IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

TELSTAR RESOURCE GROUP, INC., Plaintiff, v. MCI, Inc., a Delaware Corporation, Defendant.	Case No. 05 Civ. 10671 (JGK)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, PROVISIONAL CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF NOTICE TO THE CLASS

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PRELIMINARY STATEMENT

Plaintiff Telstar Resource Group, Inc. and Defendant MCI, Inc. (now known as Verizon Verizon Business Network Services Inc.) ("MCI") have entered into a Stipulation Of Settlement dated December 3, 2007 ("Settlement Agreement") setting forth a proposed class action settlement of this case.[1] Under the Settlement Agreement, MCI will segregate $2,811,500 into an interest-bearing account for the benefit of the class, in exchange for the release of all claims arising from or directly or indirectly related to the litigation.

Plaintiff's counsel have investigated the merits of the claims asserted on behalf of the class, the defenses to those claims, and the alternatives for a class recovery in the absence of this settlement. They achieved the settlement only after months of extensive arm's length negotiations with MCI. Based on their evaluation of the facts and governing law – and their recognition of the considerable risk, expense, and delay inherent in continued litigation of this matter – Plaintiff and its counsel submit that the proposed settlement is in the best interests of the class as a whole and should be granted preliminary approval.

Accordingly, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiff respectfully requests that the Court enter the accompanying proposed Order Provisionally Certifying Class, Directing Dissemination of Notice, and Setting Hearing on Fairness of Proposed Settlement. If entered, the proposed order will begin the settlement approval process recommended in the *Manual For Complex Litigation – Fourth* (2004), by (i) granting preliminary settlement approval; (ii) provisionally certifying the class for settlement purposes; (iii) approving the parties' proposed form, content, and means of notice to the class;

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[1] A copy of the Settlement Agreement and its exhibits is attached to the Notice of Motion as Exhibit 1.

(iv) establishing procedures by which class members may present their views of the settlement to the Court and the parties; and (v) scheduling a hearing at which the Court will consider whether to grant final approval of the proposed settlement.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's Allegations And Claims

This action involves MCI's assessment of Universal Service Fund or USF surcharges on private line or frame relay services subscribed to by business customers. Under federal law, providers of interstate telecommunications services must contribute to a federal Universal Service Fund, which subsidizes telecommunications services for low-income and rural customers, among other things. Federal law also permits states to establish their own Universal Service Funds, and to require fund contributions from intrastate-service providers. Service providers are allowed to pass their USF contributions on to their customers by billing them for USF surcharges. (Amended Class Action Complaint filed March 29, 2007, ¶¶ 8-12.)

Plaintiff alleges that by federal regulation, MCI's private or frame relay lines must be classified as either interstate or intrastate, based on the percentage of interstate traffic carried. Plaintiff alleges MCI is thus allowed to assess either federal or state USF surcharges on a given private or frame relay line, depending on whether it is classified as interstate or intrastate. Plaintiff, a business that subscribed to frame relay service from MCI, alleges it had been assessed both federal and state USF surcharges for the service during the same billing period. Plaintiff also alleges MCI has similarly assessed both types of surcharges on other private line and frame relay customers. (*Id.* ¶¶ 12-21.)

On behalf of itself and all others similarly situated, Plaintiff alleges MCI's assessment of both federal and state USF surcharges violates the Communications Act, 47 U.S.C. § 201(b), in that the practice is unjust, unreasonable, and unauthorized by MCI's own service agreement.

Plaintiff further alleges MCI has refunded or credited back USF surcharges to certain customers who were assessed both federal and state surcharges, thus engaging in unjust or unreasonable discrimination under 47 U.S.C. § 202 against those who received no refunds or credits. (*Id.* ¶¶ 24, 31-44.)

B. Procedural History And Negotiation Of The Settlement

Plaintiff filed its original complaint on December 21, 2005. In January 2006, Plaintiff filed a motion for class certification. MCI filed a motion to dismiss in April 2006. In January 2007, the Court deferred ruling on the class certification motion and stayed discovery pending its decision on the motion to dismiss. In January 2007, the Court denied the motion in part and granted it in part. The Court also stayed the case under the primary-jurisdiction doctrine, concluding the issues raised by Plaintiff's surviving claims should be decided by the Federal Communications Commission. *See Telstar Resource Group, Inc. v. MCI, Inc.*, 476 F. Supp. 2d 261 (S.D.N.Y. 2007). Pursuant to a stipulated order, Plaintiff filed an amended complaint March 29, 2007.

