

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
The Merger of MCI Communications) GN Docket No. 96-245
Corporation and)
British Telecommunications plc)

MEMORANDUM OPINION AND ORDER

Adopted: August 21, 1997 Released: September 24, 1997

By the Commission: Commissioner Chong issuing a separate statement.

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I. INTRODUCTION

1. In this order, we consider the applications filed by British Telecommunications plc (BT) and MCI Communications Corporation (MCI) (collectively, BT/MCI) pursuant to Sections 214(a) and 310(d) of the Communications Act, as amended (the Communications Act)¹ and the Cable Landing License Act,² to transfer ultimate control from MCI to BT of licenses and authorizations held by subsidiaries of MCI. BT/MCI seek approval for this transfer in connection with the proposed merger of MCI and BT, under which MCI would be merged into a U.S. subsidiary of BT, and would become a subsidiary of a newly created U.K. company, Concert plc (Concert).

2. In accordance with the terms of Sections 214(a) and 310(d) of the Communications Act, we must be persuaded that the proposed transaction is in the public interest, convenience and necessity before we can approve the transfers of licenses and other authorizations underlying the merger. Applicants bear the burden of demonstrating that the proposed transaction is in the public interest.³

3. The public interest standard, which we must apply in analyzing any merger involving the transfer of control of Federal Communications Commission (FCC or Commission) licenses, is a broad, flexible standard that encompasses the "broad aims of the Communications Act."⁴ As we explained in our recent *Bell Atlantic/NYNEX Order*, "[t]hese 'broad aims' include, among other things, the implementation of Congress' 'pro-competitive, de-regulatory national policy framework' for telecommunications, 'preserving and advancing' universal service, and 'accelerat[ing] . . . private sector deployment of advanced telecommunications and information technologies and services.'"⁵ In addition, because this proposed merger involves both a domestic and foreign carrier, our public interest inquiry also extends to considering how the merger will affect competitive conditions on international routes. Although the public interest includes

¹ 47 U.S.C. §§ 214(a), 310(d) (1997).

² 47 U.S.C. §§ 34-39 (1997) (*Cable Landing License Act*).

³ See, e.g., NYNEX Corp. and Bell Atlantic Corp., *Memorandum Opinion and Order*, File No. NSD-L-96-10, FCC 97-286 at ¶¶ 29, 32 (rel. Aug. 14, 1997) (*Bell Atlantic/NYNEX Order*).

⁴ *Western Union Division, Commercial Telegrapher's Union, A.F. of L. v. United States*, 87 F. Supp. 324, 335 (D.D.C.), *aff'd*, 338 U.S. 864 (1949). See also *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953); *Washington Utilities and Transportation Comm'n. v. FCC*, 513 F.2d 1142, 1147 (9th Cir. 1976).

⁵ *Bell Atlantic/NYNEX Order* at ¶ 2 (citing H.R. Rep. No. 104-458 at 1 (1996), and 47 U.S.C. § 254 (1997)).

consideration of the competition policies underlying the Sherman and Clayton Acts,⁶ the public interest standard necessarily subsumes and extends beyond the traditional parameters of review under the antitrust laws. Moreover, as we concluded in the *Bell Atlantic/NYNEX Order*, in order to find that a merger is in the public interest, the applicants must demonstrate, not merely that the merger will not "substantially . . . lessen competition . . . [or] . . . tend to create a monopoly,"⁷ but that the merger actually "will enhance competition."⁸

4. We must evaluate this proposed merger against the backdrop of rapid changes in domestic and international regulations and market conditions. As discussed below, Congress' enactment and our implementation of the Telecommunications Act of 1996 (1996 Act) and the signing of the World Trade Organization's Basic Telecom Agreement (WTO Basic Telecom Agreement) are radically altering the regulatory regimes under which we evaluate this proposed merger. Both the 1996 Act and the WTO Basic Telecom Agreement seek to replace the traditional regulatory regime of monopoly telephone providers with pro-competitive, deregulatory policies. An important purpose of the WTO Basic Telecom Agreement is to enable carriers to provide international service on an end-to-end basis.⁹

5. Because the 1996 Act and the WTO Basic Telecom Agreement are in the early stages of implementation, however, there is considerable uncertainty concerning how quickly and to what extent regulatory and market conditions in various telecommunications markets will change. As a result of this uncertainty about the pace with which competition will develop in various telecommunications markets, we must be particularly concerned about mergers between companies that are potential rivals, especially where one of the merging parties is or was the incumbent monopoly provider. Our concern is heightened by our awareness that, as regulatory barriers to entry fall, firms that might "otherwise compete directly may, as one possible strategic

⁶ 15 U.S.C. §§ 1-7 (1997); 15 U.S.C. §§ 18 *et seq.* (1997). We note that the Commission is separately authorized to enforce Section 7 of the Clayton Act in the case of mergers of common carriers. 15 U.S.C. § 21(a). *See infra* ¶ 28 (discussing our Clayton Act authority).

⁷ 15 U.S.C. § 18.

⁸ *Bell Atlantic/NYNEX Order* at ¶ 2. In that decision, we explained that:

A merger will be pro-competitive if the harms to competition -- *i.e.*, enhancing market power, slowing the decline of market power, or impairing this Commission's ability properly to establish and enforce those rules necessary to establish and maintain the competition that will be a prerequisite to deregulation -- are outweighed by benefits that enhance competition. *Id.*

⁹ *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Notice of Proposed Rulemaking*, IB Docket No. 97-142, FCC 97-195 at ¶¶ 29-30 (rel. June 4, 1997) (*Foreign Participation Notice*).

response, seek to cooperate through merger."¹⁰ Given these regulatory and market uncertainties, we will scrutinize closely proposed mergers of potential competitors, and will strictly enforce our requirement that the applicants demonstrate that, on balance, the proposed merger will be pro-competitive and thus serve the public interest, convenience, and necessity.

6. Congress, in enacting the 1996 Act, sought to introduce competition into local telephone exchange markets and to facilitate increased competition in telecommunications markets already subject to competition.¹¹ In August 1996, the Commission, in its *Local Competition Orders*, set forth its initial pro-competitive rules to implement those provisions of the 1996 Act that are designed to open the local telecommunications marketplace to competition.¹² These orders addressed and sought to reduce or remove a range of legal, regulatory, operational, and economic barriers to entry. The United States Court of Appeals for the Eighth Circuit recently vacated key provisions of these orders, thereby creating greater uncertainty as to the pace and extent of the development of competition in local telecommunications markets.¹³ Also contributing to uncertainty is the fact that permanent prices for interconnection, unbundled network elements, transport and termination, and resale have yet to be set in many states, and many state arbitration and pricing decisions have been appealed to United States District Courts, where they are likely to face protracted judicial review. These circumstances make clear that we are in the earliest stages of implementing the 1996 Act and that future regulatory and market developments remain clouded by uncertainty.

7. Even greater uncertainty faces the implementation of the WTO Basic Telecom Agreement. Sixty-nine countries signed this agreement and most of the world's major trading nations committed to move from monopoly provision of basic telecommunications services to open entry and pro-competitive regulation of these services. Fifty-five of these countries have committed to enforce fair rules of competition by adopting the Reference Paper embodying pro-competitive regulatory principles. This agreement, however, was signed only recently and does

¹⁰ *Bell Atlantic/NYNEX Order* at ¶ 3.

¹¹ *See supra* ¶ 3.

¹² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, 11 FCC Rcd 15499 (1996), *rev'd in part, Iowa Utilities Bd. v. FCC*, Nos. 96-3321, *et al.*, 1997 WL 403401 (8th Cir. Jul. 18, 1997) (*Local Competition Order*); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers), *Second Report and Order*, 11 FCC Rcd 19392 (1996).

¹³ *See Iowa Utilities Bd. v. FCC*, No. 96-3321, 1997 WL 403401 (8th Cir. Jul. 18, 1997) (vacating pricing rules on the grounds that the Commission lacks jurisdiction to set prices. The Commission plans to petition for writ of certiorari of the 8th Circuit decision).

not take effect until January 1, 1998.¹⁴ Moreover, we recognize that the signatory countries vary considerably both in terms of their current regulatory regimes, their precise WTO commitments, and their progress towards implementing pro-competitive, deregulatory telecommunications policies. Although the U.S. commitment under the WTO Basic Telecom Agreement calls for an open entry standard to be applied to carriers from WTO member countries, it does not preclude the United States from taking steps necessary to protect against competitive distortions in the U.S. market. Consequently, we must be especially careful at this time in evaluating mergers involving U.S. and foreign telecommunications carriers.

