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# Network Effects in Telecommunications Mergers

## MCI WorldCom Merger: Protecting the Future of the Internet

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Address by  
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Antitrust Division  
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Before the  
Practicing Law Institute  
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### Introduction

We are currently in the midst of an historic merger wave that has washed across almost every segment of our economy. Every year since 1995 has set a new record for the number of Hart-Scott-Rodino ("HSR") filings received by the agencies. Last year, the Antitrust Division reviewed a record 9,264 HSR filings for 4,728 transactions, an increase of nearly 70% since 1995, and we're receiving just as many this year. If the filings continue at the pace of the last few weeks, we may even meet or surpass last year's record. The hectic pace of filings this year has resulted, as of July 31, in 192 merger investigations, 42 merger challenges, and 44 merger wins. Last fiscal year, one of the busiest and most successful periods of merger enforcement for the Antitrust Division, we had a total of 230 merger investigations, 51 mergers challenges, and 49 merger wins.

Some of the most significant mergers and some of largest mergers we have investigated have been in the telecommunications industries. As of July 31, about 10% of HSR transactions involved telecommunications, similar to last year. That translates into about 23% of our investigations, compared to 27% last year. So far this year, 24% of our cases involve telecommunications, while last year only 17% of cases involved telecommunications.

Perhaps one of the most significant telecommunications merger investigations was the investigation of WorldCom Inc's acquisition of MCI Communications, which resulted in the largest divestiture of a company in merger history. That investigation focused on the Internet backbone market and on how the merger would affect the industry. Today I'm going to talk about network effects and explain how they can be relevant to merger analysis. Then I will talk specifically about the MCI/WorldCom transaction, the role of network effects in our analysis of that case, and the resolution of our competitive concerns.

### **Explanation of Network Effects and Compatibility**

What are network effects? Network effects occur when the customer's value of a product increases with the number of people using that same product or a complementary product. A typical example is the telephone. By itself the telephone is little more than a paperweight; it is only useful to me if other people have them. The more people who have phones, the more useful, and therefore the more valuable, phones are to the consumer. Another example is fax machines; the more people I can reach by faxing, the more valuable my fax machine is. In "real" networks like these communications networks, the value of the product increases with the number of people that the user can communicate with. In addition to real networks, there are "virtual" or "hardware-software" networks. In this type of network, the increase in the number of people using the product increases the number of complements for that product which increases the value of the product.<sup>(1)</sup> For example, as the number of owners of video tape recorders increases, the number and selection of tapes for video recorders increases, making the video tape recorders more valuable to their owners. Another example is a computer operating system. If only five people owned an operating system, no one would write any software for that system, which would limit its usefulness. But as more people purchase that same operating system, programmers will create more programs for that particular system, increasing its usefulness.

The characteristics of network industries make them prone to dominance by a single firm. If the attractiveness of a network increases as it enlarges, consumers will tend to choose the larger network, which in turn will make it even larger and even more attractive. These "positive feedback" effects are due to "increasing returns to consumption" also referred to as demand-side scale economies and can lead to a market "tipping" towards a single company or standard.<sup>(2)</sup> A classic example of tipping is the video tape recorder market, in which Betamax became extinct after consumers flocked to VHS.<sup>(3)</sup>

In some instances--where there are significant economies of scale, or where costs of designing components to work with different systems ("compatibility") are high<sup>(4)</sup>--it can actually be more efficient for the market to tip and for a single firm to dominate and become a monopoly. If tipping results in an increase in the size of the network, consumers can benefit. On the other hand, tipping can also increase the monopoly power of the dominant firm by creating significant barriers to entry. This is because "network market(s) tend to display inertia -- that is, once a technology is known to have a substantial lead in its installed base, it is hard for it to be displaced even by a technically superior and cheaper alternative."<sup>(5)</sup> A new entrant's network is limited by its lack of popularity and its inability to achieve network effects. Overcoming this Catch 22 is extremely difficult because "[a]lthough users are happy to jump on the 'bandwagon' of the new technology, too few may be willing to switch in advance of other users for fear of being stranded with an orphaned technology if others do not join them."<sup>(6)</sup>

Additionally, the difficulty of entry is exacerbated because consumers who use the Internet, like consumers of other products, may prefer to stay with the established technology because they are "locked-in" or tied to a particular product by significant investments into that product. These investments can range from time spent training employees how to use the product (e.g., computer software) to investments in complementary products (e.g., owning VHS video recorders and large collections of movies on VHS tapes). Such consumers will be even more reluctant to switch to a new entrant.

For these reasons, it is often difficult to reverse a tipping effect. Moreover, the possibility of obtaining significant and sustained market power creates an incentive for a firm to engage in predatory behavior to create a tipping effect. In a network industry, a likely form of such anticompetitive conduct would be for a firm seeking to obtain dominance to degrade its rivals' access to its network. By denying compatibility, a larger firm will have less to lose by decreasing compatibility than rival firms; the value of the rivals' networks will decrease more than the value of the larger firm's network, leaving the larger firm in a better relative position and increasing the likelihood that customers will switch to it. Also, by working to deny rivals or entrants access to its network, a larger firm will deny its rivals the benefits of network effects and raise a barrier to entry.

On the other hand, one of the ways that entry barriers can be overcome is by making products compatible or interoperable. If two firms' products are fully compatible, both are part of the same real or virtual network, and both can share in the economies of scale. As one might imagine, differently situated firms have different incentives regarding compatibility. If firms are relatively equally situated or if compatibility is critical to creating demand for a product, then the firms will likely favor compatibility.<sup>(7)</sup> In other words, if the two firms need each other to realize the benefits of network effects, they will likely make their products compatible. On the other hand, if the firms are not relatively equal, the dominant firm will prefer incompatibility. "[I]f one firm has a distinctly superior

package, including its product offering, its installed base, and its reputation, that firm is likely to prefer incompatibility and may in fact spend resources to block compatibility."<sup>(8)</sup> Since the dominant firm's network benefits more from network effects than its challenger's, incompatibility is likely to increase the chance of the market tipping towards the dominant firm's product.

Firms often have to weigh the costs of compatibility (decreasing the chance of the market tipping in their favor) against the benefits (increasing the size of the overall network). There are trade-offs either way. This is also true with respect to overall efficiency; interconnection or compatibility is not always the best or the least costly way to achieve network efficiencies. In some instances, the interconnection between firms could be more costly and less efficient than if the firms with incompatible products competed until the market tipped in favor of one or the other. Antitrust enforcement is designed to ensure that anticompetitive practices or anticompetitive mergers do not thwart the ability of free and vigorous competition to decide the winners and losers.

### Overview of the Internet

This issue of compatibility is critical to understanding the Internet. The Internet, at its very core, is a way of interconnecting different computer networks; in other words, the Internet is a way of making different computer networks compatible. The term Internet comes from Interconnected Networks. With its roots going back almost 25 years, the Internet began as a government-sponsored network joined at different military and academic research sites by fiber telecommunications facilities.<sup>(9)</sup> Key to this network was the adoption of a single protocol, Transmission Control Protocol/Internet Protocol ("TCP/IP"), which allowed these many different types of computer networks to communicate. After federal funding for this backbone was discontinued in 1995, private companies began operating their own backbone networks and selling access to their networks and the Internet. After privatization, the Internet developed into a much more widespread and diverse connection of networks. As you know, it's been growing by leaps and bounds and no longer has a university or research orientation but has become highly commercial in nature. According to the FCC,<sup>(10)</sup> the Internet has grown from ten million users in 1995 to over 140 million today. In 1997, Internet consumers purchased \$6.2 billion in Internet services (such as providing access, hosting, and other communication services), an amount expected to increase to over \$50 billion in 2002.