In May 2007, while preparing for the initiation of proceedings before the FCC, the parties began discussing the possibility of settling this matter. Those discussions developed into full-blown settlement negotiations. After several months of negotiations, the parties reached a settlement in principle. In late October 2007, the parties reduced their agreement to the Stipulation of Settlement now before the Court for preliminary approval.

By the time they agreed to the proposed settlement, Plaintiff and its counsel had become thoroughly familiar with the strengths and weaknesses of the class claims. Before and after filing this action, counsel conducted extensive investigation and analysis of the factual and legal issues involved, including an examination of MCI's service agreements governing its provision of private line and frame relay services; review of the Communications Act; and analysis of FCC

regulations concerning the classification of mixed-use direct access lines as either interstate or intrastate (the so-called "Ten Percent Rule"). In addition, MCI's motion to dismiss and the Court's thorough decision on the motion provided significantly more clarification of the legal issues. Furthermore, Plaintiff has recently completed confirmatory discovery agreed to by MCI to verify factual premises underlying the parties' settlement negotiations.

II. SUMMARY OF SETTLEMENT TERMS

A. Definition Of Settlement Class

The parties have agreed to certification of the following class for settlement purposes:

> All customers of MCI, Inc. or its successor in interest, Verizon Business, who subscribed to private line service or frame relay service and who were assessed the Federal USF surcharge and a state USF surcharge for the same service or services during the same billing period between June 22, 2005 and March 16, 2007, inclusive.

(Settlement Agreement ¶ 1.2.) Excluded from the class are Verizon Business; any entity in which Verizon Business Network Services Inc. has a controlling interest; any of the officers, directors, or employees of Verizon Business; the legal representatives, heirs, successors, and assigns of Verizon Business; anyone employed with the law firms of Girard Gibbs LLP or Seeger Weiss LLP; any Judge to whom the lawsuit is or was assigned, and his or her immediate family; any entity of the United States government, or any state, territory, or municipality of the United States, or any entity thereof; and any person or entity who submits a timely and valid request to be excluded from the class. (*Id.* ¶ 1.3.)

B. MCI's Payment Of $2.8 Million And Proposed Plan of Allocation

Under the settlement, MCI will segregate $2,811,500 into an interest-bearing account for the benefit of the class. This settlement fund will first be applied to pay costs of class notice and settlement administration; taxes and tax-related expenses; any Court-approved award of attorneys' fees and expenses; and any Court-approved incentive award to the class

representative. After deduction of these amounts, the balance of the settlement fund will be available for allocation among the class. (*Id.* ¶¶ 9.2, 9.3.) Based on their estimates of notice and administrative expenses, and assuming the requested awards are granted in full, Plaintiff's counsel estimate the available balance will be approximately $1.9 million plus accrued interest.

Plaintiff's proposed plan of allocation is attached as Exhibit E to the Settlement Agreement. Under the plan, settlement payments will be made only to class members who complete and submit timely a basic claim form. The proposed claim form, which is attached to the Settlement Agreement as Exhibit C and will be enclosed with the class notice, is exceedingly simple. The form will be mailed out with the class member's name and address already printed on it. As the class under the Settlement Agreement consists entirely of business entities, The person acting on behalf of the class member need only correct the preprinted address if necessary; sign and date the form; provide his or her name and business title; and mail the form to the listed address by the given deadline.

After the claim deadline, a Settlement Administrator retained by Plaintiff's counsel will allocate the net settlement as follows. Using customer billing and its tax record data provided by MCI/Verizon, the Settlement Administrator will look up the dollar amount of state USF surcharges paid by each valid claimant and not subsequently refunded or credited to the claimant. The Settlement Administrator will then allocate the net settlement fund among claimants in the same proportion that their state USF surcharges bear to the total of all state USF surcharges paid by all claimants. Mathematically, the allocation to each claimant can be

expressed as follows:

$$\text{Payment} = (\text{Net settlement fund}) \times \frac{(\text{State USF surcharges you paid})}{(\text{Total of state USF surcharges paid by all claimants})}$$

Claimants will be paid by check, sent to them by first-class mail and with an expiration date 180 days after issuance. (Settlement Agreement, Ex. E.)

Under the Settlement Aement, any balance remaining in the settlement fund after six months following the mailing of settlement checks (whether because of tax refunds, uncashed checks, or otherwise) will be distributed among class members in an equitable manner, if economically reasonable, and/or donated to a nonprofit organization. (Settlement Agreement ¶ 9.6.)