8. We also recognize that, even if it were possible to implement fully and immediately the 1996 Act and the WTO Basic Telecom Agreement, significant barriers to entry into domestic and international telecommunications markets would remain. In the *Bell Atlantic/NYNEX Order*, we explained that:

Entrants must still attract capital, and amass and retain the technical, operational, financial and marketing skills necessary to operate as a telecommunications provider. For mass market services, entrants will have to invest in establishing brand name recognition and, even more important, a mass market reputation for providing high quality telecommunications services.¹⁵

For these reasons, we cannot assume that the passage of the 1996 Act or the signing of the WTO Basic Telecom Agreement, without more, have eliminated concern about the potential harmful effects of some mergers on the development of competition in various telecommunications markets.

9. In analyzing the effects of the proposed merger of BT and MCI, we apply the same competitive analysis framework that we applied in the *Bell Atlantic/NYNEX Order*. We find that the appropriate time frame for analyzing the proposed merger of BT and MCI includes not only the period during the implementation of the 1996 Act and the WTO Basic Telecom Agreement, but also the period after the competitive entry obligations of the WTO Basic Telecom Agreement and the local competition provisions of the 1996 Act have been more fully implemented, and after the Bell Operating Companies (BOCs) have received authorization to provide in-region interLATA (including international) services pursuant to Section 271 of the Communications

¹⁴ The WTO Basic Telecom Agreement was signed on February 15, 1997. We are considering how the United States should implement its obligations under the WTO Basic Telecom Agreement in the *Foreign Participation* proceeding. See *Foreign Participation Notice*, *supra* note 9.

¹⁵ *Bell Atlantic/NYNEX Order* at ¶ 6.

Act.¹⁶ Even though there is uncertainty as to how quickly changes in the domestic and international regulatory and market environments will occur, we make these assumptions so as to attempt to examine the likely effects of the merger on competition that may be just beginning to develop or, in some cases, may not yet be permitted to develop.¹⁷ We then evaluate the competitive effects of the proposed merger on relevant markets. In particular, we examine whether the merger would consolidate or eliminate firms possessing significant assets or capabilities in particular relevant markets.

10. We recognize that, in evaluating particular mergers, we may find that the merger is likely to benefit competition in certain relevant markets and harm competition in other relevant markets. In such a case, we would need to balance the relative expected beneficial and harmful competitive effects, taking into account the relative size and importance of the markets involved, and the relative impact on U.S. consumers. A significant harm to competition in one market, however, will not likely be outweighed by marginal benefits to competition in other markets. It is also possible, in certain circumstances, for prospective merger partners to make pro-competitive commitments, whose likely effect in enhancing competition in some or all relevant markets outweighs the likely harmful effects that are expected to occur by reason of the merger.¹⁸ In such a case, we might find it in the public interest, convenience and necessity to approve the merger.¹⁹

11. We do not intend to suggest, however, that applicants, by offering pro-competitive commitments, will always be able to carry their burden of demonstrating that a proposed transaction is in the public interest. To the contrary, as we explained in our *Bell Atlantic/NYNEX Order*:

For some potential mergers, the harm to competition may be so significant that it cannot be offset sufficiently by pro-competitive commitments or efficiencies. In such cases, we would not anticipate the applicants could carry their burden to

¹⁶ 47 U.S.C. § 271 (1997).

¹⁷ See *Bell Atlantic/NYNEX Order* at ¶ 7.

¹⁸ *Id.* at ¶¶ 13-14.

¹⁹ See, e.g., *id.* at ¶ 14 ("We believe these conditions create pro-competitive benefits that at least in part mitigate the potentially negative impacts of the proposed merger on competition in LATA 132 and the New York metropolitan area, and that, when extended throughout the Bell Atlantic and NYNEX regions, outweigh any other adverse effects in those areas. These conditions will make it more likely that other market participants can enter, expand or become more significant market participants that are capable of mitigating in the relevant market, the competitive harms that we otherwise foresee as likely resulting from the elimination of Bell Atlantic as a likely independent market participant.").

show the transaction, even with commitments, is pro-competitive and therefore in the public interest.²⁰

This situation could arise, for example, where one of the merging carriers is an incumbent monopolist, and the relevant regulatory regime is not sufficiently pro-competitive and does not contain sufficient safeguards to prevent harm to competition through the leveraging of market power into the U.S. market.

12. More specifically, in applying this analytical framework, we identify the relevant end-user and input markets. For each of these relevant markets, we consider both potential horizontal competitive effects and vertical competitive effects that may enhance or harm competition in the relevant markets.

13. With respect to the market for U.S.-U.K. outbound international services, an end-user market, BT possesses assets and capabilities that would assist its entry into this market, but there are a number of interexchange carriers and large incumbent local exchange carriers (incumbent LECs) that appear better positioned than BT. Thus, the loss of BT as an independent entrant into the U.S.-U.K. outbound market is unlikely to have any significant harmful effect on competition.

14. In the U.S.-U.K. international transport market, an input market, both MCI and BT are currently among the most significant suppliers and would likely continue to be so absent the merger. The merger of the two carriers will increase concentration and thus possibly market power in this market, raising significant concerns about potential harm to competition. Several factors, however, should reduce the concentration in this market, and thus diminish the potential for anti-competitive effects. First, within the next nine to twelve months, new transatlantic cables are expected to become operational that would more than double the amount of capacity available and significantly dilute the merged entity's share of capacity on the route. Second, BT and MCI have agreed, as a condition for European Commission approval of the merger, that, as an interim measure, they will sell a significant amount of their own capacity. The combination of longer term entry and near term capacity sale should constrain any increase in market power resulting from the merger. Based on these considerations, we believe that the merger is unlikely to result in significant harmful effects on competition in the U.S.-U.K. international transport market.

15. The merger is also likely to enhance competition in the U.S. local exchange markets by strengthening MCI's position as an entrant. Through the merger, MCI will gain access to BT's financial and technical resources. MCI's entry in local exchange markets is likely to reduce the market power of incumbent local exchange carriers, compared to what it would be

²⁰ *Id.* at ¶ 15.

absent the merger, and thus is likely to enhance competition in U.S. local exchange markets. The merger is also likely to enhance competition and benefit consumers in the market for global seamless services by generating significant efficiencies for Concert, which are likely to be passed on to consumers of global seamless services.

16. We must also consider whether the merger is likely to increase the incentive or ability of either BT or MCI to use market power in one market to discriminate in favor of its affiliate in another market, thereby possibly harming competition and U.S. consumers. We focus on whether BT's market power arising from its control of facilities in the United Kingdom could be used to disadvantage unaffiliated carriers serving residential and business customers on the U.S.-U.K. outbound route and in the market for global seamless services.²¹ We find that the merger may give BT an added incentive to discriminate in favor of its U.S. affiliate in the U.S.-U.K. outbound international services market, but that BT's ability to discriminate will be adequately constrained. In the near term, regulatory safeguards will constrain BT's ability to discriminate. In the longer term, BT's ability to discriminate will be significantly constrained by competition. These factors will be unaffected by the merger. The United Kingdom has been in the forefront in adopting regulatory policies that seek to introduce competition into all telecommunications markets. We are concerned, however, that the United Kingdom's policies limiting equal access and the availability of unbundled local network elements will disadvantage competitors of the merged entity. We anticipate that our concerns will be addressed through European Union (E.U.) and U.K. regulatory processes, and commitments we have received from MCI.²²

17. Finally, we examine BT/MCI's application under our current market entry rules, as articulated in the *Foreign Carrier Entry Order*.²³ We find that the United Kingdom offers U.S. carriers effective competitive opportunities in each of the communications market segments that BT seeks to enter in the United States.

²¹ This issue is termed a "vertical" issue because it relates to the relationship between two markets which can be thought of as vertically related, in the sense that one market provides an input to another. In contrast, the issue of whether the loss of BT or MCI as competitors would lessen competition in each relevant market, discussed in the paragraph above, is termed a "horizontal" issue. *See infra* Sections IV.D. and IV.E.

²² Letter from Michael H. Salsbury, Executive Vice President and General Counsel of MCI, to Reed E. Hundt, Chairman, FCC (July 28, 1997).

²³ Market Entry and Regulation of Foreign-affiliated Entities, *Report and Order*, 11 FCC Rcd 3873, 3897 (1995), *recon. pending* (*Foreign Carrier Entry Order*).

18. Given these factors, we find that, on balance, the merger will enhance competition in the relevant markets. We thus conclude that the applicants have met their burden of demonstrating that the proposed merger serves the public interest, convenience, and necessity.

