

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Intermedia Communications Inc., Transferor,)
and WorldCom, Inc., Transferee, for Consent)
to Transfer Control of Corporations Holding)
Commission Licenses and Authorizations)
Pursuant to Sections 214 and 310(d) of the)
Communications Act and Parts 21, 63, 90, 101)

RECEIVED
CC Docket No. 00-206

MEMORANDUM OPINION AND ORDER

Adopted: January 17, 2001

Released: January 17, 2001

By the Chief, Common Carrier Bureau; Chief, International Bureau; and Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On October 23, 2000, WorldCom, Inc. ("WorldCom") and Intermedia Communications, Inc. ("Intermedia") filed a joint application pursuant to sections 214 and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 214, 310(d), requesting Commission approval to transfer control to WorldCom of Commission licenses and authorizations held by Intermedia. In this Order, we approve the wireless, international and domestic wireline transfer of control application filed by WorldCom and Intermedia (collectively, the "Applicants"), pursuant to sections 214 and 310(d).¹ Based on the record, we conclude that approval of the transfer of wireless licenses, international section 214 authorizations, and domestic blanket section 214 authorization from Intermedia to WorldCom will serve the public interest, subject to the condition that Intermedia and its subsidiaries shall be regulated as dominant in their provision of service on the U.S.-Brazil route.

¹ See *In re Applications of Intermedia Communications, Inc., and WorldCom, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to sections 214 and 310(d) of the Communications Act and Parts 21, 63, 90, 101*, CC Docket No. 00-206 (filed Oct. 23, 2000) (Application). On November 6, 2000, the Common Carrier Bureau placed the application on public notice. See *Commission Seeks Comment on Application for Consent to Transfer Control Filed By WorldCom, Inc. and Intermedia Communications Inc.*, Public Notice, DA 00-2493 (rel. Nov. 6, 2000).

II. BACKGROUND

2. WorldCom is a provider of facilities-based local, long distance, and international telecommunications services, as well as Internet and Internet-related services.² WorldCom's subsidiary, UUNET, is a major provider of Internet backbone services.³ Intermedia provides integrated data and voice communications services, including frame relay services, Internet connectivity, private line data, local, long distance, international and systems integration services to approximately 90,000 business and government customers throughout the United States. In addition, Intermedia provides wholesale carrier services, and domestic long distance carriage and local termination and origination services for international telecommunications carriers. Intermedia also owns a controlling interest in Digex, Inc. (Digex), a publicly traded subsidiary that provides managed web-hosting services to businesses operating mission-critical, multi-functional websites. To facilitate the acquisition of Intermedia, WorldCom created Wildcat, a wholly-owned subsidiary of WorldCom that will merge into Intermedia.

3. On November 17, 2000, prior to the closing of the public comment period in this proceeding, the Department of Justice (Department) announced it had reached a settlement agreement with the Applicants to resolve antitrust concerns that the acquisition would result in higher prices and lower quality of services in the Internet backbone market. The agreement, detailed in a proposed consent decree, calls for WorldCom and Intermedia to divest, within six months after the close of the merger, all the "Intermedia Assets," defined as all business operations and assets of Intermedia except for the capital stock of Digex.⁴ On November 10, 2000, the Applicants notified the Commission of their agreement with the Department, and the Department's Hold Separate Stipulation and Order, which requires Intermedia to "preserve, maintain, and continue to operate the Intermedia Assets as an independent, ongoing, economically viable competitive business, with management, sales, and operations of such assets held entirely separate, distinct, and apart from those of WorldCom's operations" until WorldCom and Intermedia obtain the regulatory approvals required to close the divestiture.⁵ The Applicants noted that "[t]he Commission, of course, will have an opportunity to review the subsequent transaction [involving the sale of the Intermedia assets], as WorldCom must file an additional application to transfer control of the Intermedia assets to a third party, once that third party has

² Application at 4.

³ See also *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025 at 18027-28, ¶3 (Sept. 14, 1998) (*WorldCom-MCI Order*).

⁴ See also *United States v. WorldCom, Inc. and Intermedia Communications, Inc.*, Proposed Final Judgment (D.D.C. Nov. 2000) Case No. 1:00CV02789(RWR) Section II.F.1.