Today, the Internet is a network of interconnected public and private computer networks joined by privately owned fiber telecommunications facilities. Internet connectivity is provided directly to end users or on a wholesale basis to other Internet Service Providers (ISPs). End user connectivity can be either dial-up access to retail customers (residential or business users) or dedicated access to corporate connectivity customers. The connectivity being provided to customers enables them access to the entire Internet, including other end-users (such as by e-mail) and content providers (i.e. The WashingtonPost.com, Amazon.com, or USDOJ.gov).

The key to the Internet is that any ISP supplies access to the entire Internet. Without this interconnection, the Internet would lose much of its value because the network effects would be lost. Originally, when all the networks were connected by a single government-funded backbone, interconnection was not an issue. But as many different companies began to provide Internet backbone service, the government created Network Access Points ("NAPs") to facilitate interconnection. NAPs are simply a location set up to facilitate the interconnection of different private networks for them to exchange traffic. The companies that wished to exchange traffic at a NAP negotiated the terms and conditions of that interexchange through bilateral agreements. Two types of these agreements developed: "peering agreements" and "transit agreements."

A peering agreement is a bilateral agreement that allows two networks to exchange and terminate each other's traffic. It is a cooperation agreement where the two networks say, "I'll take your traffic if you take mine." It is important to note, however, that peering agreements refer only to traffic being delivered to an address on one of the two networks. The agreements do not allow one network to pass off traffic meant for a third network. For example, Network A peers with Network B and Network B peers with Network C, but Network A does not peer with Network C. Network A therefore cannot send traffic to Network C through its peering relationship with Network B.

At the beginning of privatization, most of the networks had peering agreements with each other. With the massive growth of the Internet, the NAPs became congested, slowing down the speed of the connection and resulting in more lost data, and lowering the quality of connection to the rest of the networks. The larger networks responded to this problem by investing in private dedicated connection points which provide faster and more accurate connections. Generally, only the big national networks have these private peering connection points. Over time, as individual networks grew, large nationwide backbone providers began to complain that small local or regional ISPs were free riding on the large providers' substantial network investments. To deal with the free-riding issues, the larger network providers began to create policies to restrict future peering arrangements with small and regional ISPs that had not invested in growing their networks. They stopped peering and entered into transit agreements where the national backbones charged the small network or ISP "transit fees" for carrying and terminating their traffic. In essence, the smaller networks became customers of the larger ones.

### **Overview of the MCI/WorldCom Transaction**

The MCI/WorldCom transaction, as it was originally structured, involved WorldCom's acquisition of MCI through a stock tender offer valued at \$37 billion. WorldCom was one of the largest telecommunications companies in the United States, providing local and long distance telephone services and Internet access services domestically and internationally. With annual revenues of about \$7 billion, WorldCom was the fourth largest facilities-based interexchange

carrier in the United States. Additionally, through its ownership of UUNET, MFS Communications, ANS Communications, and CompuServe Network Services, it was one of the leading providers of Internet backbone transmission services. MCI, with annual revenues of \$18.5 billion, was the second largest long distance telephone service provider, a leading provider of Internet transmission services (iMCI), and a recent entrant into the provision of local telephone services.

Procedurally, the investigation itself was complicated because it involved reviews by a number of law enforcement entities--the DOJ, 16 states and the European Union--as well as a number of regulatory agencies--the Federal Communications Commission and state public utility commissions. While we and the EU conducted independent investigations, they were highly coordinated. With the parties' consent, the two agencies shared evidence with each other and held joint meetings with the parties. We also shared information about theories. The EU's investigation went into a Phase 2 proceeding, meaning that it issued a statement of objections and held a hearing on the merger. <sup>(11)</sup>

Substantively, the transaction initially raised competitive concerns in four principal areas: long distance telephone services, local telephone service, international telecommunications networks, and Internet backbone services. We ultimately determined that the area of most significant competitive concern was the provision of Internet backbone services, or the provision of ubiquitous connectivity to the Internet. The merger would have combined two of the four leading nationwide or worldwide Internet backbones; MCI and WorldCom were the leading providers of wholesale Internet transmission services to ISPs and of dedicated access services to large businesses. Our investigation focused on what effect this combination, which would have created a dominant player in the provision of backbone services, would have had upon interconnection and access to the various networks that make up the Internet. We also examined whether the merger would give rise to market power through the powerful network effects that characterize the Internet.

### **Analysis of the MCI/WorldCom Merger**

While there have been changes in the Internet market since our investigation, at the time, we learned that the providers of Internet connectivity could be classified as a loose hierarchy broken down into roughly four tiers.<sup>(12)</sup> At the top are nationwide (or worldwide) Internet backbones, which provide nationwide Internet services using extensive owned or leased fiber facilities. They generally have peering arrangements or private peering connections with the other national backbone providers and are "transit-free," so they do not have to rely on transit agreements. UUNET (owned by WorldCom) and iMCI are examples of these large national backbone providers. The second group of providers are national Internet backbone networks that use facilities leased from underlying fiber telecommunications providers, but which pay transit fees to one or more national backbone providers. A third group comprises the Regional or local ISP Internet connectivity providers, which lease some regional or local network fiber

facilities and equipment and interconnect with other small providers at the public NAPs make up another category. They typically purchase transit backbone services from any of the national backbone providers. The last group is made up of ISPs that do not have a network, but instead rely on others for wholesale Internet connectivity services. Small "Mom & Pop" ISPs are typical of this type.

Given this complex and highly technical web of relationships, and the highly dynamic nature of a market characterized by rapid technological change, one thing was clear--defining a relevant product market was going to be a challenge. But after talking to competitors, customers, industry experts, and the parties, there seemed to be a national backbone market.<sup>(13)</sup> Smaller regional backbone networks would not be adequate substitutes after the merger, because they would be dependent on MCI/WorldCom for Internet connectivity. Without MCI/WorldCom, the smaller networks would be unable to offer customers sufficient connectivity to all sources of content on the Internet. Also, as an industry participant we talked to during our investigation explained it, "ISP customers want to know a backbone is large enough to peer with the other big backbones before becoming a customer."

The national backbone market was highly concentrated, with several significant competitors including UUNET, iMCI, and Sprint. The merger would have combined the facilities, personnel, and, perhaps most importantly, the customer bases of iMCI and UUNET, the two top backbone providers. The combined entity would have been by far the largest single nationwide backbone and Internet connectivity provider with an overall majority of customers (web sites, ISPs, and dedicated access corporate customers) connected to the Internet. Post-merger market shares for Internet connectivity ranged from 40-75%, depending on what measure of market share was used.<sup>(14)</sup>

Determining market shares was challenging because there was no commonly accepted method and there were legitimate questions about the accuracy of each method. In addition to public sources, we used a variety of other sources to evaluate market shares--interviews with industry players, internal documents from the parties and their competitors, and information we obtained through compulsory process. The two main public sources measured market share either according to shares of overall Internet industry revenues generated by ISPs that connected through various Internet providers, or according to the percentage of ISPs connected to a specific backbone versus the total number of ISPs connected to all of the backbones combined. According to the first measure of market share, 70% of the revenue generated by Internet providers would have purchased connectivity from MCI/WorldCom. According to the second method, used by *Boardwatch Magazine*, the combined MCI/WorldCom would hold an approximately 50% market share. Also, by this method, MCI/WorldCom and its next largest competitor would have together controlled a 75% market share, with the third largest competitor having only 4.4% of the market.