II. BACKGROUND

A. The Applicants

19. MCI is a publicly-traded U.S. corporation that owns or controls subsidiaries that hold numerous domestic and international FCC licenses and authorizations. MCI conducts its business primarily through its subsidiaries. MCI is the second largest U.S. carrier of long distance telecommunications services, providing a broad spectrum of domestic and international voice and data communications services. Its domestic telecommunications services are provided primarily via fiber and terrestrial digital microwave communications systems. Its international telecommunications services are provided primarily via submarine cable systems, satellites, and leased international facilities. Currently, MCI is 20 percent-owned by BT.²⁴

20. BT, a company organized under the laws of England and Wales, is the largest telecommunications operator in the United Kingdom, providing local, long distance, and international telephone service and telecommunications equipment for customers' premises. BT also offers a range of other telecommunications products and services, including private line circuits, mobile communications products and paging services. In addition to its current 20 percent interest in MCI, BT's wholly-owned U.S. affiliate, BT North America Inc. (BTNA), is authorized to provide certain U.S. international switched, non-interconnected private line, interconnected private line, and facilities-based services pursuant to Section 214 of the Act.²⁵

²⁴ See MCI Communications Corp. and British Telecommunications plc, *Declaratory Ruling and Order*, 9 FCC Rcd 3960 (1994) (*BT/MCI I*); see also MCI Communications Corp., *Declaratory Ruling*, 10 FCC Rcd 8697 (Int'l Bur., 1995) (*MCI Declaratory Ruling*) (permitting overall foreign ownership of MCI to reach 35 percent).

²⁵ See BT North America Inc., *Order and Certification*, 9 FCC Rcd 6851 (Int'l Bur., 1994) (authority, as a dominant carrier, to resell switched services between the United States and various international points and to resell non-interconnected private line services between the United States and Australia, Canada, France, Germany, the Netherlands, Sweden, and the United Kingdom); *Memorandum Opinion, Order and Authorization*, 10 FCC Rcd 3204 (Int'l Bur., 1995) (authority to resell interconnected private lines for the provision of switched services between the United States and the United Kingdom and between the United States and Canada); *Order and Authorization*, 10 FCC Rcd 4414 (Int'l Bur., Telecom. Div., 1995) (authority to resell non-interconnected private line services between the United States and various overseas points); *Public Notice*, 11 FCC Rcd 11306 (1996) (authority to provide limited global facilities-based services to all points except the United Kingdom, Russia, France, the Netherlands and Gibraltar); *Order, Authorization and Certificate*, 12 FCC Rcd 1985 (Int'l Bur., Telecom. Div., 1997) (authority to provide facilities-based services between the United States and France). In addition, BTNA has applications pending before the Commission to provide facilities-based service between the

B. The Applications

21. The proposed transfer involves authorizations for international wireline facilities, and a variety of wireless facilities, including point-to-point microwave stations, earth station licenses, private telephone maintenance radio service licenses, private business radio licenses, private aircraft station licenses, and an 800 MHz air-ground radiotelephone license, that MCI uses to provide voice and video services. Also included are submarine cable landing licenses and a direct broadcast satellite (DBS) license.

22. Through the merger, ultimate control of authorizations held by MCI subsidiaries will be transferred to BT. The applicants indicate that, under the terms of their merger agreement, upon closing, MCI will be merged into a U.S. subsidiary of BT, now known as Tadworth Corporation (Tadworth), which was formed specifically to effect the merger. MCI will then cease to exist as a separate corporation. Tadworth will be renamed MCI. Concurrently, BT will be renamed Concert plc and the BT U.K. operations will be placed into a subsidiary of the new Concert. MCI also will become a subsidiary of the new Concert.²⁶

23. The current chairmen of BT and MCI will become co-chairmen of Concert, the current chief executive officer of BT will become Concert's chief executive, and the current chief executive officer of MCI will become Concert's president and chief operating officer. Concert will have headquarters in Washington, D.C. and London. The majority of the Board of Directors of the new MCI will be U.S. citizens, and the entire Boards of Directors of the MCI subsidiaries holding FCC licenses and certificates will be U.S. citizens. Concert's Board of Directors will be made up of fifteen directors, of whom four will be designated by BT, three will be designated by MCI, and eight will be drawn equally from the current BT and MCI Boards. The applicants state that, based on ownership levels as of the filing of the joint application, U.S. citizens would hold approximately 35 percent of the Concert shares immediately upon closing.²⁷

24. The Department of Justice (DoJ) has conducted its own review of the proposed merger under its antitrust responsibilities. On July 7, 1997, DoJ signalled its approval of the BT/MCI merger with its filings of several documents with the U.S. District Court for the District

United States and the United Kingdom as a non-dominant carrier. BT North America Inc., Application for Section 214 Authority, ITC 96-439 (filed Aug. 2, 1996); Motion to be Reclassified as a Non-dominant Carrier for U.S.-U.K. Service, ISP 96-007-ND (filed Aug. 2, 1996).

²⁶ BT/MCI application at 4-5. Unless otherwise noted, all cites to BT/MCI's application are to Volume 1.

²⁷ *Id.* at 6-7.

of Columbia.²⁸ The *Proposed MFJ* modifies the Final Judgment entered by the Court on September 29, 1994,²⁹ which allowed BT to hold a 20 percent ownership interest in MCI. Although acknowledging that both the U.S. and U.K. Governments have enacted reforms designed to encourage competition on the U.S.-U.K. route, DoJ found that BT retains the ability and the incentive to discriminate against unaffiliated U.S. carriers. Consequently, DoJ proposed certain modifications of the Final Judgment.³⁰ Briefly summarized, the *Proposed MFJ*: (1) modifies and strengthens the parties' existing reporting requirements; (2) prohibits the new Concert and MCI from using any confidential, competitively sensitive information that BT receives through its correspondent relationships and/or as a result of BT's provision of interconnection or other telecommunications services in the United Kingdom for any purpose other than the purpose for which such information is obtained, or to disclose such information to any person other than those persons with a need to know such information; and (3) extends the term of the decree until ten years after the entry of the existing Final Judgment (September 29, 2004).³¹

C. Petitioners and Commenters

25. On December 10, 1996, the International Bureau released a public notice inviting public comment regarding BT/MCI's transfer of control applications.³² On January 24, 1997, three parties filed petitions to deny the proposed merger³³ and twelve parties filed comments

²⁸ *U.S. v. MCI Communications Corp. and BT Forty-Eight Co. (NEWCO)*, Civil Action No. 94-1317 (TFH) (D.D.C. filed July 7, 1997). The following documents were filed: Motion of the United States for Modification of the Final Judgment; Stipulation; Modified Final Judgment (*Proposed MFJ*); Memorandum of the United States in Support of Modification of the Final Judgment (*Memorandum in Support of MFJ*); and United States' Explanation of Procedures.

²⁹ *U.S. v. MCI Communications Corp. and BT Forty-Eight Co. (NEWCO)*, Case No. 1:94 CV01317 (D.D.C. entered Sept. 29, 1994).

³⁰ *Proposed MFJ* at 2-10. Specifically, DoJ indicates that because BT maintains substantial market power in the U.K. local and domestic long distance markets, and because BT's dominance in these markets is "unlikely to erode swiftly," BT has the ability and the incentive to discriminate against unaffiliated U.S. carriers seeking to terminate calls in the United Kingdom. See *Memorandum in Support of MFJ* at 5-6.

³¹ *Proposed MFJ* at 2-10, 21.

³² MCI Communications Corporation and British Telecommunications plc Seek FCC Consent for Proposed Transfer of Control, *Public Notice*, 11 FCC Rcd 17326 (1996).

³³ Bell Atlantic filed a petition to deny. Time Warner, Inc. (Time Warner) and PRIMESTAR Partners L.P. (PRIMESTAR) also filed petitions to deny or condition grant of BT/MCI's application, which were subsequently withdrawn. Letter from Arthur H. Harding, Counsel for Time Warner to William F. Caton, Acting Secretary, FCC

generally asking the Commission to impose certain conditions on the merged entity.³⁴ The petitioners and commenters include competitors of MCI in the U.S. long distance and international services markets, current and potential U.S. and foreign carrier competitors of BT in the United Kingdom and Europe, BOCs in U.S. local exchange markets MCI seeks to enter, video programmers and distributors, and Executive Branch agencies. On February 24, 1997, BT/MCI and the U.K. Government responded to these petitions and comments.³⁵ On March 24, 1997, ten parties filed final replies.³⁶

D. BT/MCI I

26. In July 1994, we granted the request of BT and MCI to allow BT to take a 20 percent ownership share in MCI. In approving BT's investment, we found that BT's 20 percent investment in MCI, even when combined with existing non-BT foreign investment for a total of up to 28 percent foreign ownership, was consistent with, and permissible under, the foreign ownership provisions of Section 310(b)(4) of the Communications Act.³⁷ We also observed that there were significant public interest reasons to permit BT's investment: it would enable MCI to expand and improve its services to the American public, stimulating economic growth and creating new job opportunities for U.S. citizens. We recognized, however, concerns raised about the incentives for potential discrimination by BT in favor of MCI over competing U.S. carriers, and we therefore imposed certain conditions on the investment.³⁸

27. In May 1995, MCI requested authority to increase the level of its foreign-owned capital stock from 28 to 35 percent. In an order granting MCI's petition, the International Bureau

(Aug. 14, 1997) (*Time Warner Letter*); Letter from Benjamin J. Griffin, Counsel for PRIMESTAR to William F. Caton, Acting Secretary, FCC (July 16, 1997) (*PRIMESTAR Letter*).