⁵ Letter from Mary L. Brown, WorldCom, and Heather B. Gold, Intermedia, to Magalie Roman Salas, Secretary, FCC (Nov. 20, 2000). See also *United States v. WorldCom, Inc. and Intermedia Communications, Inc.*, Hold Separate Order (D.D.C. Nov. 2000) Case No. 1:00CV02789(RWR) Section V.A.1.

been identified.”⁶

4. On December 6, 2000, the Commission received one comment concerning the transfer of control, a petition to deny submitted by AT&T.⁷ On December 19, 2000, the Applicants filed their reply comments.⁸

III. DISCUSSION

5. Before the transfer of control of authorizations and licenses can be approved in connection with a merger, sections 214(a) and 310(d) require that we determine that the proposed transfers serve the public interest.⁹ We weigh the potential public interest harms against the potential public interest benefits, considering both the possible competitive effects of the proposed transfers and the broader aims of the Communications Act and federal communications policy.¹⁰ In particular, we consider: (1) whether the merger would violate the Communications Act; (2) whether the merger would violate Commission rules; (3) whether the merger would frustrate the Commission’s efforts to enforce the Communications Act or substantially interfere with achievement of the objectives of the Act; and (4) whether affirmative public interest benefits would be realized as a result of the merger.¹¹ Applicants bear the burden of proving by a preponderance of the evidence that the transaction serves the public interest.¹²

6. We conclude that the pending merger, as modified by the proposed consent decree, will not result in a violation of the Communications Act or the Commission’s rules and will not undermine the Commission’s ability to enforce the Communications Act or substantially interfere with the objectives of that Act.¹³ In addition, we find that the proposed merger,

⁶ Letter from Mary L. Brown, WorldCom, and Heather B. Gold, Intermedia, to Magalie Roman Salas, Secretary, FCC (Nov. 20, 2000).

⁷ Petition of AT&T Corp. to Deny Application to Transfer Control, CC Docket No. 00-206 (filed Dec. 6, 2000) (AT&T Petition to Deny).

⁸ Reply to Petition to Deny Application for Consent to Transfer Control, CC Docket No. 00-206 (filed Dec. 19, 2000) (Applicants’ Reply Comments).

⁹ 47 U.S.C. §§ 214(a), 310(d); *see also WorldCom-MCI Order*, 13 FCC Rcd at 18030-35, ¶¶ 8-14.

¹⁰ *WorldCom-MCI Order* 13 FCC Rcd at 18030-31, ¶ 9. These aims include, among other things, implementing Congress’ pro-competitive, deregulatory national policy framework designed to open all communications markets to competition, preserving and advancing universal service, and accelerating private sector deployment of advanced services.

¹¹ *Id.*

¹² *Id.* at 11831-32, ¶ 10 n. 33; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Memorandum Opinion and Order, FCC 99-24, 14 FCC Rcd 3160 at 3169-70, ¶ 15 (1999).

¹³ We note that the proposed consent decree intends to ensure that competition that would be lost from the merger of Intermedia with WorldCom is replaced by the divestiture of the Intermedia assets. For example, the Proposed Final Judgment requires that WorldCom and Intermedia “make certain divestitures for the purpose of remedying the (continued....)

specifically WorldCom's acquisition of Intermedia's web-hosting business, Digex, is likely to serve the public interest by increasing competition for next-generation data services provided to business customers.

1. Potential Public Interest Harms

7. Pursuant to the consent decree entered into with the Department, WorldCom must divest all the Intermedia assets with the exception of the Digex web-hosting business. Accordingly, we find that the merger, so conditioned, will result in no change in market concentration, with the exception of web-hosting, where the increase would be minimal.¹⁴ For this reason, we find that this transaction is not likely to result in any public interest harms. Further, we note that only a single commenter, AT&T, alleges there are any potential public interest harms associated with this merger.¹⁵

8. We view the instant transaction as an "interim" transfer of licenses and authorizations that will not adversely impact the Commission's goals or violate Commission rules. Once a third-party purchaser is identified, we will review the subsequent transfer of control of the Intermedia assets to ensure the public interest is served and that the sale does not violate the Communications Act or Commission rules, frustrate Commission goals under the Communications Act, or is otherwise not in the public interest benefits.¹⁶ The Department's "hold separate" order requiring Intermedia to operate independently of WorldCom while WorldCom searches for a third party purchaser reduces WorldCom's incentive and ability to favor Intermedia in a manner that would harm competition.¹⁷