Since there were questions about the accuracy of these measures, we examined market shares using other methods as well: Internet traffic originating, terminating, or otherwise traversing an Internet backbone's network (a

measurement of size and significance of a backbone relative to other competitors); a revised revenue share that attempted to eliminate the double counting and irrelevant revenues; the number and type of Internet Points of Presence ("POPs") on a backbone's network; the number of circuits connecting customers to a backbone (which would correct for differences in customer size/significance); the number of "routes advertised" (or terminating IP addresses)--the density of a provider's network and web of customers, and finally the number, type, and significance of each network's customers. While none of these measures was perfect, each of them, while resulting in different absolute numbers, exhibited the same pattern. They all indicated that after the merger, MCI/WorldCom would be the dominant player in the market, and substantially larger than any other player.

It was unlikely that entry would have eroded MCI/WorldCom's post-merger dominance because post-merger entry in the national backbone market would have been extremely difficult. Providing backbone services requires a large investment in telecommunication facilities. Even more significant is the need to obtain efficient interconnection with larger players. Without peering arrangements, a new entrant is substantially disadvantaged because it has to pay transit fees for interconnection, and many businesses are reluctant to become customers of a network that does not have a full set of peering arrangements. To secure such arrangements, however, the provider must have a large customer base. In this case, a new entrant would have to overcome the substantial advantage that a combined MCI/WorldCom would have had. Even John Sidgmore, who at the time was the Vice President of WorldCom and the CEO of UUNET, admitted that "[h]aving a big network is a huge barrier to entry for competitors."<sup>(15)</sup>

### **Competitive Effects of the Merger**

Given the market structure and barriers to entry, what was the likely effect of the merger? In addition to a concern that the merger would facilitate tacit collusion, we were concerned about what effect it would have on the existing network. Prior to the MCI/WorldCom merger, no single backbone provider reached a disproportionate amount of destinations on the Internet relative to other major players. There was a rough equality, with each backbone provider depending on the other. Each backbone provider, therefore, had an incentive to support efficient interconnections because its failure to do so would have caused such a degradation of quality that it risked losing customers to the other networks. That incentive would change, however, if the two largest backbone providers were combined. But the MCI/WorldCom merger threatened to create a very large network with a huge size disparity. By representing a majority of the Internet customers, MCI/WorldCom would have been more valuable and been more important as a point of interconnection for other Internet providers, which would otherwise lose access to a great deal of the Internet. MCI/WorldCom would have far less need to depend on the other backbones than those backbones would have to depend on it. By giving MCI/WorldCom a disproportionately large customer base, the merger would have changed MCI/WorldCom's incentives from

favoring compatibility toward favoring incompatibility. Recognizing this, there was widespread industry concern about the effects of the merger on peering arrangements and on interconnection prices.

MCI/WorldCom's changed incentives would have increased the likelihood that it would attempt to tip the market by charging existing peers for interconnection or by degrading the quality of interconnections. MCI/WorldCom would have been able to do this, either through unilateral action, or through collusion with the only remaining player with a significant market share. The disproportionate dependence that other backbones would have had on MCI/WorldCom would have given it bargaining leverage to dictate the pricing and terms of interconnection. MCI/WorldCom could have begun charging peers for interconnection to its network, either all at once or on an individual peer-by-peer basis (by picking off the smallest rivals first), raising the costs of its rivals. MCI/WorldCom then could have chosen either to raise its own prices with that of its rivals, or to keep its price lower and let the market tip towards it, possibly leading to monopoly control of the Internet. Or MCI/WorldCom could have degraded the quality of its competitor's interconnections to its network. It could have done this either actively or passively, by not investing in the interconnections needed to keep up with the massive growth, and it could have done this either to all competitors or on an individual basis. Interconnection points are constantly upgraded to keep up with the exponential growth of Internet traffic; any slowdown in the upgrading of these points would have serious effects on the quality of the connection. While this strategy would lower the quality of service for all networks, rivals' networks would suffer more degradation, allowing MCI/WorldCom either to increase its own prices, reflecting its better quality, or to gain market share. Again, with this strategy the market could have tipped to MCI/WorldCom, giving it monopoly control of the Internet. Under either scenario, WorldCom would have been able to purchase, through its acquisition of iMCI, market power and gain a monopoly, or at least a dominant, position in Internet backbone services.

As I explained earlier, interconnection of multiple firms is not always the best or least costly way of achieving network efficiencies, but the history of interconnection in this industry suggests otherwise. Moreover, the parties failed to present any evidence suggesting that interconnection was inefficient or that it would be more efficient for MCI/WorldCom to be a monopoly provider. At this early, but critical stage where the development of cost-based pricing and other terms and conditions for interconnection are expected to be developed through bargaining among the industry's participants, allowing one player to achieve dominance through acquisition could have had an irreversible anticompetitive impact on this market. So we either had to try to block the merger or find another way to address our competitive concerns.

## Remedy

Since entry was not going to constrain a dominant MCI/WorldCom, any remedy had to create a viable competitor that would replace iMCI as a principal player in the national backbone market. The only way this was possible was through the

divestiture of MCI's entire Internet business. As a condition of the EU's andur approval, MCI/WorldCom sold iMCI to Cable & Wireless for \$1.75 billion. The divestiture was structured to include all assets, except for long-haul lines, and included the transfer of all of MCI's contracts with wholesale and retail customers for the provision of Internet backbone services, the transfer of all necessary employees to support the iMCI business being transferred, and all other necessary support arrangements to fulfill existing contractual obligations of the iMCI business. MCI/WorldCom was to refrain from soliciting or contracting to provide dedicated Internet access services for a specified period. MCI/WorldCom was also required to assign to Cable & Wireless iMCI's peering agreement with WorldCom and agree not to terminate that agreement for a period of five years. These conditions were imposed to ensure that the new competitor would be a significant player with the ability to compete effectively with MCI/WorldCom. It is important to note that the relief we obtained does not preclude MCI/WorldCom from eventually reaching a monopoly position. It is possible that in the future the market may tip, having MCI/WorldCom as the dominant player, but if that does happen, it will be because the company out-competed the other networks, not because it bought customers.

## Conclusion

This merger was important because, without the divestiture, it could have had a significant and negative effect on the Internet, an emerging industry that thus far has functioned successfully without regulation. Allowing one player to achieve dominance through acquisition could have had an irreversible impact on this market and could have stifled competition at a critical stage in the development of the industry.

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## FOOTNOTES

1. For more information on network effects see A. Douglas Melamed, "Network Industries and Antitrust," Address Before the Federalist Society (Apr. 10, 1999); Daniel Rubinfeld, "Competition Innovation, and Antitrust Enforcement in Dynamic Network Industries," Address Before the Software Publishers' Association (Mar. 24, 1998).
2. It may not take much for one technology to become dominant. "The technology that garners the early lead tends to become locked in as the winner. This early lead can come from relatively minor historical events or from an early technological advantage." William E. Cohen, *Competition and Foreclosure in the Context of Installed Base and Compatibility Effects*, Antitrust L. J., Spring 1996, at 537.
3. "[D]e novo entry into a market occupied by vendors with large installed bases is exceedingly difficult." Nicholas Economides, *The Economics of Networks* 8, 15 (Nov. 1994) (New York University discussion paper EC-94-24).

