

Stephen A. Youngman  
Texas Bar No. 22226600  
WEIL, GOTSHAL & MANGES LLP  
200 Crescent Court, Suite 300  
Dallas, Texas 75201-6950  
Telephone: 214-746-7700  
Facsimile: 214-746-7777  
E-mail: [stephen.youngman@weil.com](mailto:stephen.youngman@weil.com)

and

James T. Grogan III, Esq.  
Texas Bar No. 24027354  
WEIL, GOTSHAL & MANGES LLP  
700 Louisiana, Suite 1600  
Houston, Texas 77002  
Telephone: 713-546-5000  
Facsimile: 713-224-9511  
E-mail: [james.grogan@weil.com](mailto:james.grogan@weil.com)

**Attorneys for MCI Network Services, Inc.  
and MCI Communications Services, Inc.**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS**

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**In re** :  
 : **Case No. 04-81694-SAF-11**  
**VARTEC TELECOM, INC., et al.** : **(Jointly Administered)**  
 :  
 : **Hearing: July 25, 2005**  
**Debtors.** : **at 1:30 p.m. (Central Time)**  
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**MCI'S OBJECTION TO DEBTORS' MOTION TO AUTHORIZE  
REJECTIONS OF CIRCUIT AGREEMENTS**

[DOCKET NO. 1395]

TO THE HONORABLE STEVEN A. FELSENTHAL,  
CHIEF UNITED STATES BANKRUPTCY JUDGE:

MCI Network Services, Inc., (formerly, MCI WorldCom Network Services, Inc.)  
("MNS") and MCI Communications Services, Inc. (formerly, MCI WorldCom Communications,  
Inc.) ("MCIC," and together with MNS, "MCI"), file this Objection to the Debtors' Motion to

Authorize Rejections of Circuit Agreements (the “Motion”) [docket # 1395].<sup>1</sup> In support of this Objection, MCI respectfully represents as follows:

**PRELIMINARY STATEMENT**

1. MCI provides the Debtors with a variety of telecommunications services pursuant to various contracts, agreements and service orders, including, *inter alia*, the following: (a) that certain Digital Services Agreement (DSA# VAR-001231), dated December 31, 2000, by and between MNS and Vartec Telecom, Inc.; and (b) that certain WorldCom Service Agreement (Contract # 365980), dated November 21, 2002, by and between MCIC and Vartec Telecom, Inc. DSA# VAR-001231 and Contract # 365980 will hereinafter be referred to collectively as the “Vartec Agreements.”

2. By their Motion, the Debtors seek this Court’s approval to “reject” eight circuits<sup>2</sup> (collectively, the “Circuits”) that were installed, and later disconnected, in accordance with the terms of the Vartec Agreements. The Debtors premise their Motion on two assumptions: (a) that the Vartec Agreements may be severed into distinct agreements for each Circuit; and (b) that, if severable, these distinct circuit agreements may be rejected following their expiration. In pertinent part, the Debtors represent in the Motion that “[a]ll of the Designated Circuits have been disconnected through the procedure provided for under the applicable Agreements.”<sup>3</sup>

3. There is no justiciable issue presented for this Court to determine. The Debtors are seeking to “reject” circuits that have been disconnected in accordance with the terms of the Vartec Agreements. Where an agreement expires or otherwise terminates during the post-

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<sup>1</sup> Capitalized terms not defined herein have the meanings ascribed to them in the Debtors’ Motion.

<sup>2</sup> The Circuits are identified as numbers 137-144 on Exhibit A to the Motion, along with their disconnection date, which ranges from 12/10/2004 to 5/24/2005.