9. AT&T urges the Commission to reject the application on the ground that the merger of WorldCom and Intermedia would have "obvious anticompetitive vertical effects" due to WorldCom's "near dominance of the Internet backbone market, and the need of web-hosting companies to interconnect with that backbone."¹⁸ According to AT&T, the merger would enable WorldCom to use its Internet backbone business to harm competitors who provide web-hosting

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loss of competition . . ." and that "[t]he divestiture . . . shall be made to an Acquirer for whom it is demonstrated to the United States's sole satisfaction that: (1) the Acquirer has the capability and intent of competing effectively in the provision of Internet backbone and access services; and (2) the Acquirer has the managerial, operational, and financial capability to compete effectively in the provision of Internet backbone and access services. *United States v. WorldCom, Inc. and Intermedia, Inc.*, Proposed Final Judgment (D.D.C.) Case No. 1:00CV02789(RWR) Section IV.G.

¹⁴ See *infra* n. 22.

¹⁵ AT&T Petition to Deny at 4-12.

¹⁶ We find irrelevant AT&T's assertion that the merger is "not necessary to ensure competition for telecommunications services." AT&T Petition to Deny at 12.

¹⁷ *United States v. WorldCom, Inc. and Intermedia, Inc.*, Hold Separate Stipulation and Order (D.D.C.) Case No. 1:00CV02789(RWR); see also Applicants' Reply Comments at 4-5.

¹⁸ AT&T Petition to Deny at 8.

services by degrading quality of service and raising the costs to those competitors associated with interconnecting to the Internet.¹⁹ As the Applicants point out, the Commission does not regulate Internet-related businesses such as web-hosting services.²⁰ The Commission has in other proceedings, however, considered a merger's competitive effects on ancillary services that the Commission does not directly regulate.²¹ Assuming, without deciding, that it is appropriate to consider AT&T's claim in the instant proceeding, we reject AT&T's analysis.

10. Assuming for purposes of our analysis that AT&T is correct that WorldCom possesses "near dominance" over Internet backbone services, AT&T presents no evidence that such asserted "near dominance" would be sufficient to support a conclusion that WorldCom will be able to leverage its current Internet backbone market position in an anti-competitive way. As an initial matter, we note, as WorldCom points out, that WorldCom and Digex offer distinctly different types of web-hosting services and that their respective shares of web hosting business are small.²² Moreover, Digex's Form 10-K filed with the United States Securities and Exchange Commission for the year ended 2000 (Digex 10-K), identifies numerous horizontal competitors in the provision of web-hosting services, including MCI WorldCom, AT&T, Cable & Wireless, Concentric Network, Data Return, EDS, Exodus Communications, Frontier/Global Center, Globix, GTE, IBM, Intel, Level 3 Communications, Navisite, PSINet, Qwest Communications International, and US Internetworking.²³ Several of these competitors own Internet backbone networks and could provide sufficient Internet connectivity for purposes of web-hosting if WorldCom degraded service to web-hosting companies that competed against Digex. Significantly, Digex's 10-K points out that Digex currently receives most of its capacity and network services from Intermedia and has found such facilities sufficient to compete. After the divestiture of Intermedia's assets, including the Internet assets, the Intermedia network would be available to serve any web-hosting customers disgruntled with the quality of Internet backbone service received from WorldCom.²⁴ Moreover, web-hosting companies, including Digex and its

¹⁹ According to the Applicants, web-hosting services involve, among other things, the provision of rack space and Internet connectivity for servers that host business customers' websites. Web-hosting providers offer such services as collocation of a customer's server in space owned by the ISP; "shared web-hosting," which involves the provision of services to multiple customers whose websites are maintained on a single server owned and maintained by the web-hosting provider; "dedicated web-hosting," which involves the provision of web-hosting services to a single customer whose website is maintained on one or several separate servers owned and operated by the web-hosting provider; and managed web-hosting, which involves complex, dedicated hosting arrangements in which the web-hosting provider also performs administration, monitoring and maintenance services. Digex provides dedicated and managed services. Application at 18 n. 49.

²⁰ Application at 18.

²¹ *WorldCom-MCI Order* 13 FCC Rcd at 11831-32, ¶ 142.

²² Applicants' Reply Comments, Declaration of Michael D. Pelcovits at ¶ 5. Applicants cite market share estimates from IDC Bulletin, which purport Digex to have a 3.3 percent share of U.S.-based web-hosting service based upon 1999 revenues, and WorldCom to have a 4.4 percent share. See Melanie A. Posey, Bulletin: Web Hosting Services: 1999 Market Share Assessment, IDC (2000) at 3.