³⁴ The following parties filed comments: ACC Corp. (ACC), AT&T Corp. (AT&T), BellSouth Corporation/Pacific Telesis Group/SBC Communications Inc. (BellSouth/PacTel/SBC), the Secretary of Defense (DoD), Deutsche Telekom AG (DT), Energis, Federal Bureau of Investigation (FBI), France Telecom (FT), Frontier Corporation (Frontier), Sprint Corporation (Sprint), U S West, Inc. (U S West) and WorldCom Inc. (WorldCom).

³⁵ In addition, Andrew L. Sommers, President of the Irish American Unity Conference (IAUC), filed reply comments.

³⁶ The following parties filed final replies: ACC, AT&T, BellSouth/PacTel/SBC, BT/MCI (responding only to IAUC's reply comments), DoD, FT, Sprint, and WorldCom. Time Warner and PRIMESTAR also filed final replies, which were subsequently withdrawn. *Time Warner Letter*; *PRIMESTAR Letter*.

³⁷ 47 U.S.C. § 310(b)(4).

³⁸ *BT/MCI I*, 9 FCC Rcd at 3965-72.

found that the additional owners were passive and widely dispersed investors and thus would have neither the interest nor the ability to control MCI.³⁹

III. LEGAL STANDARDS

28. Pursuant to Titles II and III of the Communications Act, the Commission must review BT/MCI's request to transfer from MCI to BT ultimate control of licenses and authorizations held by subsidiaries of MCI and determine whether the transfer serves the public interest, convenience and necessity.⁴⁰ Under the Communications Act, applicants bear the burden of demonstrating that the transaction is in the public interest.⁴¹ The Commission also has jurisdiction under Sections 7 and 11 of the Clayton Act to disapprove acquisitions of "common carriers engaged in wire or radio communications or radio transmissions of energy" where "in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."⁴² Because our public interest authority under the Communications Act to consider the impact of the proposed transfer on competition is sufficient to address the competitive issues raised by the proposed merger,⁴³ and because the conditions modifying the merger allow us to conclude that the transaction is in the public interest, we decline to exercise our Clayton Act authority in this case.⁴⁴

³⁹ *MCI Declaratory Ruling*, 10 FCC Rcd at 8698. BT's ownership interest in MCI remained at 20 percent.

⁴⁰ 47 U.S.C. §§ 214(a), 303(r), 310(d).

⁴¹ 47 U.S.C. § 309(e) (1997) (burdens of proceeding and proof rest with the applicant); *see, e.g.*, *LeFlore Broadcasting Co., Inc.*, 66 FCC 2d 734, 736-37 (1975) (on the ultimate issue of whether the applicants have the requisite qualifications to be or to remain Commission licensees, and whether a grant of the applications would serve the public interest, convenience and necessity, as on all issues, the burden of proof is on the licensees). *See also Bell Atlantic/NYNEX Order* at ¶¶ 29, 32.

⁴² Section 7 of the Clayton Act may be found at 15 U.S.C. § 18 and Section 11 may be found at 15 U.S.C. § 21(a). Both BT and MCI are common carriers. Section 1 of the Clayton Act, 15 U.S.C. § 12, defines commerce as "trade or commerce among the several States and with foreign nations"

⁴³ *Craig O. McCaw, Transferor and AT&T Co., Transferee, Memorandum Opinion and Order*, 9 FCC Rcd 5836, 5843-44 & n.25 (1994), *recon. denied on other grounds, Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 11786 (1995), *affirmed sub nom., SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) (*AT&T/McCaw*); *Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Co., Order*, 10 FCC Rcd 13368, 13373 & n.19 (Wireless Telecom. Bur., 1995), *application for review pending (BAMS/NYNEX)*.

⁴⁴ *United States v. FCC*, 652 F.2d 72, 83 (D.C. Cir. 1980) (en banc). *See also Sprint Corp., Declaratory Ruling and Order*, 11 FCC Rcd 1850 & n.82 (1996) (*Sprint Declaratory Ruling*); *Bell Atlantic/NYNEX Order* at ¶ 33.

29. Sections 214(a) and 310(d) of the Communications Act require that we determine whether the public interest, convenience and necessity will be served by the transfer of control of a company holding FCC licenses and authorizations to any other company, whether the transferee is U.S.- or foreign-owned.⁴⁵ In fulfilling the statutory obligation to serve the public interest, the Commission examines whether a proposed license transfer is consistent with the policies of the Communications Act, including, among other things, the transfer's effect on Commission policies encouraging competition and other public interest benefits that would flow from the transfer.⁴⁶

30. The Commission's analysis of the effect of the transfer on competition is informed by antitrust principles,⁴⁷ but not limited to the scope of the antitrust laws.⁴⁸ The competitive analysis applied under the public interest standard is necessarily broader than the standard applied to ascertain violations of the antitrust laws.⁴⁹

31. In November 1995, subsequent to the *BT/MCI I* decision, we adopted new foreign carrier market entry rules and safeguards in our *Foreign Carrier Entry Order*. Because MCI seeks to transfer control of its Section 214 authorizations to BT, a foreign carrier within the

⁴⁵ 47 U.S.C. §§ 214(a), 310(d). See also *Bell Atlantic/NYNEX Order* at ¶ 30.

⁴⁶ ABC Cos. Inc., *Memorandum Opinion and Order*, 7 FCC 2d 245, 249 (1966). See also *Bell Atlantic/NYNEX Order* at ¶ 32. The public interest can also include other factors, such as diversity, spectrum efficiency, "just, reasonable and affordable" rates, national security, etc. See, e.g., Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45, FCC 97-157 ¶¶ 43-55 (May 8, 1997) (public interest factors include principles for the preservation and advancement of universal service and competitive neutrality); Infinity Broadcasting Corp. and Westinghouse Electric Corp., *Memorandum Opinion and Order*, FCC 96-495 ¶¶ 39-48, 91 (rel. Dec. 26, 1996) (public interest benefits of diversity can include improved news, children's programming, and provision of time to political candidates); Capital Cities/ABC, Inc., *Memorandum Opinion and Order*, 11 FCC Rcd 5841, 5885-95 (1996) (public interest includes concerns regarding diversity and concentration of economic power); *Foreign Carrier Entry Order*, 11 FCC Rcd at 3897 (additional public interest factors include national security, law enforcement, foreign policy and trade concerns raised by the Executive Branch).

⁴⁷ See *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953) ("There can be no doubt that competition is a relevant factor in weighing the public interest."); *United States v. FCC*, 652 F.2d at 81-82 (quoting *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968)). Indeed, the courts have construed our statutory authority to mean that the Commission has discharged its antitrust responsibilities "when [it] seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors." *United States v. FCC*, 652 F.2d at 88; *OTI Corp., Order*, 6 FCC Rcd 1611, 1612 (Common Carrier Bur., 1991).

⁴⁸ See *United States v. FCC*, 652 F.2d at 88.

⁴⁹ *Id.* at 88 (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry"). See also *Bell Atlantic/NYNEX Order* at ¶ 32.

meaning of Section 63.18(h)(1)(ii) of our rules,⁵⁰ we consider under Section 214(a) whether BT/MCI's application satisfies the framework for foreign carrier entry established in the *Foreign Carrier Entry Order*. Likewise, we apply the framework established in our *Foreign Carrier Entry Order* to MCI's proposal to transfer to BT various common carrier wireless licenses. Section 310(b)(4) of the Communications Act establishes a 25 percent benchmark applicable to foreign investment in and ownership of the parent company of a U.S. common carrier radio licensee. This statutory provision affords us the discretion to allow higher levels of foreign ownership as long as we determine that such ownership would not be inconsistent with the public interest.⁵¹ Also, because MCI seeks to transfer ultimate control of its ownership interests in cable landing licenses to BT, we review this application under the Cable Landing License Act.⁵²

32. Finally, as part of our determination under Sections 214(a) and 310(d), we review the citizenship, character, and financial and technical qualifications of the transferee, which, in this case, is BT.⁵³ BT, through its wholly-owned U.S. affiliate, BTNA, has been a Commission licensee since 1994. No party claims that BT lacks any of the qualifications just mentioned, as

⁵⁰ A "foreign carrier" is defined in Section 63.18(h)(1)(ii) of our rules as: ". . . [A]ny entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations, *see* Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art.1." 47 C.F.R. § 63.18(h)(1)(ii).