4. The cost of compatibility is either a loss of variety (if compatibility is achieved through standardization) or the cost of the adapter used to allow compatibility between the networks (either the actual cost of the adapter or the degradation of quality caused by the adapter).
5. Stanley M. Besen & Joseph Farrell, Symposium, *Strategies and Tactics in Standardization*, at 15 (1993) (prepared for Journal of Economic Perspectives).
6. Garth Soloner, *Economic Issues in Computer Interface Standardization*, 1 Economic Innovation & New Technology 135, 150 (1990).
7. Besen & Farrell, *supra* note 5, at 20.
8. Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, Journal of Economic Perspectives, at 110 (1994).
9. Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, Federal Communications Commission (1997) (Office of Plans and Policy working paper).
10. Connecting the Globe: A Regulator's Guide to Building A Global Information Community, Federal Communications Commission (1999).
11. The European Union has thirty days from notification of a merger to investigate whether the merger raises anticompetitive issues. If, after thirty days, the EU has determined that the merger raises no "serious doubts as to its compatibility with the common market," the EU will clear the merger. Otherwise it must initiate "proceedings," often called "second-stage" or "Phase 2" proceedings. The proceedings are commenced by the issuance of a formal written decision describing the serious doubts that caused the Commission to enter Phase 2. After entering Phase 2, the EU will continue to investigate the merger. After the conclusion of the investigation, a Statement of Objections is issued describing the Commission's competitive concerns. Shortly after issuance of the Statement of Objections, the Commission will hold a formal hearing at which testimony is taken from the parties and other interested persons. Finally, within four months after entering Phase 2, the Commission must issue a decision as to whether the merger should be cleared, prohibited, or cleared with "undertakings" (similar to a consent decree).
12. This method of describing the Internet industry is not uniformly accepted and it is certainly not perfect, but it does provides a useful conceptual framework in describing key differences between the major players and how the players are related. It is possible to describe the market in many different ways, but describing the market differently does not affect the competitive analysis.
13. The EU and the FCC both determined that there was a national backbone market. The parties, on the other hand, argued that the market was considerably broader and included all participants in the provision of Internet access and,

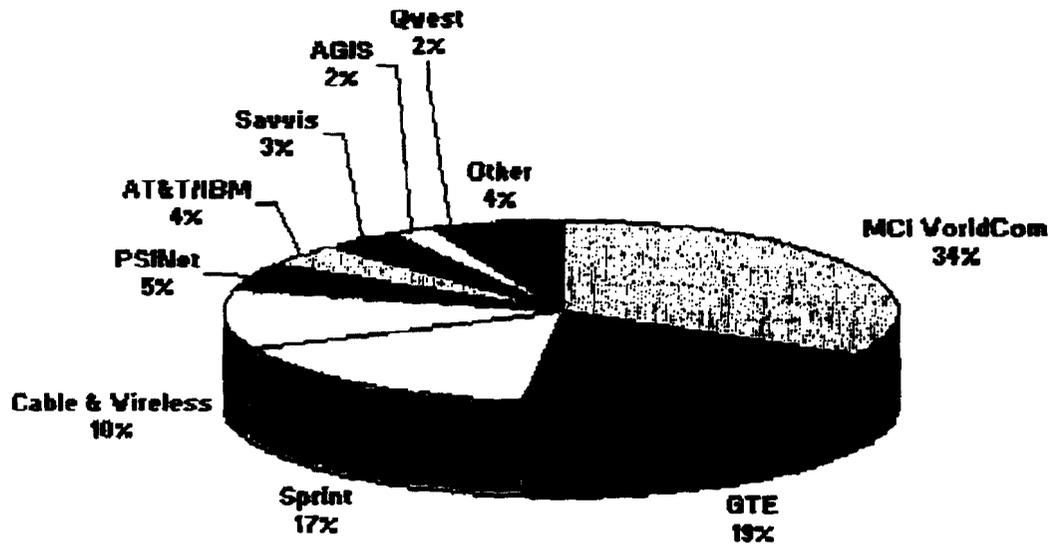
since the underlying fiber facilities are the same, all voice telecommunications.

14. The parties, of course, disputed that estimate, claiming that they had only 20% of the Internet backbone market. They calculated market share based on a percentage of revenue. They included all revenues related to the Internet which means that they included revenue from sources other than their backbone services and double counted other revenue, such as revenues for ISPs who buy connectivity from others, thereby increasing the significance of their competitors' market share and diluting MCI/WorldCom's.

15. Rajiv Chandrasekaren, *Making UUNet Into A Very Big Deal; With His Agreement With CompuServe and AOL, CEO John Sidgmore Takes It to Another Level*, The Washington Post, Sept. 29, 1997.

D

**Estimated US Internet Wholesale Market Shares at the end of 1998**



**Daily Traffic Levels for Selected Backbone Providers**

<b>Backbone Provider</b>	<b>Terabytes Per Day at YE98</b>
MCI WorldCom-UUNET	45
Cable & Wireless	36
Sprint	28
GTE	20
LXC	15
AT&T	13
Savvis	10

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

CABLE & WIRELESS USA, INC. and  
CABLE and WIRELESS plc,

Plaintiffs,

v.

MCI WORLDCOM, INC.,

Defendant.

Civil Action No. 99 204

**JURY TRIAL DEMANDED**

**COMPLAINT**

Plaintiffs Cable and Wireless USA, Inc. and Cable & Wireless plc (collectively, "Cable & Wireless"), for their complaint against MCI WorldCom, Inc. ("MCI WorldCom"), allege and state as follows:

**NATURE OF THE ACTION**

1. This is an action for numerous breaches of a Stock Purchase Agreement ("SPA") (attached hereto as Exhibit A) pursuant to which Cable & Wireless was to purchase, as an operating entity, the Internet business of MCI WorldCom's predecessor.

**JURISDICTION AND VENUE**

2. Subject matter jurisdiction is conferred on this Court by 28 U.S.C. § 1332 in that MCI WorldCom and Cable & Wireless USA, Inc. are citizens of different states, Cable and Wireless plc is a citizen of a foreign state, and the amount in controversy exceeds \$75,000.

3. Defendant MCI WorldCom is subject to the personal jurisdiction of this Court pursuant to the Delaware long-arm statute, 10 *Del. Code* § 3104 (1998),

in that it regularly does or solicits business in Delaware, engages in many other persistent courses of conduct in Delaware, or derives substantial revenue from services, or other things used or consumed in Delaware. In addition, MCI WorldCom submitted to the jurisdiction of this Court in respect of any action arising out of or based upon the SPA, which forms the basis for the claims asserted in this Complaint.

4. Venue is proper in this judicial district under 28 U.S.C. § 1391 in that MCI WorldCom is deemed to reside in this judicial district because it may be found or transact business in this judicial district and is subject to the personal jurisdiction of this Court at this time.

#### **THE PARTIES**

5. Plaintiff Cable and Wireless plc is a corporation organized and existing under the laws of England and Wales, having its principal place of business in London, England. Cable and Wireless plc is a provider of telecommunications and multimedia communications services.

6. Plaintiff Cable & Wireless USA, Inc. is a corporation organized and existing under the laws of the District of Columbia, having its principal place of business in Vienna, Virginia. Cable & Wireless USA, Inc. is the successor in interest to Cable & Wireless Internet Holdings, Inc., one of the original parties to the SPA.

7. Defendant MCI WorldCom, Inc., formerly WorldCom, Inc., is a corporation organized and existing under the laws of Georgia, having its principal place of business in Jackson, Mississippi. In September 1998, WorldCom Inc. ("WorldCom") acquired and merged with MCI Communications Corporation ("MCI"). In connection with that acquisition, WorldCom changed its name to MCI WorldCom, Inc. MCI WorldCom is a global communications company providing facilities-based and fully-integrated local, long distance, international

and Internet services with revenues of more than \$30 billion and operations in over 65 countries.