²³ See Applicants' Reply Comments, Declaration of Michael D. Pelcovits at ¶16.

²⁴ Digex 10-K at 17.

competitors, require redundant Internet connectivity.²⁵ If WorldCom were to raise price or degrade connection quality of Internet backbone service provided to rivals of Digex, WorldCom could very well lose customers of its backbone business because these customers would shift more business to the alternative backbone rather than adding customers to Digex's web-hosting business.²⁶ Therefore, even assuming that the matter is appropriate to consider in this proceeding, we disagree with AT&T's analysis that the merger could grant Digex an "unfair" advantage and harm web-hosting competitors.

11. Similarly, we disagree with AT&T that the addition of Digex's web-hosting business will "entrench UUNet's near dominance of the Internet backbone."²⁷ AT&T provides no support for this conclusory assertion. As the Applicants point out, even if all the Digex traffic were shifted to WorldCom, the incremental gain in traffic would likely be insignificant.²⁸ Therefore, we reject AT&T's claim that the merger will have anti-competitive vertical effects.

12. We also find no basis in the record to conclude that the transfer of wireless licenses would result in anti-competitive effects. We received no comments on the proposed transfer of control of the wireless licenses. We therefore approve the transfer of wireless licenses specifically, the Common Carrier Microwave and Private Land Mobile licenses.²⁹

13. We find no basis in the record to conclude that the proposed merger would have anti-competitive effects in any U.S. international services market. We received no comments on the proposed transfer of control of Intermedia's international section 214 authorizations to WorldCom.³⁰ Pursuant to section 63.18(h)(1) of the Commission's rules,³¹ Applicants have

²⁵ See Digex 10-K at 5.

²⁶ Reply Comments at 9. Moreover, we note that web-hosting, unlike ISP functions, essentially is an outsourcing function that some customers may find profitable to manage "in house." Some web-hosting customers, therefore, may be potential competitors of WorldCom/Digex. It is possible that if WorldCom raised the costs to web-hosting rivals associated with interconnectivity, a number of those firms' web-hosting clients could discipline WorldCom by opting to manage web-hosting functions internally rather than shifting to Digex.

²⁷ AT&T Petition to Deny at 4-9.

²⁸ Michael D. Pelcovits, WorldCom's economist, rebuts AT&T's theory that there are a large number of "eyeballs" that provide the web traffic for Digex. See AT&T Petition to Deny at 10; Applicants Reply Comments, Declaration of Michael D. Pelcovits at ¶ 19-20. Pelcovits responds that Digex serves large enterprises with low bandwidth needs, focusing on transactions, rather than content sites that attract "eyeballs." "Digex does not provide the high bandwidth hosting services typically used for streaming video and high graphics content entertainment, but instead focuses on complex computing problems, such as transactions and running complex databases." Pelcovits states that these transaction-based services, such as the kind provided by Digex, typically use only a very small fraction of bandwidth. *Id.*

²⁹ File No. 0000231239, Lead Call Sign KCK70 (191 common carrier point-to-point microwave licenses) and File No. 0000307462, Call Sign WPNT721 (one private land mobile radio license).

³⁰ See *In re Applications of Intermedia Communications, Inc., and WorldCom, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to section 214*, CC Docket No. 00-206, ITC-T/C-20001023-00751, ITC-T/C-20001023-00752, ITC-T/C-20001023-00753 ("International section 214 Application") Exhibit 1 at 1-2 (listing authorizations granted under the following file (continued....))

identified the foreign carrier affiliates of WorldCom, which will become the foreign carrier affiliates of Intermedia after the merger.³² Applicants certify that all of WorldCom's foreign carrier affiliates lack market power in their home markets, except Embratel S.A. ("Embratel"), a provider of intra-city and international transport communications services in Brazil.³³ WorldCom is regulated as dominant on the U.S.-Brazil route, pursuant to section 63.10(a) of the Commission's rules and Commission order.³⁴ Applicants state that Intermedia and its subsidiaries currently holding international section 214 authority accept dominant carrier regulation on the U.S.-Brazil route due to Intermedia's proposed affiliation with WorldCom.³⁵ We conclude that it is in the public interest to authorize the transfer of control of the international section 214 authorizations held by Intermedia and its subsidiaries to WorldCom and find that Intermedia and its subsidiaries will now be subject to regulation as dominant carriers on the U.S.-Brazil route, due to their affiliation with Embratel.