⁵¹ 47 U.S.C. § 310(b)(4).

⁵² 47 U.S.C. §§ 34-39. *See* Telefonica Larga Distancia de Puerto Rico, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 5173 (1997) (*TLD Order*) (applying effective competitive opportunities analysis under the Cable Landing License Act to a common carrier cable landing license application); Cable & Wireless, plc., *Cable Landing License*, File No. SCL 96-005, FCC 97-204 (rel. June 20, 1997) (*C&W Cable Landing License*) (applying effective competitive opportunities analysis under the Cable Landing License Act to a private cable).

⁵³ 47 U.S.C. §§ 214(a), 310(d). *AT&T/McCaw*, 9 FCC Rcd at 5844 ("Subsumed within [the requirement that we find that the public interest, convenience and necessity will be served by the transfer of control of a company holding radio licenses is the requirement] that we review the citizenship, character, financial, technical and other qualifications of the transferee applicant") (footnote omitted).

defined in the relevant Commission policy statements.⁵⁴ Accordingly, we find that BT satisfies the necessary citizenship, character, financial, and technical qualifications.

IV. PUBLIC INTEREST ANALYSIS OF THE MERGER

A. Background and Summary

33. In this section, we consider whether the merger of BT and MCI will serve the public interest, convenience and necessity. We first evaluate the likely competitive effects of the proposed merger of BT and MCI. In performing this evaluation, we focus on how the merger will affect competitive conditions in the relevant markets, compared with the competitive conditions that would likely exist in these markets if BT and MCI did not merge. We assess whether the merger will harm competition or benefit competition in the relevant markets. Our analysis includes any pro-competitive commitments that the applicants have made. Finally, we identify any beneficial efficiencies that are likely to result from the merger. Considering all these factors together, we then assess whether the proposed merger is in the public interest. As previously indicated, it is the applicants that bear the burden of demonstrating that the proposed transaction will enhance competition and thus is in the public interest.⁵⁵

34. In evaluating the likely competitive effects of a proposed merger and whether the merger will enhance competition, we apply a framework for competitive analysis that we use for assessing market power in other contexts.⁵⁶ This analytical framework is also embodied in the

⁵⁴ Policy Regarding Character Qualifications in Broadcast Licensing, *Report, Order and Policy Statement*, 102 FCC 2d 1179, 1195-97, 1200-03 (1986), *modified*, *Policy Statement and Order*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, *Memorandum Opinion and Order*, 6 FCC Rcd 3448 (1991), *modified in part*, *Memorandum Opinion and Order*, 7 FCC Rcd 6564, 6566 (1992); MCI Telecommunications Corp., *Order and Notice of Apparent Liability*, 3 FCC Rcd 509, 515 n.14 (1988) (stating that character qualification standards adopted in the broadcast context can provide guidance in the common carrier context). Combined, these precedents indicate that in deciding character issues, the FCC will consider adjudicated non-FCC conduct that includes: (1) all felonies; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition. *See Bell Atlantic/NYNEX Order* at ¶ 236.

⁵⁵ *Supra* ¶ 28.

⁵⁶ *See, e.g.*, Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Areas and Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order*, CC Docket No. 96-149, and *Third Report and Order*, CC Docket No. 96-61, FCC 97-142 (Apr. 18, 1997) (*LEC In-Region Interexchange Order*); Pacific Telesis Group, *Memorandum Opinion and Order*, 12 FCC Rcd 2624 (1997); Motion of AT&T Corp. To Be Declared Non-Dominant for International Service, *Order*, 11 FCC Rcd 17963 (1996) (*AT&T International Non-dominance Order*); Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271 (1995) (*AT&T Domestic Non-dominance Order*); *BAMS/NYNEX*, *supra* note 43; *AT&T/McCaw*, *supra* note 43.

antitrust laws,⁵⁷ including the Department of Justice and Federal Trade Commission 1992 *Horizontal Merger Guidelines* and the April 8, 1997 revisions of those guidelines.⁵⁸ We also applied and further articulated this framework in the *Bell Atlantic/NYNEX Order*.⁵⁹

1. Identifying Relevant Markets and Market Participants

35. As we explained in the *Bell Atlantic/NYNEX Order*, the first step in analyzing a merger is to define the relevant product and geographic markets.⁶⁰ In defining the relevant product and geographic markets, the Commission follows the approach taken in the *LEC In-Region Interexchange Order*,⁶¹ which in turn was based on the approach taken in the 1992 *Horizontal Merger Guidelines*. We note that, in defining relevant markets, we may identify both "final product markets" or "end-user markets," where the product or service is sold to end-user customers, and "input markets," where the product or service is sold to firms which use it as an input in producing other products or services.

36. Having defined the relevant markets, we identify the likely market participants in those relevant markets, especially those that are likely to have a significant competitive effect on those markets. As explained in the *Bell Atlantic/NYNEX Order*, in order to evaluate proposed mergers properly in the context of an evolving marketplace and to take account of the uncertainties surrounding the pace and extent of the development of competition, it was necessary

⁵⁷ The analytical framework we apply is similar in many respects to the "actual potential competition" doctrine. See *Bell Atlantic/NYNEX Order* at ¶ 64. Although this doctrine has never been explicitly adopted by the Supreme Court, see, e.g., *United States v. Marine Bancorporation Inc.*, 418 U.S. 602 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973), it has been applied by lower courts in evaluating non-horizontal mergers. See, e.g., *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982); *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), cert. denied, 456 U.S. 915 (1982).

⁵⁸ See United States Dept. of Justice & Federal Trade Comm'n, *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. 41552 (1992) (*1992 Horizontal Merger Guidelines*); *1997 Revisions to the Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission*, April 8, 1997 (available at <<http://www.usdoj.gov/atr/Guidelines/sec4.html>>) (*1997 Horizontal Merger Guidelines Revisions*). See also *United States v. Eastman Kodak Co.*, 63 F.3d 95 (2d Cir. 1995); *United States v. Englehard*, 1997 WL 314410 (M.D.Ga. 1997); *Anti-Monopoly, Inc. v. Hasbro, Inc. et al.*, 958 F. Supp. 895 (S.D.N.Y. 1997); *Community Publishers, Inc., et al. v. Donrey Corp., et al.*, 892 F. Supp. 1146 (W.D.Ga. 1995); *State of New York v. Kraft General Foods, et al.*, 926 F. Supp. 321 (S.D.N.Y. 1995); *Wallace Oil Co. v. Robert Michaels, et al.*, 839 F. Supp. 1041 (S.D.N.Y. 1993); and *LEC In-Region Interexchange Order* at ¶ 5.

⁵⁹ *Bell Atlantic/NYNEX Order* at ¶ 37.

⁶⁰ *Id.* at ¶ 49.

⁶¹ See *supra* note 56.

to examine the likely competitive effects of the merger "both during implementation of the 1996 Act and as that implementation alters market structure."⁶² More specifically, we examined relevant markets as they exist today and as we expect they will exist after the 1996 Act and the WTO Basic Telecom Agreement have been implemented and after the BOCs have obtained approval to provide in-region, interLATA services.⁶³ Those likely market participants include both "actual competitors"⁶⁴ and "precluded competitors."⁶⁵ From the universe of actual and precluded competitors, we then identify those likely market participants "that have, or are likely to speedily gain, the greatest capabilities and incentives to compete most effectively and soonest in the relevant market."⁶⁶

2. Horizontal Effects on Competition

37. We next evaluate the *horizontal* effects that the merger may have on competition in the relevant markets. Where a relevant market is concentrated and the merger results in a firm that controls a significant portion of the market, the merger may increase or slow the decline of the ability of the merged firm, absent regulation, profitably to exercise *unilateral* market power by raising its price above competitive levels.⁶⁷ Alternatively, where the relevant market is concentrated, the merger may also increase or slow the decrease of the ability of a relatively small number of significant market participants, including the merged firm, to exercise market power

⁶² *Bell Atlantic/NYNEX Order* at ¶ 7.