III. THE SETTLEMENT MEETS THE CRITERIA FOR PRELIMINARY APPROVAL

A. Role Of The Court At The Preliminary-Approval Stage

Rule 23(e) requires judicial approval for any compromise of claims brought on a class basis. Fed. R. Civ. P. 23(e). Approval of a proposed settlement is a matter within the broad discretion of the district court. *See, e.g., In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995). "Preliminary approval of a proposed settlement is the first in a two-step process required before a class action may be settled." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). "First, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing." *Manual for Complex Litigation – Fourth* § 13.14. "In some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties." *Id.* § 21.632.

"Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *NASDAQ*, 176 F.R.D. at 102. Preliminary approval permits notice to be given to class members of the proposed settlement and the scheduling of a fairness hearing, at which class members and the parties may be heard on whether the settlement should be granted final approval.

Upon presentation of a settlement for preliminary approval, the court must "make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." *Manual for Complex Litigation – Fourth* § 21.632. "[P]reliminary approval should be granted and notice of the proposed settlement given to the class if there are no obvious deficiencies in the proposed settlement[ ]." *In re Medical X-Ray Film Antitrust Litig.*, No. CV 93-5904, 1997 U.S. Dist. LEXIS 21936, at *19 (E.D.N.Y. Dec. 10, 1997). The primary question raised by a request for preliminary approval is whether a proposed settlement is "within the range of reasonableness" of settlements that could ultimately merit final approval. *Manual for Complex Litigation – Fourth* § 40.42; *see also Prudential Ltd. P'ships*, 163 F.R.D. at 210 ("At this stage of the proceeding, the Court need only find that the proposed settlement fits 'within the range of possible approval' . . . .").

Preliminary approval does not require the court to answer the ultimate question of whether a proposed settlement is fair, reasonable, and adequate. Rather, that decision is made only at the final-approval stage, after notice of the settlement has been given to the class members and they have had an opportunity to voice their views of, or exclude themselves from, the settlement. *See* 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.165 [2-3], at 23-516 (3d ed. 2006).

B. The Proposed Settlement Is Entitled To A Presumption Of Fairness.

Even at the final-approval stage, before consideration of its substance, a proposed settlement is entitled to a presumption of fairness if it is negotiated at arm's-length by experienced, knowledgeable counsel. *See In re Excess Value Ins. Coverage Litig.*, 2004-2 Trade Cas. (CCH) ¶ 74,521, 2004 U.S. Dist. LEXIS 14822, at *34 (S.D.N.Y. July 30, 2004) ("Where 'the Court finds that the Settlement is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation, the Settlement will enjoy a presumption of fairness.'"); *see also In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993) ("In appraising the fairness of a proposed settlement, the view of experienced counsel favoring the settlement is 'entitled to great weight.'"); *see also Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) (affirming approval of settlement) ("[T]he value of the assessment of able counsel negotiating at arm's length cannot be gainsaid. Lawyers know their strengths and they know where the bones are buried.").

The settlement negotiations here were adversarial and conducted at arm's length by competent, knowledgeable counsel. Plaintiff's counsel has extensive experience in complex class actions, including telecommunications litigation. The proposed settlement is therefore entitled to a presumption of fairness at this preliminary-approval stage. A review of its substance only confirms the presumption.

C. The Proposed Settlement Falls Within The Range Of Possible Final Approval.

As discussed above, the proposed settlement is the product of serious, informed, adversarial negotiations. The settlement also has no obvious deficiencies and grants no preferential treatment to the class representative or segments of the class. It falls within the range of possible final approval and should be granted preliminary approval.

The settlement provides substantial benefits to the class in the form of a $2,811,500 interest-bearing settlement fund. After deduction of notice and administrative costs; taxes on income earned by the fund and tax-related expenses; any Court-awarded attorneys' fees and expenses; and any Court-approved incentive award to the class representative, the entire balance of the fund will be distributed among all class members who submit valid claims. Information furnished by MCI shows that the total dollar amount of alleged USF overcharges, i.e., state USF surcharges assessed on class members' lines simultaneously with federal USF surcharges, is approximately $6 million. See Declaration of A. J. De Bartolomeo In Support Of Plaintiff's Motion For Preliminary Approval of Settlement, Provisional Certification Of Settlement Class, And Approval Of Notice To The Class ("De Bartolomeo Decl.") ¶2. Thus, the settlement represents a recovery of roughly 50 cents on the dollar – an excellent compromise, as this high-percentage recovery is being obtained without the considerable risk, expense, and delay of litigating the case to judgment. *See Telstar*, 476 F. Supp. 2d at 272 (in staying case pending resolution of issues by FCC, describing Plaintiff's theory concerning application of Ten Percent Rule to USF surcharges as "novel").