## **FACTUAL BACKGROUND**

### **MCI's Commitment To Divest Its Internet Business**

8. In October 1997, WorldCom announced its offer to purchase MCI, and in November 1997, announced a definitive merger agreement with MCI.

9. When the intended merger was announced, WorldCom owned UUNET, the world's largest top level Internet network. Top level networks are able to provide connectivity anywhere on the Internet solely through their own "peering arrangements" with other networks, in which no fees are charged, without having to purchase transit service from any other provider. MCI owned iMCI, the second largest top level network.

10. Following the announcement of WorldCom's intent to purchase MCI, the Commission of the European Communities (the "Commission") and the Antitrust Division of the U.S. Department of Justice ("DOJ") began investigations of the proposed merger.

11. In July 1998, after an investigation in which the DOJ extensively cooperated and participated, the Commission concluded that the proposed merger of WorldCom and MCI, "if not altered, would lead to the creation of a dominant position in the market for the provision of top level or universal Internet connectivity."

12. In response to the Commission's and DOJ's competitive concerns, MCI and WorldCom entered into written commitments requiring MCI to divest its Internet business as an operating entity, along with assets and services that would allow the purchaser to replace the departing competitor (the "Undertakings"). Both the Commission and DOJ approved the merger of MCI and WorldCom

subject to the express condition that MCI WorldCom fully comply with the Undertakings.

13. The Undertakings were intended to ensure that “the entirety” of the iMCI Business, including “100% of the Internet traffic and 100% of the Internet revenues of the iMCI Business” would be transferred “as an operating entity” to “a single purchaser.” The Undertakings were designed “to ensure that the customers transferred do not migrate back to MCI WorldCom and hence enhance its market power.” Accordingly, the Undertakings required MCI to transfer all of its Internet customers to the purchaser, to provide all employees and services necessary to support those customers and the growth of the business, and to refrain from soliciting those customers for specified periods of time.

14. Specifically, the Undertakings provided, *inter alia*, that

- (a) “all MCI’s contracts with wholesale and retail customers for the provision of Internet access and all MCI’s Internet web hosting and managed firewall service contracts will be assigned” to the business to be transferred;
- (b) “For those contracts which cannot be assigned without the customer’s consent . . . MCI and WorldCom will use their best efforts to obtain the customer’s consent . . . and cause all such contracts to be transferred to the Purchaser within 90 days post closing . . .”;
- (c) “MCI agrees that until the closing date the iMCI Business shall be operated in the ordinary course consistent with past practice, including without limitation, the commercially reasonable solicitation and retention of Internet service customers . . .”;
- (d) “MCI will transfer . . . all necessary employees to support the iMCI Business being transferred . . .”;
- (e) “MCI will make available all other necessary support arrangements to fulfil existing contractual obligations of the iMCI Business – and to accommodate growth of that business . . .”;
- (e) “MCI and Purchaser will enter into . . . supporting agreements [including agreements for transport capacity for use in

providing Internet services] in order to give effect to the transaction. . . .”;

- (f) “the Purchaser will benefit from the use of intellectual property rights necessary for the operation of the transferred business . . .”; and
- (g) “Except for Internet customers of WorldCom as at the closing date, MCI/WorldCom will not solicit or contract to provide dedicated Internet access services . . . to wholesale dedicated Internet access customers (i.e., ISPs) for a period of at least 24 months post closing . . . [and] to retail dedicated Internet access customers whose contracts are assigned to the Purchaser for a period of at least 18 months post closing.”

These and the other provisions of the Undertakings represented “the minimum protection that will be afforded by MCI/WorldCom to the Purchaser.”

15. On September 3, 1998, MCI and WorldCom entered into the SPA, which provided for the sale of the iMCI business to Cable & Wireless for \$1.75 billion, subject to post-closing adjustments. The SPA recited that MCI “determined to sell its iMCI Business” “in order to expedite regulatory approval of the proposed merger . . . with WorldCom.”

16. The obligations imposed by the Undertakings on MCI and WorldCom were incorporated into the SPA.

17. Through the SPA, the parties intended that Cable & Wireless “will acquire a business with assets and support services reasonably necessary to create a viable Internet business. . . .”

18. The SPA obligated MCI, immediately prior to the closing date, to transfer the assets and operations of the iMCI business to INetCo, a Delaware limited liability company formed and organized by MCI. Cable & Wireless’s purchase of the iMCI business was accomplished through the purchase of all of the issued and outstanding membership interests in INetCo.

19. On September 14, 1998, Cable & Wireless closed its purchase of iMCI from MCI and WorldCom.

20. The SPA provides that the Laws of the State of New York shall govern the agreement and legal relations between the parties. The SPA also provides that the parties irrevocably submit to the exclusive jurisdiction of any federal court in the State of Delaware.

### **MCI WorldCom's Violations Of The SPA**

21. Since the sale of MCI's Internet business to Cable & Wireless in September 1998, MCI WorldCom has failed and continues to fail, in numerous respects, to comply with the SPA. Among other things, MCI WorldCom has not effectively transferred MCI's Internet customer base to Cable & Wireless, has not provided the employees, assets or services necessary to operate the iMCI business, and has not refrained from soliciting MCI's Internet customers.

#### **Failure To Provide Contract Documentation And Other Key Customer Information**

22. Section 2.2 of the SPA provides that MCI WorldCom shall contribute to INetCo . . . all of MCI's right, title and interest in, to and under . . . [various] assets and properties of MCI dedicated to the conduct of the iMCI business . . . (collectively . . . the "Transferred Assets") [, including]:

\* \* \*

(B) . . . All Contracts . . . between MCI and its Internet Customers to provide Internet Services in effect at the Transfer Time . . . ( . . . collectively, the 'Internet Contracts') . . .

\* \* \*

(C) . . . Customer lists for the Internet Customers . . . and applicable historical data for Internet Services provided to Internet Customers . . .

\* \* \*

(O) . . . All books of account, records, files and invoices records used in connection with the iMCI Business, including . . . accounting records, sales and sample sales promotional data, . . . cost and pricing information, . . . and any other records and data used in connection with the iMCI Business. . . .

23. MCI WorldCom failed to provide any original Internet Contracts and failed to provide copies of more than 37% of all Internet Contracts as well as copies of key portions of many of the remaining contracts. MCI WorldCom has not only failed to provide Internet Contracts to Cable & Wireless but has also refused a customer's own request for permission to provide its contract to Cable & Wireless.

24. MCI WorldCom has also failed to identify a significant number of its Internet customers to Cable & Wireless — many of whom have complained publicly about lack of attention from Cable & Wireless before Cable & Wireless was made aware that they were customers. In many of these instances, MCI WorldCom not only failed to specify the true customer, but identified an MCI WorldCom salesperson or office as the customer contact.

25. MCI WorldCom has also failed to provide other basic and essential identifying customer information such as the customer address, telephone number, decisionmaker or other key contact, complete status and customer profile, revenue and billing information, customer support records, sales representatives' records, order entry, promotions and prospects information, accounts receivable and payment history, and marketing materials and records.

26. By failing to provide the information described above, MCI WorldCom violated § 2.2 of the SPA.

#### **Failure To Transfer All Necessary Personnel**

27. In § 4.12 of the SPA, MCI represented and warranted that it was transferring "all personnel necessary for the operation of the iMCI Business at the performance and services level standards in effect at the Closing Date. . . ."