<sup>3</sup> Motion at ¶ 11.

petition period, the debtor has nothing to assume or reject. Assuming, *arguendo*, that the circuits that have been disconnected may be treated as severable agreements, those disconnected circuits are not capable of rejection by the Debtors and the Motion should be denied as moot.<sup>4</sup>

### **JURISDICTION**

4. This Court has jurisdiction to consider and determine this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

### **ARGUMENT**

5. The Debtors premise their Motion on flawed assumptions, namely, that the agreement to provide circuits is severable and remains executory after such circuits have been disconnected. The Bankruptcy Code provides that, with some exceptions and subject to court approval, a trustee “may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). The Bankruptcy Code does not define the term “executory.” The legislative history reveals only that Congress, aware of the imprecision of the term, intended executory contracts generally to include those “on which performance remains due to some extent on both sides.” H.R. REP. NO. 595, 95TH CONG., 1ST SESS. 220 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5844.

6. Once a contract expires by its own terms prior to assumption or rejection, Courts and commentators agree that such contracts cannot be assumed or rejected. *See, e.g., Gloria Mfg. Corp. v. International Ladies’ Garment Workers’ Union (In re Gloria Mfg. Corp.)*, 734 F.2d 1020, 1022 (4th Cir. 1984); *In re Nat’l Steel Corp.*, 316 B.R. 287, 304 (Bankr. N.D. Ill. 2004) (relying on R. GINSBERG & R. MARTIN, GINSBERG & MARTIN ON BANKRUPTCY § 7.01[C],

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<sup>4</sup> Although the Motion should be denied for the reasons set forth herein, MCI submits that the Vartec Agreements are integrated, single agreements that must be assumed, or rejected, *in toto*. Accordingly, MCI expressly reserves all of its rights with respect to the issue of severability.

at 7-8 n.37 (4th ed. 1995 & Supp. 2004), and holding that where an executory contract expires by its own terms during the post-petition, pre-assumption/rejection period, the debtor-in-possession has nothing to assume or reject.”); *In re Balco Equities Ltd., Inc.*, 312 B.R. 734, 750 (Bankr. S.D.N.Y. 2004) (holding that even if a debtor could have assumed or rejected an agreement as of the petition date, “it is well settled that ‘events after the filing of the bankruptcy petition may cause the contract to be regarded as not executory when the motion to assume or reject was made, such as contracts which expired post-petition by their own terms after the date of the petition but before the motion was heard.’”); *In re Child World, Inc.*, 147 B.R. 847, 852 (Bankr. S.D.N.Y. 1992) (holding same).

7. As noted in the Motion, each of the Circuits has been disconnected in accordance with the terms of the Vartec Agreements.<sup>5</sup> Even if this Court were to conclude that each disconnected Circuit has been provided under a severable agreement, those agreements are no longer capable of assumption or rejection by the Debtors and the Motion should be denied as moot.

**[Remainder of page intentionally left blank]**

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<sup>5</sup> Motion at ¶¶ 11 and 12 (representing, *inter alia*, that the Debtors have discontinued their use of MCI’s circuits).

**CONCLUSION**

Based on the foregoing, MCI requests that the Court enter an order denying the Debtors' Motion and granting the relief requested herein and such other and further relief as is just.

Dated: Houston, Texas  
July 8, 2005

Respectfully submitted,

/s/ James T. Grogan III

Stephen A. Youngman  
Texas Bar No. 22226600  
WEIL, GOTSHAL & MANGES LLP  
200 Crescent Court, Suite 300  
Dallas, Texas 75201-6950  
Telephone: 214-746-7700  
Facsimile: 214-746-7777  
E-mail: [stephen.youngman@weil.com](mailto:stephen.youngman@weil.com)

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**Attorneys for MCI Network Services, Inc. and MCI  
Communications Services, Inc.**

**CERTIFICATE OF SERVICE**

I hereby certify that on July 8, 2005, a copy of MCI's Objection to Debtors' Motion to Authorize Rejections of Circuit Agreements was served by email, facsimile and/or United States first class mail, postage prepaid to all the individuals/entities identified on the service list annexed hereto as Exhibit A and was also so served on counsel for the Debtors, counsel for the Official Committee of Unsecured Creditors, counsel for the Rural Telephone Finance Cooperative, and the United States Trustee.

/s/ James T. Grogan III

James T. Grogan III