The settlement fund will also be the source of any attorneys' fees and expenses awarded to Plaintiff's counsel. Counsel will apply for fees not to exceed 25 percent of the settlement fund, or $702,875; reimbursement of expenses incurred in this action; plus interest on such fees and expenses at the same rate as earned by the settlement fund. Counsel will also apply for a $5,000 incentive award to class representative Telstar Resource Group, Inc., for its initiative and effort in pursuing the case and settlement on behalf of the class. Defendant has agreed to Plaintiff Counsel's 25% fee request plus reimbursement of expenses incurred, and the payment of a $5,000 incentive award to Plaintiff Telstar. (Settlement Agreement ¶10.1.)

IV. THE PLAN OF ALLOCATION IS REASONABLE AND SHOULD ALSO BE GRANTED PRELIMINARY APPROVAL.

Plaintiff also requests preliminary approval of its proposed plan of allocation, attached as Exhibit C to the Settlement Agreement. As discussed above, the plan allocates the balance of the settlement fund in direct proportion to the amount each claimant paid in state USF surcharges. The proposed settlement payments are thus reasonably tied to the fundamental theory of liability asserted in the case, i.e., that it is unlawful for MCI to assess class members both federal and state USF surcharges for the same private or frame relay line and during the same service period. Even at the final-approval stage, "[w]hen formulated by competent and experienced class counsel, an allocation plan need have only a 'reasonable, rational basis.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004). As the proposed plan here was formulated by competent, experienced counsel and has a reasonable, rational basis, there is no reason to doubt its fairness for purposes of preliminary approval.

V. THE PROPOSED CLASS SHOULD BE PROVISIONALLY CERTIFIED ON AN OPT-OUT BASIS.

A. The Class Members Are Too Numerous To Be Joined.

As stated in the *Manual for Complex Litigation – Fourth*, where a proposed settlement is submitted for preliminary approval and a class has not yet been certified in the case, "[t]he judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) [of the Federal Rules of Civil Procedure] and at least one of the subsections of Rule 23(b)." *Id.* § 21.632. Certification of a settlement class "has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants." *Prudential Ltd. P'ships*, 163 F.R.D. at 205; *see also Weinberger v. Kendrich*, 698 F.2d 61, 72 (2d Cir. 1982) ("Temporary settlement classes have proved to be quite useful in resolving major class action disputes."); *Aramburu v. Health Fin.*

Servs., No. 02 CV 6535 (ARR), 2005 U.S. Dist. LEXIS 42257, at *5 (E.D.N.Y. April 18, 2005) ("The law in the Second Circuit favors the liberal construction of Rule 23, . . . and courts may exercise broad discretion when they determine whether to certify a class.").

Here, Plaintiff requests provisional certification of the proposed class under Rule 23(a) and Rule (b)(3), i.e., on an opt-out basis. Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is impracticable. *See Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 54 (S.D.N.Y. 1993). The proposed class for this settlement consists of all MCI private-line or frame relay customers who were assessed both federal and state USF surcharges for the same service during the same billing period between June 22, 2005 and March 16, 2007. Information produced by MCI shows the proposed class consists of approximately 8,852 entities throughout the United States, making joinder impracticable. (De Bartolomeo Decl., ¶3.) Thus, the numerosity requirement is met.

B. Common Questions Of Law And Fact Exist.

Rule 23(a)(2) requires the existence of questions of law or fact common to the class. *See Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 122 (S.D.N.Y. 2001) ("[T]he commonality inquiry asks if the named plaintiffs' 'grievances share a common question of law or of fact' with those of the proposed class . . . ."). Generally, courts have "liberally construed" the commonality prerequisite, requiring only a "minimum of one issue common to all class members." *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198 (S.D.N.Y. 1992). The existence of a common course of conduct arising out of a single set of operative facts satisfies the commonality requirement. *In re Blech Sec. Litig.*, 187 F.R.D. 97, 104 (S.D.N.Y. 1999).