2. Potential Public Interest Benefits

14. We find that the merger is likely to serve the public interest because WorldCom's acquisition of Digex will more quickly provide WorldCom with resources it currently lacks, making WorldCom a stronger competitor in the provision of next generation communications services to business customers. Therefore, we reject AT&T's claim that the proposed merger offers no "legitimate benefits."³⁶ Applicants describe Digex as possessing "state of the art" web-hosting assets that complement WorldCom's current provision of "basic collocation and simple shared and dedicated web-hosting services, as well as some managed web-hosting services."³⁷ Given this, we find it likely that the merger will improve WorldCom's ability to provide the support structure and automated systems necessary for providing mission critical hosting products and services for mid- to large-sized business customers.³⁸

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numbers: ITC-214-19960619-00256, ITC-214-19960718-00326, ITC-96-339, ITC-94-258, ITC-95-400, ITC-88-096, ITC-91-050, ITC-93-303, ITC-94-015, ITC-93-041).

³¹ 47 C.F.R. § 63.18(h)(1).

³² See International section 214 Application at 3-4.

³³ See *id.* at 3-5

³⁴ 47 C.F.R. § 63.10(a); see also *MCI WorldCom, Inc.*, 13 FCC Rcd 22532 (1998) (regulating then-MCI WorldCom as dominant on the U.S.-Brazil route).

³⁵ See International section 214 Application at 5.

³⁶ AT&T Petition to Deny at 4.

³⁷ Application, Affidavit of K. William Grothe, Jr. at ¶ 3.

³⁸ Applicants' Reply Comments at 6-7. Applicants further contend that the acquisition of Digex's "state-of-the-art systems" are needed to compete in the provision of complex managed web-hosting services for businesses against AT&T, Exodus, Verio, IBM, Qwest and GTE, among others.

IV. CONCLUSION

15. Because we find that the potential public interest benefits exceed any potential harms, we approve the transfer of the wireless licenses, and international and domestic wireline section 214 authorizations associated with this merger.

V. ORDERING CLAUSES

16. Accordingly, having reviewed the Applications and the record in this matter, IT IS ORDERED, pursuant to sections 4(i) and (j), 214(a) and (c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309 and 310(d) that the application to transfer wireless licenses, and international and blanket domestic section 214 authorization filed by WorldCom and Intermedia in the above-captioned proceeding IS GRANTED.

17. IT IS FURTHER ORDERED that, pursuant to section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, File Nos. ITC-T/C-20001023-00751, ITC-T/C-20001023-00752 and ITC-T/C-20001023-00753 are hereby GRANTED and Intermedia and its subsidiaries are authorized to transfer control of their international section 214 authorizations to WorldCom, subject to the condition that Intermedia and its subsidiaries will be regulated as dominant in their provision of service on the U.S.-Brazil route pursuant to section 63.10(a) of the Commission's rules, 47 C.F.R. § 63.10(a).

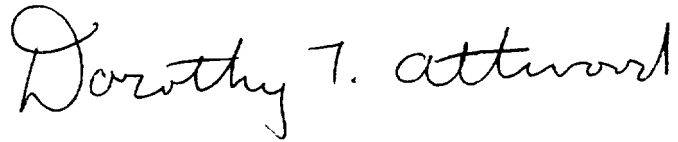
18. IT IS FURTHER ORDERED, that this grant is CONDITIONED on the merged entity's divestiture of Intermedia's assets in accordance with the Department of Justice Proposed Final Judgment and the Proposed Hold Separate Stipulation and Order referred to herein.

19. IT IS FURTHER ORDERED, that AT&T's "Petition to Deny," filed in this proceeding IS DENIED.

20. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release in accordance with 47 C.F.R. § 1.103.

21. IT IS FURTHER ORDERED that this action is taken under delegated authority pursuant to sections 0.51, 0.91, 0.131, 0.261, 0.291, and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.51, 0.91, 0.131, 0.261, 0.291, 0.331.

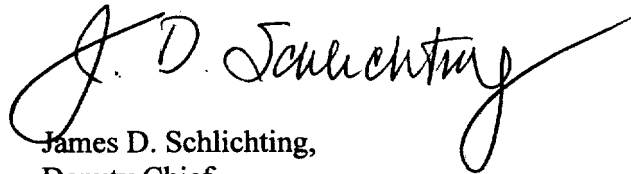
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