI)** the international circuits and domestic backhaul facilities used to connect foreign ISPs [Internet

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Service Providers] to nodes on the U.S. backbone."[1] (emphasis added) With these facilities C&W will "replace MCI as the provider of backbone services to more than 1,300 domestic and international ISP customers that now obtain Internet access from MCI."[2]

As Telstra stated in its June 11 "Comments" on MCI's original divestiture plan, the preferential IPL and backhaul arrangements for Internet access proposed for C&W underscore the concerns which Telstra has raised in this docket since January 1998 and in other FCC dockets since early 1997. The terms upon which MCI and other U.S. international carriers currently furnish IPLs to off-shore ISPs for Internet access are not cost-based and are unduly discriminatory.[3] That is presumably why C&W was unwilling to acquire MCI's Internet business "as is," and MCI consequently has offered C&W "a favorable two-year agreement" for leasing the "international circuits and domestic backhaul facilities" which MCI will retain post-divestiture but which C&W will need to connect its nodes to the U.S. Internet backbone.

MCI is incorrect therefore in asserting that the revised divestiture resolves the Internet competition issues raised by its proposed merger with WorldCom and that "FCC approval is not required for this divestiture...."[4] FCC review and approval of the Internet divestiture is necessary because the IPL and domestic backhaul facilities leased to C&W on "favorable" terms for Internet service are basic common carrier facilities and are subject to the tariff provisions of Title II of the Communications Act (e.g., 47 U.S.C. §§ 201-203) as well as the FCC's related rules (e.g., 47 C.F.R. § 63.01 et seq.). Accordingly, prior to furnishing C&W with a "favorable" two year lease for IPL facilities, MCI would need to file appropriate tariffs and/or contracts with the FCC for approval.[5] This would be so if MCI were leasing IPL

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[1] "Reply Comments of MCI Concerning Divestiture of Its Internet Business," dated July 15, 1998, p. 7.

[2] Id.

[3] The failure of the Commission (or MCI) to address current U.S. carrier pricing arrangements for the provision of international backbone facilities already has led Telstra to seek judicial review of the FCC's Report and Order, 12 FCC Rcd 19806 (1997) in the accounting rate benchmark docket (IB Docket No. 96-261), and Telstra is reviewing various legal options — including an action for injunctive relief — to protect its rights in the current proceeding.

[4] Id., p. 9.

[5] Section 61.1(c) of the Commission's Rules states that "[n]o carrier required to file tariffs may provide any interstate or foreign communication service until every tariff publication

(continued...)

facilities to C&W in the absence of a related asset purchase, and neither MCI nor C&W have provided any reason (nor could they) as to why these long standing tariff rules should be waived here.[6]

In these circumstances, MCI's request to expedite approval of the WorldCom-MCI merger,

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[5](...continued)
for such communication services is on file with the Commission and in effect." Tariffs for non-dominant international carriers may be filed on one day's notice (Section 63.24(c)) but the Commission's staff may defer the effective date for up to 120 days where appropriate to permit adequate review (Section 61.58(a)(2)).

To date, the FCC has repeatedly declined to forbear enforcement of the Communications Act and its tariff rules for carriers offering international private line and other international services, except for certain services offered by Commercial Mobile Radio Service (CMRS) providers. See generally Report and Order, 11 FCC Rcd 12,884 at ¶s 80-84 (1996); Second Report and Order, 11 FCC Rcd 20730 at ¶ 94 (1996); Memorandum Opinion And Order And Notice of Proposed Rulemaking, GN Dok. No. 94-34 et al., FCC 98-134, released July 2, 1998 at ¶ 56.

[6] MCI's Reply ignores Telstra's position regarding the FCC's jurisdiction over the Internet divestiture. In a June 16 "Reply" pleading in this docket, C&W contends, at pp. 4-5, that the tariff provisions of the Communications Act are inapplicable because: (a) the divestiture does not involve regulated private line service but an "exchange of service between two carriers [which] is not a common carrier undertaking subject ... to Section 203 ... or the contract filing requirements of Section 211 ..."; and (b) C&W and MCI are not dominant carriers. Neither of these arguments are persuasive. First, MCI itself has repeatedly characterized the backbone service which it will provide to C&W as a contract-based offering (an "agreement") involving the same IPL and domestic facilities now furnished to its existing ISP customers. However, to avoid any doubt on this score, the FCC should promptly require C&W and MCI to docket the underlying agreement(s) so that the regulatory status of the services at issue can be resolved. As noted above, thus far the FCC has declined to forbear enforcement of its tariff rules for international services provided by non-dominant and dominant carriers alike. Moreover, earlier this year, the FCC advised the Congress that a carrier's provision of leased lines to ISPs for backbone services constitutes the provision of "interstate telecommunications" — that is, a Title II service. See Report to Congress, CC Docket No. 96-45, FCC 90-67, released April 10, 1998, ¶ 67. If basic telecommunication circuits leased to ISPs for backbone services are not "telecommunication services," and the tens of millions of dollars generated thereby are not subject to Universal Service Fund contributions, that would mark an abrupt change in the FCC's policy and the Congress, as well as the parties to this docket, deserve a full explanation.