In the present action, Plaintiff alleges a common course of conduct undertaken by MCI that affected all class members. In particular, Plaintiff alleges MCI assesses both federal and state USF surcharges in connection with class members' private line or frame relay service for

the same billing period. This alleged course of conduct raises issues of law and fact common to the class, including these:

- Whether MCI does in fact engage in the practices alleged;
- Whether MCI classifies class members' private or frame relay lines as both interstate and intrastate for purposes of levying USF surcharges;
- Whether MCI's practices violate 47 U.S.C. § 201;
- Whether MCI's practices violate 47 U.S.C. § 202; and
- The nature of the relief to which Plaintiff and the class are entitled.

(Amended Class Action Complaint ¶ 26.)

Thus, the commonality requirement is satisfied.

C. The Named Plaintiff's Claims Are Typical Of Those Of The Class.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] . . . typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a). Typicality is satisfied if "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001). The typicality requirement is liberally construed, and "typical" does not mean "identical." *Trief*, 144 F.R.D. at 200.

The claims of Plaintiff and the class all arise out of the same course of conduct alleged to have been conducted by MCI. Plaintiff alleges that it and all class members have been assessed both federal and state USF surcharges on their MCI private line or frame relay service during the same billing period. Plaintiff further alleges that these practices violate the Communications Act, 47 U.S.C. §§ 201-02. Therefore, Plaintiff's claims are typical of those of the class.

D. Plaintiff And Its Counsel Will Adequately Represent The Proposed Class.

Rule 23(a)(4) requires that representative plaintiffs fairly and adequately protect the interests of the class. The inquiry into adequacy focuses on whether the named plaintiff's interests are antagonistic to the interests of other class members; and whether the counsel retained by the named plaintiff are qualified, experienced, and capable of conducting the litigation. *See Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). A conflict or potential conflict of interest will not necessarily defeat a finding of adequacy. To do so, the conflict must be "fundamental." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001).

No conflict of interest, potential or real, exists between the named Plaintiff and the class here. As discussed above, Plaintiff's claims arise from the same course of conduct as, and are typical of, the claims of the class. Plaintiff and all class members share an interest in proving the existence of MCI's practices and their unlawfulness and obtaining redress. In addition, Plaintiffs has retained experienced, capable counsel to represent the class. Girard Gibbs LLP has successfully pursued and resolved a multitude of complex class actions in courts throughout the United States. Girard Gibbs in particular has handled many telecommunications class actions and has extensive experience prosecuting claims under the Communications Act. De Bartolomeo Decl., ¶6, Exh. A (Girard Gibbs resume). Therefore, the adequacy requirement of Rule 23(a)(4) is met in this case.

E. The Proposed Class Satisfies The Requirements Of Rule 23(b)(3).

1. Common questions of law and fact predominate.

In addition to the four requirements of Rule 23(a), a class must also satisfy one of the three subparts of Rule 23(b). As stated above, Plaintiff seeks class certification under Rule 23(b), which authorizes certification on an opt-out basis if:

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3). This rule is designed to "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997).

The predominance inquiry normally focuses "'on the legal or factual questions that qualify each class member's case as a genuine controversy . . . [and] tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Cromer,* 205 F.R.D. at 127 (quoting *Amchem*, 521 U.S. at 623) (alteration in *Cromer*). Predominance "is a test readily met in certain cases alleging consumer or securities fraud . . . ." *Amchem*, 521 U.S. at 625. "A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." 2 *Newberg on Class Actions* § 4:25.

In this action, all class members were subjected to, and harmed by, MCI's uniform course of conduct in assessing both federal and state USF surcharges, when MCI was allegedly restricted by law and contract to assessing either one or the other. Such crucial issues as whether MCI engaged in the alleged practices and whether those practices violated the Communications Act would be determined by focusing on MCI's conduct, not that of individual class members. As the claims of the class are all based on a common nucleus of facts and common course of conduct, the predominance requirement is satisfied in this case. *See Cromer*, 205 F.R.D. at 127 (finding predominance because "[t]he proof for the claims of misrepresentation or omission,

materiality, and . . . scienter are [sic] all based on a common nucleus of facts and a common course of conduct.").

2. A class action is superior to other available methods for resolving this litigation.

Rule 23(b)(3) also requires that a class action be "superior to other available methods for fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

> The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.; *see Cromer*, 205 F.R.D. at 133 ("A class action is the superior method for the fair and efficient adjudication of this controversy. The potential class members are both significant in number and geographically dispersed. The interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions. To force each investor to litigate separately would risk disparate results among those seeking redress, would encourage a race to judgment given the limited funds available to fund recovery here, would exponentially increase the costs of litigation for all, and would be a particularly inefficient use of judicial resources.") (footnote omitted).