⁶³ *Id.*

⁶⁴ In the *Bell Atlantic/NYNEX Order*, we defined "actual competitors" as those "firms that are now offering the relevant products in the relevant geographic markets and that we expect to be doing so as the 1996 Act, and particularly Sections 251, 252, and 271, become more fully implemented." *Id.* at ¶ 59 (footnotes omitted). Because the merger before us involves a foreign carrier, we expand this definition to include those current competitors that we expect will continue to offer the relevant product as both the 1996 Act and the WTO Basic Telecom Agreement are more fully implemented.

⁶⁵ In the *Bell Atlantic/NYNEX Order*, we explained that "precluded competitors" were firms that were most likely to have entered the relevant markets, but, until recently, had been prevented or deterred from market participation by barriers that the 1996 Act seek to lower. *Id.* at ¶ 60. Because this merger involves a foreign carrier, BT, we must also consider firms that have been prevented or deterred from participating in international and foreign markets by barriers to entry that the WTO Basic Telecom Agreement seeks to lower.

⁶⁶ *Id.* at ¶ 62.

⁶⁷ See William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 937 (1981); *LEC In-Region Interexchange Order* at ¶¶ 11, 83; Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, *Fourth Report and Order*, 95 FCC 2d 554, 558 (1983).

through coordinated action, either by increasing price or restricting output.⁶⁸ Where the relevant market is a final product market, consumers will be directly injured through increased prices or reduced quality. Where the relevant product is an input market, end-user customers may be indirectly injured to the extent that final good producers can, and do, pass on the higher input prices to end-user customers in the form of higher end-user prices. We note that, for either unilateral or coordinated horizontal effects to occur, the merged firm, or a group of firms, must possess market power in the relevant product market.

38. Finally, as previously indicated, because we are in the midst of rapid regulatory and market changes, we must evaluate horizontal effects not only during the current period, when the 1996 Act and the WTO Basic Telecom Agreement are just beginning to be implemented, but also during the period after the 1996 Act and the WTO Basic Telecom Agreement have been more fully implemented and after the BOCs have received authorization to provide in-region, interLATA (including international) services. In examining the relevant markets as if the 1996 Act and the WTO Basic Telecom Agreement were more fully implemented, we are not making a judgment that such implementation will occur swiftly. To the contrary, we are fully aware of the significant uncertainty as to how quickly these regulatory reforms can be implemented and how quickly domestic and international barriers to entry will be lowered or eliminated. Examining market structure as if these regulatory reforms were implemented, however, illuminates the extent to which the merger is likely to change future market structure, and possibly increase market power or slow its decline. Moreover, although changes in the timing of the implementation of these regulatory reforms may affect the timing when anti-competitive or pro-competitive effects become manifest, they should not affect the basic nature of those effects.

⁶⁸ 1992 *Horizontal Merger Guidelines*, 57 Fed. Reg. at 45558-45559 §§ 2.0-2.1. The 1992 *Horizontal Merger Guidelines* define "coordinated interaction" as being "comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behavior includes tacit or express collusion, and may or may not be lawful in and of itself." *Id.* at 41558 § 2.1.

3. Vertical Effects on Competition

39. In evaluating mergers, we must also consider the possibility that a merger may have vertical effects on competition in other markets. A proposed merger may harm competition if it increases or slows the decline of a firm's ability to engage in behavior that ultimately will restrain output or increase prices in final product markets. As Professors Krattenmaker, Lande, and Salop have explained, where a vertically-integrated firm possesses unilateral market power in an upstream input market, it may have the ability profitably to raise and sustain prices significantly above competitive levels in another downstream, end-user market by raising its rivals' costs in that second market, thus causing them to restrain their output.⁶⁹

40. A merger that increases or slows the decrease of market power in an input market also therefore may increase or slow the decrease of the ability to affect adversely competition in downstream, end-user markets. For example, if the merged firm controlled an essential input and raised the price of that input, it could force final goods producers to raise their prices to the detriment of consumers, even though the merged firm lacked market power in the final good market. As we have explained elsewhere, a firm possessing unilateral market power in one market may also discriminate against its rivals in a second market either by raising the price of an essential input it supplies or by reducing the quality of the input as compared with the price or quality that the firm provides the input to itself.⁷⁰ As with our analysis of horizontal competitive effects, we must consider possible vertical effects both now and after the 1996 Act and the WTO Basic Telecom Agreement have been more fully implemented.

4. Balancing Harmful and Beneficial Competitive Effects

41. Our evaluation of whether a particular merger is in the public interest essentially involves a balancing of a number of factors. As previously indicated, we assess whether a merger is likely to result in harmful effects on competition in any of the relevant markets. We also examine whether the merger is likely to result in beneficial effects in any of the relevant markets. Our assessment takes into account any pro-competitive commitments made by the parties.⁷¹ We must also consider whether the proposed merger will result in other merger-specific efficiencies,

⁶⁹ Thomas G. Krattenmaker, Richard H. Lande, and Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241, 249-53 (1987). See also *LEC In-Region Interexchange Order* at ¶ 83.

⁷⁰ See *id.* at ¶¶ 111-19.

⁷¹ *Bell Atlantic/NYNEX Order* at ¶ 37 (citing Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, MM Docket No. 92-264, *Second Report and Order*, 8 FCC Rcd 8565); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513 (1995).

such as cost reductions, productivity enhancements, or improved incentives for innovation, and whether the merger will support the general policies of opening markets and lowering entry barriers that underlie the 1996 Act and the WTO Basic Telecom Agreement. We must weigh those competing harmful and beneficial effects in order to determine whether, on balance, the merger is likely to enhance competition in the relevant markets. We note, however, that, in light of the uncertainty concerning regulatory and market developments, we will scrutinize skeptically any merger that appears likely to remove a firm that might prove a significant competitor in markets that are just opening to competition.

42. Finally, we recognize that, in evaluating proposed mergers in telecommunications markets that are subject to such change and uncertainty, we will necessarily be making predictions about future market conditions and the likely success of individual competitors. In making our predictions, however, we are not bound by the rules of evidence that may apply in judicial contexts. As the Supreme Court stated in *FCC v. RCA Communications, Inc.*:

To restrict the Commission's actions to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast⁷²

43. In this case, we conclude that, on balance, the merger of BT and MCI will serve the public interest, convenience, and necessity. In our analysis, we identify three relevant *end-user markets* that are likely to be affected by the merger of BT and MCI: (1) U.S. local exchange and exchange access service; (2) U.S.-U.K. outbound international service; and (3) global seamless services. In addition, we identify six relevant *input markets*: (1) international transport between the United States and United Kingdom; (2) U.K. cable landing station access; (3) U.K. backhaul; (4) U.K. intercity transport; (5) U.K. terminating access services; and (6) U.K. originating access services. We identify MCI as among the most significant market participants in

⁷² *FCC v. RCA Communications Inc.*, 346 U.S. at 96-97 (omitting citations to and quotations from *Far East Conference v. United States*, 342 U.S. 570, 575 (1952) and *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953)), cited with approval in *Washington Utils. & Trans. Comm'n v. FCC*, 513 F.2d 1142, 1158-60 (9th Cir.), cert. denied, 423 U.S. 836 (1975). See also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981) (citing and quoting *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978) and *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961): "[T]he Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission's ultimate conclusions is not required, since a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." (footnotes and internal quotations omitted).

each of the relevant end-user markets and in one input market (international transport facilities between the United States and the United Kingdom). In addition, we find that BT is among the most significant market participants in each of the relevant input markets and is a significant participant in the market for U.S.-U.K. outbound international services.

44. In our analysis of the horizontal effects of the merger, we find that the merger is unlikely to have anti-competitive effects on any of the three relevant end-user markets. We further conclude that the merger is likely to enhance competition in two of the three relevant markets -- the market for U.S. local exchange and exchange access services and the market for global seamless services. We also find that, with the exception of the international transport market, the merger will not increase or slow the decrease of market power in the relevant input markets. As to the international transport market, we find that, although the merger of BT and MCI will lead to some increased concentration of transport facilities between the United States and the United Kingdom in the short term, there are mitigating factors, including BT/MCI's agreement to share its existing capacity with new entrants, and the expected substantial increase in international transport capacity over the next two years, that should mitigate any increase in market power resulting from this increase in concentration in international transport facilities.

45. In our analysis of the vertical effects of the merger, we find that the merger may give BT an added incentive to discriminate in favor of its U.S. affiliate in the U.S.-U.K. outbound international services market. We find, however, that BT's ability to discriminate will be adequately constrained. In the near term, regulatory safeguards will constrain BT's ability to discriminate. In the longer term, BT's ability to discriminate will be significantly constrained by competition. These constraints will be unaffected by the merger. The United Kingdom has taken a leading role in adopting regulatory policies that seek to introduce competition into all telecommunications markets. We are concerned, however, that the United Kingdom's policies limiting equal access and the availability of unbundled local network elements will disadvantage competitors of the merged entity. We anticipate that our concerns will be addressed through European Union and U.K. regulatory processes, and commitments we have received from MCI.