conditioned on the divestiture of the MCI Internet business, should be denied until MCI and C&W fully disclose the tariff terms on which any IPL circuits and related common carrier facilities for Internet backbone service will be provided to C&W by the post-merger MCI WorldCom, and the FCC has had a full opportunity to review same.[7] Thereafter, consistent with Title II of the Communications Act and the agency's rules, the FCC should not approve the divestiture and related merger proposal absent a finding that said common carrier facilities and services are cost based and will be offered on unbundled, non-discriminatory tariff terms to Telstra and other similarly situated parties.

Telstra's objection to the discriminatory terms on which C&W will obtain IPL and backhaul facilities for Internet services is not simply a matter of principle. Telstra currently pays MCI and other U.S. international carriers more than U.S. $30 million annually for IPL and related facilities needed to obtain access to the U.S. Internet backbone. Thus, as a direct competitor of C&W, among others, Telstra obviously would be at a commercial disadvantage if C&W can obtain equivalent Internet backbone facilities at a steeply discounted rate. This would be doubly true, of course, if that discounted rate is subsidized by the standard tariff rates billed to Telstra and other IPL customers of the post-merger MCI WorldCom.[8]

MCI WorldCom Noncompete Agreement

In connection with the sale of its Internet business to C&W, MCI has also advised the Commission that it has entered into a noncompete agreement with C&W. According to MCI, "[t]he agreement preclud[es] MCI-WorldCom from soliciting or contracting with any ... transferred ISP customers to provide dedicated Internet access services for a period of two years, except that MCI-WorldCom is permitted to continue to compete for such business of any ISP customer that purchases Internet services from WorldCom as of the closing."[9]

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[7] If necessary and to afford adequate time for review, the Commission should use its power under Section 203(b)(2) of the Communications Act to suspend any relevant tariff for up to 120 days.

[8] Beyond that, MCI currently offers IPL facilities to numerous destination in Europe, Asia and the Americas which Telstra may also wish to serve. If C&W can obtain discounted access to these facilities (which may well be matched with IPL facilities owned by C&W overseas, including IPLs in the markets where C&W affiliates hold a monopoly (e.g., Hong Kong, Jamaica) then Telstra and other service providers also maybe unfairly disadvantaged.

[9] "Reply Comments of MCI" supra, p. 7.

It is unclear whether this noncompete agreement applies to IPL and backhaul services offered to foreign ISPs, such as Telstra. However, Telstra believes that the noncompete is not in the public interest and likely unlawful if the agreement would bar Telstra from contracting with the post merger company for new IPL or backhaul facilities during the next two years. As noted above, Telstra competes directly with C&W and if its existing IPL lease with MCI is transferred to C&W Telstra may wish to obtain alternative IPL capacity from a competing supplier, such as MCI-WorldCom. At the very least, therefore, the noncompete agreement proposed by MCI should be declared unlawful and contrary to the public interest to the extent it would limit the options of Telstra and other non-U.S. ISPs to acquire IPL and related backhaul facilities for Internet access from the post merger company.

Regulatory Litmus Test For FCC

The U.S. Department of Justice (DOJ) and the European Commission (EC) have taken appropriate steps to ensure that the proposed merger of MCI and WorldCom will not give the post-merger company undue power over Internet backbone services by requiring MCI wholly to divest its Internet business as a condition of approving the merger. It is now up to the FCC to ensure that the divestiture proposed by MCI is implemented in a fashion which is consistent with U.S. telecommunication policy.

To do so, the FCC need not revisit all the basic terms of the bargain which MCI and C&W have struck; it need only focus on those provisions which, on their face, are at odds with the Communications Act and the FCC's established policies. In this regard, the "favorable" — i.e., discriminatory — lease for IPL and related common carrier backhaul facilities stand out. If such terms are more nearly cost-based than MCI's existing terms for such facilities, then the post-merger company should offer like terms to other IPL customers, such as Telstra, which are also off-shore ISPs, so that they have an equal ability to compete with C&W and MCI WorldCom. And, if the terms are not cost-based — for example, because they reflect a special discount for C&W which other private line customers will subsidize — then they should be rejected as unreasonably discriminatory under Section 201(b) of the Communications Act and Part 61 of the Commission's Rules.

Likewise the Commission should not permit MCI and C&W to enter into a noncompete agreement which would limit the ability of Telstra and other ISPs to obtain competitive IPL facilities to access the U.S. Internet backbones.

* * *

The rise of the Internet has made the MCI-WorldCom merger a litmus test for telecom policy as much as for competition policy. The DOJ and the EC have risen to the challenge, not by