28. MCI WorldCom violated this representation and warranty by failing to provide all personnel necessary for the operation of the iMCI Business at the

performance and service level standards in effect at the time up to and at the closing Date.

29. MCI WorldCom violated Section 4.12 by materially failing to provide necessary personnel in various key areas. MCI WorldCom utterly failed to provide necessary personnel in the sales and sales support areas. MCI WorldCom should have transferred 324 sales personnel (*i.e.*, sales management, sales representatives and technical support persons), but MCI WorldCom offered only 41 sales personnel. Cable & Wireless received mostly first level, district sales representatives and no vice president or regional vice president in the sales area. Furthermore, MCI WorldCom failed to provide necessary sales representatives in key geographical areas, leaving entire geographic areas without any coverage.

30. With regard to business marketing, MCI WorldCom provided only 18 of the 55 personnel necessary (including but not limited to product management and development, for which MCI WorldCom provided no one). The diversion of MCI's business marketing personnel to create a "day one" marketing program for MCI WorldCom crippled the efforts of Cable & Wireless to establish a marketing program for the Internet business.

31. MCI WorldCom only transferred one of the forty-nine personnel required for billing.

32. MCI WorldCom also failed to transfer necessary personnel at appropriate levels in customer service. Cable & Wireless received less than half of the customer care personnel necessary to support the dedicated access business. ("Dedicated access" refers to customers that have installed communications circuits to be used exclusively for Internet access.) Cable & Wireless has had to hire over 50 employees in two of its business dial-up customer service centers in Dallas (22) and Sugar Land (31), Texas. ("Dial-up" refers to customers that access

the Internet over circuits that are shared with other communications uses, such as voice telephone.)

33. MCI WorldCom also failed to provide numerous necessary personnel in network management, engineering, trouble management, dial engineering and the network operations and security areas, including the following:

- (a) **Architecture Team** - This MCI team of approximately 18 was dedicated to MCI's Internet business and was necessary for design decision making, arranging to meet critical needs for increased capacity, scaling the network, and taking advantage of new technology in order to continue to be able to serve the customer base; MCI WorldCom failed to provide even a single member of the team.
- (b) **Internet Network Security Team** - This MCI team of approximately nine was dedicated to the Internet business and is necessary for managed firewall products and for anti-hacking; MCI WorldCom provided no one.
- (c) **Firewall Services Development Personnel** - Personnel are necessary in this area to develop firewall services in a rapidly evolving environment. None was provided.
- (d) **Capacity Planning Personnel** - MCI WorldCom failed to provide necessary personnel to meet Cable & Wireless needs in this key area.
- (e) **Integration and Testing** - This group of approximately seven had been dedicated to the Internet business, yet key components of this group were not offered or transferred by MCI WorldCom.
- (f) **Project Management Group** - This group of approximately eight was necessary to deploy new designs, manage the warehouse, and deal with vendor technical issues; MCI WorldCom provided only one.
- (g) **Anti-Spamming Personnel** - MCI WorldCom failed to provide personnel who were reasonably qualified to perform this necessary function; this failure resulted in anti-spamming measures being taken that were not customer-friendly and that left customers without certain capabilities, resulting in unhappy customers and lost business.

- (h) Y2K Staff - MCI WorldCom failed to provide necessary Y2K staff to Cable & Wireless, forcing Cable & Wireless to start a Y2K program from scratch, even though MCI had half completed such a program.
- (i) Specialized Technology Attorneys - MCI had at least five attorneys who were needed to support the Internet business. MCI offered Cable & Wireless only two attorneys, neither of whom were known to former management of MCI's Internet business, and who were not qualified to provide the specialized services and experience required.

34. By failing to transfer all necessary personnel, MCI WorldCom violated § 4.12 of the SPA.

#### **Failure To Provide Enforceable Contracts**

35. In SPA § 4.18(B), MCI represented and warranted that

As of the Effective Time, each Assigned Contract and Nonassigned Contract will be enforceable against the other party thereto in all material respects, there will be no unremedied breaches or defaults which would materially adversely affect such Contracts in the aggregate (except that MCI makes no such representation with respect to the Internet Dial-up Contracts), and, to the best of MCI's knowledge, there will be no event that will likely prevent the Internet Customer under any such Contract from fulfilling its contractual obligations in all material respects.

36. MCI WorldCom violated SPA § 4.18(B) (as well as § 2.2(B)) by failing to contribute fully realizable IDC Contracts to Cable & Wireless. Cable & Wireless has learned that 51 of MCI's 165 former IDC customers were on "settlement" terms (*i.e.*, they set off the value of Internet services provided by MCI against services they provided to MCI). These customers did not pay MCI directly for Internet services and have refused to make direct payment to Cable & Wireless. MCI WorldCom has refused to cooperate in converting them to direct payment customers of Cable & Wireless or otherwise paying Cable & Wireless directly.

**Failure To Conduct Business In The Ordinary Course Prior To Closing**

37. Section 6.1 of the SPA provides:

Conduct of Business. From the date hereof to the Closing Date, MCI shall carry on the iMCI Business in the ordinary course of business and consistent with achieving the revenue projections set forth in Schedule 2.11(A), including the commercially reasonable solicitation and retention of Internet Customers and Internet Backbone development, and shall not engage in any transaction or activity, enter into any agreement or make any commitment except in the ordinary course of the iMCI Business. Notwithstanding the foregoing, MCI shall not be prohibited or restricted from taking any action specifically required or permitted by any other provision of this Agreement.

38. Moreover, in § 4.22, MCI represented and warranted that it had complied with its obligations under a Term Sheet agreed to by the parties as of July 1, 1998. In the Term Sheet, MCI agreed that, from July 1, 1998, until the closing date, “the iMCI Business shall be operated in the ordinary course consistent with past practice . . . , including without limitation, the commercially reasonable solicitation and retention of Internet Customers. . . .”

39. MCI violated SPA §§ 6.1 and 4.22 by, *inter alia*, failing to sell iMCI services in the ordinary course prior to the Closing Date and permitting a major General Services Administration contract schedule to expire prior to the Closing Date. As a result, Cable & Wireless has been unable to secure payment from or do business with U.S. Government agencies in the same manner as MCI’s Internet business had prior to the expiration.

40. By failing to carry on the iMCI Business in the ordinary course before the closing, MCI WorldCom violated §§ 6.1 and 4.22 of the SPA.

**Failure To Obtain Consent To Assign Contracts**

41. Section 2.8(C) of the SPA provides, in pertinent part:

For those Internet Contracts that cannot be assigned without the Internet Customer’s consent, MCI and WorldCom will use

their best efforts to obtain the Internet Customer's consent and cause such Contracts to be assigned . . . within ninety (90) days after the Closing Date. . . .

42. MCI WorldCom has failed to use its best efforts to obtain all customer consents to, and to otherwise achieve, assignment of any Internet Contracts that require customer consent. MCI WorldCom has released MCI employees who had been primarily responsible for performing MCI WorldCom's obligations to obtain assignments. In addition, MCI WorldCom sent out consent letters for state and non-U.S. government customers to sign that would not accomplish necessary novations, and were otherwise clearly ineffective to accomplish an assignment. As a result, according to MCI WorldCom, at least 103 contracts remain unassigned.

43. By failing to use its best efforts to assign Internet Contracts, MCI WorldCom violated § 2.8(C) of the SPA.

#### **Failure To Remit All Internet Revenue**

44. Section 2.8(c)(3)(b) of the SPA provides that:

MCI will leave one hundred percent (100%) of the Internet Customer's Internet traffic under such Nonassigned Contracts on the Internet Backbone and will collect and deliver to INetCo, in accordance with the procedures set out in the Wholesale Internet Services Agreement, all amounts received in respect of the Nonassigned Contracts with respect to Internet Services provided after the Effective Time.