46. Given these factors, we find that, on balance, the merger will enhance competition in the relevant markets. We thus conclude that the applicants have met their burden of demonstrating that the proposed merger serves the public interest, convenience, and necessity.

B. Relevant Markets

47. The first step in analyzing a merger is to define the relevant product and geographic markets.⁷³ Accordingly, this section, employing the framework set forth in the *LEC In-Region Interexchange* and *Bell Atlantic/NYNEX Orders*, identifies the relevant product and geographic markets that are most likely to be affected by the merger.⁷⁴

48. In the *LEC In-Region Interexchange* and *Bell Atlantic/NYNEX Orders*, we defined a relevant *product* market as a service or group of services for which there are no close demand substitutes.⁷⁵ As we noted in those decisions, this approach is consistent with that of the *1992 Horizontal Merger Guidelines*, which states that "market definition focuses solely on demand substitution factors, *i.e.*, possible consumer responses."⁷⁶ As we explained in the *LEC In-Region Interexchange Order*, in order to determine the relevant product market, we must consider whether, in the absence of regulation, if "all carriers raised the price of a particular service or group of services, customers would be able to switch to a substitute service offered at a lower price."⁷⁷

49. We recognize that relevant product markets may change over time. For example, as competition increases and more telecommunications carriers enter each others' markets, we expect that carriers will begin to bundle packages of telecommunications services. As more

⁷³ See *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41554-41555 §§ 1.0-1.2.

⁷⁴ We note that no party in this proceeding, including the applicants, has proposed any relevant markets for analyzing this merger, despite the fact that the applicants have the burden of establishing the relevant markets. See, *e.g.*, *HTI Health Services, Inc. v. Quorum Health Group, Inc.*, 960 F. Supp. 1104, 1115 ("The burden is on the plaintiff to prove the relevant product market or markets."), 1117 ("It is the plaintiff's burden to define its product markets") (S.D. Miss. 1997), *citing C.E. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241, 1244 (5th Cir.), *cert. denied*, 474 U.S. 1037 (1985). We urge future applicants to propose the product and geographic markets they believe relevant in analyzing a proposed merger.

⁷⁵ *LEC In-Region Interexchange Order* at ¶ 40; *Bell Atlantic/NYNEX Order* at ¶ 50.

⁷⁶ *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41554 § 1.0.

⁷⁷ *LEC In-Region Interexchange Order* at ¶ 28. Cf. *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41554 § 1.0 (the relevant product market is "a product or group of products . . . such that a hypothetical profit-maximizing firm . . . that was the only present and future producer or seller of those products . . . likely would impose at least a small but significant and non-transitory increase in price. . . ." (internal quotations omitted)).

carriers offer bundles of services, consumer expectations and perceptions of relevant products may change.⁷⁸ To the extent that large numbers of consumers come to expect and demand bundled product offerings, and carriers accordingly supply such offerings, the bundled product offerings may well become a separate relevant product market even if, today, such offerings are nascent or nonexistent in most markets.⁷⁹

50. We also recognize that, within a particular relevant product market, it may be appropriate to identify and separately aggregate consumers with similar demand patterns.⁸⁰ As explained in greater detail below, in analyzing relevant product markets in this context, we find it appropriate to distinguish between mass market (including residential and small business) customers on the one hand and medium- and large-sized business customers on the other.

51. A relevant *geographic* market aggregates those consumers with similar choices regarding a particular good or service in the same geographical area.⁸¹ In the *LEC In-Region Interexchange Order*, we found that each point-to-point market constituted a separate relevant geographic market.⁸² Because of the existence of ubiquitous calling plans and geographic rate averaging,⁸³ however, we further concluded that, "when a group of point-to-point markets exhibit sufficiently similar competitive characteristics (*i.e.*, market structure), we will examine that group of markets using aggregate data that encompasses all point-to-point markets in the relevant area, rather than each individual point-to-point market separately."⁸⁴ In the *Bell Atlantic/NYNEX Order*, we clarified that we would treat as a single relevant geographic market, "an area in which all customers in that area will likely face the same competitive alternatives for a [relevant]

⁷⁸ In the *Bell Atlantic/NYNEX Order*, we stated our expectation that, once the BOCs satisfy the requirements of Section 271 of the Communications Act and are able to offer in-region long distance services, both they and competing interexchange carriers will begin to offer bundled packages of local and long distance service. *Bell Atlantic/NYNEX Order* at ¶ 52.

⁷⁹ *Id.*

⁸⁰ In the *Bell Atlantic/NYNEX Order*, for example, we concluded that "there are at least three customer groups that can be identified as having similar patterns of demand: 1) residential customers and small businesses; 2) medium-sized businesses; and 3) large businesses/government users." *Id.* at ¶ 53.

⁸¹ *See, e.g., Tampa Elec. Co. v. Nashville Co.*, 365 U.S. 320, 327 (1961).

⁸² *LEC In-Region Interexchange Order* at ¶ 64.

⁸³ *Id.* at ¶¶ 65-67.

⁸⁴ *Id.* at ¶ 66.

product."⁸⁵ We further explained that "[t]his approach allows assessment of the market power of a particular carrier or group of carriers based on unique market situations by recognizing, for example, that certain carriers may target particular types of customers, provide specialized services or control independent facilities in specific geographic areas."⁸⁶

52. As discussed in greater detail below, we identify three relevant *end-user markets* that are likely to be affected by the merger of BT and MCI: (1) U.S. local exchange and exchange access service; (2) U.S.-U.K. outbound international service; and (3) global seamless services. In addition, we identify six relevant *input markets*: (1) international transport between the United States and United Kingdom; (2) U.K. cable landing station access; (3) U.K. backhaul; (4) U.K. intercity transport; (5) U.K. local terminating access services; and (6) U.K. local originating access services.

1. End-User Markets

a. U.S. Local Exchange and Exchange Access Services

53. The first end-user market that we identify as relevant to our merger analysis is local exchange and exchange access services in the United States. In the *Bell Atlantic/NYNEX Order*, we treated local exchange and exchange access services as a relevant product market separate from interstate, interexchange, long distance service.⁸⁷ We reaffirm our finding that these services should be treated as a separate relevant market, because we find no close demand substitutes for these services. To the extent that the merger may affect the competitive conditions for U.S. local exchange and exchange access services, this market is relevant in our assessment of whether the merger is in the public interest.

b. U.S.-U.K. Outbound International Services

54. A second market that is relevant to our analysis of this merger is the market for U.S.-U.K. outbound international services. Identifying this as a separate relevant market is consistent with past Commission decisions, in which the Commission found each international route between the United States and a foreign country to be a separate geographic market.⁸⁸

⁸⁵ *Bell Atlantic/NYNEX Order* at ¶ 54.

⁸⁶ *Id.* (footnote omitted).

⁸⁷ *Id.* at ¶ 51.

⁸⁸ See *International Competitive Carrier Policies, Report and Order*, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986).

55. We recognize that this conclusion may appear at odds with our finding in the *LEC In-Region Interexchange Order* that we should aggregate point-to-point markets only where we find that customers face similar competitive choices.⁸⁹ More specifically, it could be argued that we should identify separate relevant markets between each U.S. incumbent LEC region (including each BOC region) and the United Kingdom, because the competitive choices facing customers will vary among regions. We believe, however, that, over the time frame we are considering,⁹⁰ all the BOCs, GTE, and other major independent LECs will have the opportunity to offer outbound international service originating in their in-region territory and terminating in the United Kingdom.⁹¹ Because we believe that the BOCs, GTE, and other major incumbent LECs have similar capabilities and incentives, in the absence of contrary evidence, we will treat the competitive choices facing customers in the various incumbent LEC regions as similar. This assumption would change to the extent that incumbent LECs offer out-of-region international services in some cases, but not others. Accordingly, we conclude that, for purposes of analyzing this merger, we can treat all U.S.-U.K. outbound international service as a single relevant market.

c. Global Seamless Services

56. In the *BT/MCI I* and *Sprint Declaratory Ruling* decisions, we recognized that "the global seamless services market . . . is an emerging product market of worldwide geographic scope."⁹² In the *Sprint Declaratory Ruling*, we described this market as "consist[ing] of a combination voice, data, video and other telecommunications services that are offered by a single source over an integrated international network of . . . facilities, and that have the same quality, characteristics, features and capabilities wherever they are provided. This end-to-end service offers the advantage to customers of 'one-stop shopping' and single-source billing."⁹³ We further

⁸⁹ See *supra* ¶ 51.