Here, the utility of resolving this matter through the class action device is substantial, as class members who have been injured by MCI's conduct number in the thousands, but few, if any, have been damaged to a degree that would induce them to bring their own suits. Information supplied by MCI shows that the average dollar amount of USF surcharges paid by each class member is approximately $680.00 (De Bartolomeo Decl., ¶4.). *Cf. Blech*, 187 F.R.D. at 107 ("Most violations of the federal securities laws, such as those alleged in the Complaint, inflict economic injury on large numbers of geographically dispersed persons such that the cost

of pursuing individual litigation to seek recovery is often not feasible."). In addition, settlement of this case on a class basis presents no trial management difficulties. As explained in *Amchem*, 521 U.S. 591, "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial." *Id.* at 620.

Thus, class certification is the superior method for resolving the claims of the class. The class action is the only feasible device by which the sizable cash recovery here could have been obtained for the thousands of MCI business customers whose claims are too small to warrant individual litigation.

VI. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE.

A. Individual Mailed Notice Will Provide The Best Notice Practicable Under The Circumstances.

Rule 23(c)(2)(B) states, "For any class certified under Rule 23(b)(3), the court must direct to all class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Rule 23(e)(B) similarly states, "The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise."

Under the proposed notice program here, individual notice will be sent by first-class mail to all class members who can be identified through reasonable effort from MCI's records. (De Bartolomeo Decl., ¶5.) Individual mailed notice satisfies Rule 23 and the requirements of due process. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974) ("[T]he names and addresses of 2,250,000 class members are easily ascertainable, and there is nothing to show that individual notice cannot be mailed to each. For these class members, individual notice is clearly the 'best notice practicable' within the meaning of Rule 23 (c)(2) and our prior decisions.").

B. The Proposed Notice Provides All Necessary Information.

The *Manual for Complex Litigation – Fourth* says that a settlement notice "should announce the terms of a proposed settlement and state that, if approved, it will bind all class members." *Id.* § 21.312. Furthermore, the notice should define the class, and disclose whether the class has been certified only for settlement purposes; describe the class members' options and deadlines; describe the essential terms of the settlement; provide information regarding the plaintiff's attorneys' fees and expenses; set forth the time and place of the final-approval hearing; describe the procedures for objecting to, or opting out of, the settlement; describe the plan of allocation; provide information that will enable class members to estimate their individual recoveries; and state how to make inquiries regarding the settlement. *Id.*

The parties' proposed form of mailed notice in this case is attached as Exhibit B to the Settlement Agreement. The notice is laid out in a "user-friendly" question-and-answer format based on models made available by the Federal Judicial Center. The notice provides information about the nature, history, and status of the case; sets forth the definition of the class; describes the material terms of the settlement, the proposed plan of allocation, and the claims and persons to be released by the settlement; advises class members of their right to opt out of the class or object to the settlement, the procedures for doing so, and the consequences of not opting out; states that Plaintiff's counsel will seek attorneys' fees not to exceed 25 percent of the settlement fund, expenses, and a $5,000 incentive award for the class representative; and describes how to obtain more information, including by calling a toll-free number or visiting a Website. The proposed notice also discloses the date, time, and place of the final-approval hearing and the procedures for appearing at the hearing.

In class notices, "[c]larity and objectivity are of primary importance in describing the key elements in the proceedings so that recipient class members have sufficient information to make

intelligent decisions." 3 *Newberg on Class Actions* § 8.39. The proposed notice here meets these criteria, describing the proceedings and the terms of the settlement in an informative and coherent manner. *See Prudential Ltd. P'ships*, 163 F.R.D. at 210 (approving notice that provided class members "with a fair understanding of the actions, the parties and the nature of the settlement"); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 175 (E.D. Pa. 2000) (approving notice that described settlement terms and plan of allocation, disclosed potential maximum request for attorneys' fees, and provided contact information for relevant attorneys). Thus, the proposed notice should be approved by the Court.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary approval of the proposed settlement; provisionally certify the proposed class for settlement purposes; and enter the accompanying proposed Order Provisionally Certifying Class, Directing Dissemination Of Notice, And Setting Hearing On Fairness Of Proposed Settlement..

Dated: December 10, 2007

Respectfully submitted,

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