45. MCI WorldCom is required under SPA § 2.8(C)(3)(b) to forward to Cable & Wireless all amounts owed under Non-Assigned Contracts, but MCI WorldCom has yet to forward such amounts. Because of MCI WorldCom's other violations of the SPA, as set forth herein, Cable & Wireless is unable to determine whether MCI WorldCom's count of Non-Assigned Contracts is complete.

46. MCI WorldCom's failure to forward all amounts owed under the Non-Assigned Contracts is a violation of § 2.8(C)(3)(b) of the SPA.

### **Failure To Provide Necessary Services, Systems And Support**

47. MCI WorldCom represented and warranted in SPA § 4.11 that:

(A) The Transferred Assets to be contributed to INetCo, together with the services, systems, support and licenses to be provided to INetCo pursuant to the Services Agreements, the software License Agreement, the Administrative Space Agreement and any Nonassigned Contracts and Internet Permits represent all of the assets, rights, and properties reasonably necessary and sufficient to operate the iMCI Business. . . . [and] . . .

\* \* \*

(C) The Transferred Assets, . . . together with the Employees and the services, systems, support and technology to be provided under the Services Agreements, the Software License Agreement and the Administrative Space Agreement or hereunder, are sufficient to operate the iMCI Business in compliance with the performance and service level standards in effect at the Closing Date. . . .

48. In fact, MCI WorldCom has failed to provide the assets and support services necessary and sufficient to operate the Business at prior performance and service levels.

49. The billing services provided by MCI WorldCom have been materially deficient for the dedicated access as well as the dial-up business. While MCI had been sending bills on a 16-day cycle before the closing, MCI WorldCom did not send out the September bill for dial-up customers until December 1 and the October bill until the week of January 4. (Even then, faulty bar coding of payment envelopes caused payments to go to the wrong address.)

50. When MCI WorldCom finally did send out bills, they were replete with errors – frequently four to five errors on a single bill. Bills have included charges for services that had not been ordered or activated or for services that had been cancelled. MCI WorldCom has also sent out numerous duplicate and double bills. MCI WorldCom has also failed to unbundle taxes for various bundled services, including non-taxable services. Further, MCI WorldCom has overcharged dial-up customers for 800 access when MCI WorldCom should have

been charging for normal access. In addition, MCI WorldCom has failed to process credit cards completely and accurately.

51. The assets and services that MCI WorldCom has provided at the Sacramento Customer Service Center have been notably deficient. When customers called into the center, systems were often down. On the most notorious of several occasions, during the first week after the acquisition, MCI WorldCom took down access to the OSPREY database for 110 hours, leaving Cable & Wireless without access to meaningful customer information. MCI WorldCom has continued to also take down the system on other occasions, frequently without sufficient notice and for longer than promised. Down time in November alone totaled approximately 138 hours. Even when there was no outright outage, customer service representatives fielding calls have been unable to access meaningful information concerning customer accounts because MCI WorldCom failed to provide the necessary information, as required by the SPA.

52. MCI WorldCom has also failed to provide sufficient support at other Cable & Wireless customer support centers such as Sugar Land and Dallas, Texas. MCI WorldCom has refused to continue automatically delivering ACD reports, which are critical to running service areas to ensure staffing, service levels, employee performance and quality; those reports include Agent Activity, Team Activity and Reliability, and call volume statistical viewing on the web. In addition, MCI WorldCom has stopped providing billing invoice detail on each business dial account.

53. MCI WorldCom has also consistently refused or delayed responses to requests for provisioning of DS3 circuits to Cable & Wireless's customers. MCI WorldCom has denied Cable & Wireless access to the MCI WorldCom facility that houses Cable & Wireless's CWIX node, forcing Cable & Wireless to inform major customers that Cable & Wireless cannot meet their needs. While

Cable & Wireless should be receiving responses to its provisioning requests from MCI WorldCom within 48 hours, MCI WorldCom has been taking weeks to respond to such requests.

54. MCI WorldCom has failed to provide trouble tickets and denied promised access to systems necessary for fault monitoring and trouble shooting. Another asset that MCI WorldCom has failed to provide is data as to mean time to repair (MTTR)—a basic component of calculating network availability. MCI WorldCom has also ceased to provide Registration Reports showing all registration activity.

55. MCI WorldCom has failed to pay fulfillment vendors on a timely basis, resulting in the loss of these vendors. Cable & Wireless lost 25 percent of 10,000 new customers based on non-fulfillment.

56. By the actions described above, MCI WorldCom violated § 4:11 of the SPA.

### **Improper Solicitation Of Customers**

57. Section 8.13(A) of the SPA provides:

Nonsolicitation of Customers. In each case, excepting only Internet Dial-up customers,

(A) From the Closing Date until the relevant date specified below, each of MCI and WorldCom shall not, and shall cause their respective Affiliates not to, solicit or contract to provide Dedicated Internet Access services:

- (1) until eighteen (18) months after the Closing Date, to Retail Dedicated Internet Access customers whose Internet Contracts are assigned to INetCo, whether before, at or after the Effective Time;
- (2) until eighteen (18) months after the Closing Date, or until after the termination or expiration of the original term of the applicable Internet Contract, whichever is later, to Retail Dedicated Internet Access customers whose Internet Contracts are not assigned to INetCo prior to such termination or expiration; and

- (3) until two years after the Closing Date, to ISP customers whose Internet Contracts for Dedicated Internet Access service are in effect immediately prior to the Effective Time.

58. Section 8.13 of the SPA provides that MCI and WorldCom may provide additional Internet services to Internet customers of WorldCom as of the Closing Date, as identified on an "Overlap List." Section 8.13(C) provides, however, that "[n]either MCI nor WorldCom shall take any steps beyond the ordinary course of business to cause the transfer of any iMCI Business to WorldCom or to 'multi-home' such business on WorldCom networks prior to the Closing Date."

59. MCI WorldCom has violated Section 8.13 of the SPA by soliciting to provide Dedicated Internet Access services to some of Cable & Wireless's customers and by advising some iMCI customers, prior to closing, to obtain UUNet service for the purpose of avoiding the non-compete provision of the SPA. These solicitations constitute a violation of Section 8.13 of the SPA.

#### **Improper Inclusion Of Customers On The Overlap List**

60. Section 8.13(E) of the SPA provides that the Overlap Lists are to include only "Internet Services customers of WorldCom Subsidiaries" as of September 14, 1998. MCI WorldCom has violated the SPA § 8.13(E) by including on the Overlap Lists customers who were not identified on the respective WorldCom List, customers who were never Internet Services customers of WorldCom, and customers who were not Internet Services customers of WorldCom as of September 14, 1998, the Closing Date of the SPA.

61. MCI WorldCom violated the SPA by including on the Overlap Lists companies that were not customers of WorldCom, on the erroneous theory that affiliates of those companies qualify as WorldCom customers.

## Misuse Of Confidential Cable & Wireless Information

62. Section 8.13(D)(i) of the SPA provides that, through the Closing Date,

MCI shall not, and shall cause its Affiliates not to, provide any information to WorldCom or an affiliate of WorldCom regarding the Internet Customers of MCI and its Affiliates. . .

63. Section 8.10 of the SPA provides:

Confidentiality. . . [A]s of the Effective Time: (i) all documents and information concerning the iMCI Business (including the Transferred Assets and the Assumed Liabilities) (“iMCI Information”) shall be the sole property of INetCo and, except as specifically contemplated by this Agreement and the ancillary Agreements (including for the provision by MCI to INetCo of services pursuant to the Services Agreements), shall not be used directly or indirectly by MCI, WorldCom or their Affiliates for any competitive or commercial purpose (other than for legitimate administrative purposes, including the preparation of financial reports, accounting purposes, customer complaint management and recordkeeping purposes). . . . Nothing in this Section 8.10 shall be construed so as to prevent MCI from using the names and addresses of the Internet Customers which are the subject of the nonsolicitation provisions of Section 8.13 below for marketing purposes once the relevant nonsolicitation period has expired. MCI further undertakes that, for a period of six (6) months, from the Closing Date, it shall not specifically target the Internet Dial-up customers of the iMCI Business (as of the Effective Time) for any marketing activity. . . .

64. MCI WorldCom violated Section 8.13(D) by sending at least 74 of Cable & Wireless’s dedicated access customer bills, which currently show a past due amount of at least \$3,374,533, directly to an MCI WorldCom account representative.

65. MCI WorldCom has further violated Section 8.13 (D) by automatically providing confidential provisioning information regarding Cable & Wireless IDC customer orders (such as in Hong Kong) to MCI WorldCom sales representatives, apparently on a global basis, for self-marketing purposes.

66. MCI WorldCom has further violated Section 8.13(D) by providing confidential information regarding customers of Cable & Wireless to an MCI WorldCom sales representative in the group responsible for providing provisioning to Cable & Wireless. MCI WorldCom has then inexplicably requested the customer name and contact for Cable & Wireless DS3 requests, and turned down or unduly delayed provisioning in response to Cable & Wireless requests for DS3s for Cable & Wireless customers. In some of these instances (such as Tulane University and Quantum Connections), MCI WorldCom has then offered provisioning directly to the customer.

67. MCI WorldCom has violated Section 8.10 by using iMCI Dial-up customer lists, which are Cable & Wireless's sole property, to specifically target Cable & Wireless Internet Dial-up customers before the expiration of the non-solicitation period.

68. MCI WorldCom has also violated SPA § 8.10 by sending a form letter to Cable & Wireless business dial-up customers which contained the false and misleading suggestion that they were still customers of MCI.

#### **Disparagement**

69. Section 8.14 of the SPA provides that,

Nondisparagement. For a period of six (6) months from the Closing Date, neither MCI nor WorldCom nor any of their Affiliates shall make a statement, written or oral, denigrating or otherwise suggesting the quality, service or other operational characteristics of Purchaser's Internet business are less than industry standard or the level previously provided by MCI. Neither MCI, WorldCom nor their Affiliates, on the one hand, nor Purchaser or its Affiliates, on the other, shall make any statement relating to the value of the iMCI Business compared to the Purchase Price.

70. MCI WorldCom violated Section 8.14 by telling Cable & Wireless Internet customers to anticipate degradation in Cable & Wireless Internet service and performance and to disconnect from Cable & Wireless.

### **Impact Of MCI WorldCom's Violations**

71. MCI WorldCom's violations of the SPA have depressed Cable & Wireless's Internet revenue growth far below the pre-closing rates of between 50 and 100 percent per year. As a result of those violations, Cable & Wireless currently believes that growth in its Internet business will fall far short of the rate at which the market is growing as a whole, resulting in a significant loss of revenue and profit.

72. New customer activations for MCI's dedicated Internet service in 1998 averaged 242 per month in the eight months prior to the divestiture, fell to 166 in September (the divestiture occurred on September 14, 1998), and averaged 84 per month from October through December – a reduction of 65.5 percent from the pre-divestiture average. The reduction could not have been this immediate if MCI had transferred its entire Internet business, including its sales force, as an operating entity.

73. The specific ways in which MCI WorldCom's violations of the SPA have injured Cable & Wireless include:

- (a) Hundreds of dedicated access customers have cancelled their service since the divestiture or have raised disputes due to service deficiencies, billing errors or the like – resulting in revenue losses in the tens of millions of dollars;
- (b) Cable & Wireless has been unable to capitalize on new business opportunities with existing customers; for example, Cable & Wireless has been unable to market new services to existing customers or even to take new orders from existing customers in a timely manner;
- (c) Cable & Wireless has been unable to pursue new commercial customers, to develop and announce new products, or even to advertise for new dial-up customers;
- (d) Management time and focus has been diverted from the development of new business and products to recruiting and compensating for deficiencies in MCI WorldCom's performance;

- (e) Cable & Wireless has been forced to expend approximately \$ 12 million in otherwise avoidable recruiting costs, not including training and ramp-up time, to replace hundreds of essential personnel that were not transferred with the MCI's Internet business;
- (f) Cable & Wireless has been forced to deploy personnel from its other business lines – e.g., 65 salespersons borrowed from its SureCom business – to support the Internet business, resulting in lost business in those other businesses; and
- (g) Cable & Wireless's reputation for high quality customer service has been injured and opportunities to sell other products to Cable & Wireless's Internet customers have been lost.

**COUNT I**  
**(Specific Performance)**

74. Cable & Wireless incorporates by reference, as though fully set forth herein, the allegations in paragraphs 1 through 73 of its Complaint.

75. The SPA constitutes a valid and binding agreement between Cable & Wireless and MCI WorldCom. Cable & Wireless has performed all of its material duties under the SPA.

76. Cable & Wireless relied on the representations and warranties that MCI WorldCom made to Cable & Wireless in connection with the SPA.

77. As described above, MCI WorldCom has breached numerous provisions of the SPA, through a variety of actions and omissions.

78. Section 12.7 of the SPA provides:

**Specific Performance.** The parties acknowledge that the transactions contemplated hereby are unique and that a breach of this Agreement will result in irreparable injury to the other parties hereto for which monetary damages alone would not be an adequate remedy. Therefore, the parties agree that in the event of a breach or threatened breach of this Agreement, the other parties hereto shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach or anticipated breach without the necessity of posting a bond. Any such relief shall be in addition to and not in lieu of any appropriate relief in the way of monetary damages.

79. As expressly recognized in the SPA, Cable & Wireless has no adequate remedy at law for MCI WorldCom's material breaches of the SPA. Cable & Wireless is therefore entitled to specific performance by MCI WorldCom of its obligations under the SPA.

**COUNT II**  
**(Damages for Breach of Contract)**

80. Cable & Wireless incorporates by reference, as though fully set forth herein, the allegations in paragraphs 1 through 79 of its Complaint.

81. The SPA constitutes a valid and binding agreement between Cable & Wireless and MCI WorldCom. Cable & Wireless has performed all of its material duties under the SPA.

82. Cable & Wireless relied on the representations and warranties that MCI WorldCom made to Cable & Wireless in connection with the SPA.

83. As described above, MCI WorldCom has breached numerous provisions of the SPA, through a variety of actions and omissions.

84. Cable & Wireless has been and continues to be injured as a direct and proximate result of MCI WorldCom's material breaches of the SPA. Cable & Wireless has suffered damages in an amount to be proven at trial but which, in any event, exceed \$75,000.

**WHEREFORE**, Cable & Wireless prays for the following relief from this Court:

- (a) Specific performance of MCI WorldCom's obligations under the SPA, pursuant to Count I;
- (b) Damages, in an amount to be proven at trial, pursuant to Count II; and
- (c) Such other and further relief as may be just and proper.

**JURY DEMAND**

Plaintiffs demand trial by jury on all claims and causes of action alleged herein.

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