⁹⁰ See *supra* ¶ 38.

⁹¹ We believe that two considerations will cause major incumbent LECs, including the BOCs, to offer such service. First, because the margins on international telecommunications services are generally so high, incumbent LECs will find it profitable to offer such services. See *International Settlement Rates, Report and Order*, IB Docket No. 96-261, FCC 97-280 (Aug. 18, 1997) (*Benchmarks Order*). Second, incumbent LECs will feel competitive pressures to offer such services in order to match interexchange carriers that appear likely to offer bundled service packages that include local, long distance, and international services. Consequently, we expect most major incumbent LECs, including all the BOCs and GTE, to offer U.S.-U.K. outbound international service.

⁹² *BT/MCI I*, 9 FCC Rcd at 569; *Sprint Declaratory Ruling*, 11 FCC Rcd at 1864.

⁹³ *Id.*

noted that, while the principal customers are high-end users such as multinational corporations, individuals may also be customers.⁹⁴

57. We recognize that this global seamless services market is a nascent market even for large business customers, and that it currently may not be available to individual residential customers. Moreover, we realize that, due to differences in network infrastructure and technology and different regulatory regimes among countries, international carriers may find it difficult, or impossible, to offer truly "seamless" coverage to all foreign countries. Despite these qualifications, however, we expect that this market will prove to be one of growing importance over time, and that it is likely to become, if it has not already, a separate relevant market. Moreover, even if we limit our consideration to bundled service offerings, that include local, long distance and international service for both the United States and United Kingdom, we find that this global market is important for many multinational corporations. Accordingly, we find this global seamless services market, even limited to the United States and the United Kingdom, to be relevant in assessing the competitive impact of the merger.

2. Input Markets

58. As previously indicated, there are two reasons why we might consider input markets relevant in assessing the competitive effects of a merger.⁹⁵ First, if as a result of the mergers, the merged parties have increased market power over an input, they might be able to raise the price of that input, either unilaterally or through coordinated interaction, which could harm consumers to the extent that, in the absence of regulation in the end-user market, the increased input price would be passed on in the form of higher end-user prices. Second, if as a result of the merger, the merged parties possessed market power over an essential input and, at the same time, competed in the downstream, competitive, end-user market, the merged company conceivably could injure competition by discriminating against unaffiliated producers of the end-user service. Because BT controls numerous inputs in the United Kingdom that other carriers need in order to provide U.S.-U.K. outbound international service and global seamless services, these input markets are accordingly relevant in assessing the competitive effects of the merger of BT and MCI.

59. For U.S.-U.K. outbound international service, BT provides the following inputs that are necessary for carriers to terminate calls in the United Kingdom: (1) international transport between the United States and United Kingdom; (2) U.K. cable landing station access; (3) U.K. backhaul; (4) U.K. intercity transport; and (5) U.K. local terminating access services.

⁹⁴ *Id.*

⁹⁵ *See supra* ¶ 37.

Accordingly, because all of these inputs are essential to providing U.S.-U.K. outbound international service, these input markets are relevant in assessing the competitive impact of the merger.

60. The relevant input markets for global seamless services are slightly more complex. Because providers of global seamless services must be able to originate and terminate local, long distance, and international calls in both the United States and the United Kingdom, such carriers must be able to originate all these types of calls in the United Kingdom, where BT exercises significant control over numerous essential inputs. More specifically, various originating services, such as retail local service and originating access service for long distance and international service are inputs into global seamless services, because they are essential parts of the package of services that a multinational corporation is likely to demand as part of a global seamless services package. Accordingly, these input markets are relevant in assessing the competitive impact of the BT/MCI merger.

C. Market Participants

61. Having defined the relevant markets, we next need to identify those entities that appear most likely to be the most significant participants in each relevant market.⁹⁶ For this exercise, we will use the framework we further articulated and applied in our *Bell Atlantic/NYNEX* merger decision.⁹⁷ From the universe of actual and precluded competitors, we identify the firms that are likely to be the most significant market participants based on an analysis of capabilities and incentives to compete effectively in each relevant market. Of particular interest are those market participants that are likely to be at least as significant a competitive force as either of the merging parties.

62. We first identify "actual competitors" in the relevant markets. We define "actual competitors" as firms that are now offering service in the relevant markets⁹⁸ and that we expect to be doing so as the relevant markets become more competitive.⁹⁹

⁹⁶ See *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41555 § 1.3.

⁹⁷ See *Bell Atlantic/NYNEX Order* at ¶¶ 58-70.

⁹⁸ See *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41555 § 1.31 (Current Producers or Sellers: "[I]dentification of firms that participate in the relevant market begins with all firms that currently produce or sell in the relevant market.").

⁹⁹ *Bell Atlantic/NYNEX Order* at ¶ 59. In the *Bell Atlantic/NYNEX Order*, our expectations as to which firms would be offering the relevant products in the relevant markets were based on market openings that would occur as the 1996 Act is more fully implemented.

63. Consistent with the *Bell Atlantic/NYNEX Order*, we also identify as market participants those firms that have been effectively "precluded" from the market. These "precluded competitors" are firms that are most likely to enter but have until recently been prevented or deterred from market participation by barriers to entry that the pro-competitive measures of the 1996 Act and the WTO Basic Telecom Agreement seek to lower.¹⁰⁰ Such barriers may be legal, regulatory, economic, or operational.¹⁰¹

64. Even as the pro-competitive measures are more fully implemented, significant entry barriers will remain. As we stated in *Bell Atlantic/NYNEX*, these barriers may include difficulties in obtaining financial capital; obtaining and retaining the technical, operational, financial and marketing skills necessary to operate as a telecommunications vendor; attracting and holding customers; and regulatory hurdles (*e.g.*, licensing requirements). These remaining entry barriers narrow the universe of significant market participants who will be able quickly to enter and serve the relevant markets. As we articulated in the *Bell Atlantic/NYNEX Order*, we must therefore analyze the capabilities and incentives of each possible competitor to see whether that possible competitor (a) has the capabilities and incentives such that it would be reasonably likely to enter the relevant market as these pro-competitive measures are implemented and (b) would likely exert pressure on competitors in the absence of regulation to lower prices, innovate or upgrade services.¹⁰²

65. From the universe of actual and precluded competitors, we then identify the firms that appear likely to be among the most significant market participants. Specifically, we determine the market participants that have, or are likely to gain quickly, the greatest capabilities and incentives to compete most effectively in the relevant market. Thus, a firm may be likely to be among the most significant market participants even though it has not yet entered the relevant market. As we indicated in *Bell Atlantic/NYNEX*, these capabilities include access to the necessary facilities, "know how," and operational infrastructure such as sales, marketing, customer service, billing and network management. They also include less tangible capabilities such as brand name recognition in the mass market, a reputation for providing high quality, reliable service, existing customer relationships, or the financial resources to obtain these

¹⁰⁰ Barriers to entry represent anything that prevents an entrepreneur from instantaneously creating a new firm in a market. See Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization*, 919 (2d ed. 1994).

¹⁰¹ *Bell Atlantic/NYNEX Order* at ¶ 60.

¹⁰² *Id.* at ¶ 61.

intangible assets.¹⁰³ Another factor is whether the actual or precluded competitor had plans to enter the relevant market or was engaged in such planning. Such plans would be probative evidence of a perception of possession of capabilities and incentives necessary to affect the market.

66. Finally, in determining the most significant market participants from among the actual and precluded competitors, it is particularly relevant to identify which competitors, other than the merging parties, are likely to be as significant a competitor as either of the merging parties.¹⁰⁴

67. Our analysis relies on a forecast of the probable future (absent the merger) as a base case by which to evaluate the merger. In this case, we assume that BT maintains its 20 percent equity interest in MCI and participates in the current Concert to provide global seamless services together with MCI. Given our finding below that BT's entry into the U.S. marketplace to provide international facilities-based service is in the public interest, we also assume that BT would provide U.S. international facilities-based services *de novo* on the U.S.-U.K. outbound route.

68. As discussed further below, we conclude that MCI is among the most significant market participants in each of the relevant end-user markets (outbound international services on the U.S.-U.K. route, U.S. local exchange and exchange access services, and global seamless service (together with BT)) and in one input market (U.S.-U.K. international transport). In addition, we find that BT is among the most significant market participants in each of the relevant input markets (international transport between the United States and the United Kingdom, U.K. cable station access, U.K. backhaul, U.K. intercity transport, U.K. local terminating access and U.K. local originating access), and is a significant participant in the market for U.S.-U.K. outbound services.

1. U.S. End-User Markets

a. Outbound International Services on the U.S.-U.K. Route

69. We first consider whether MCI and BT are market participants in any of the relevant downstream markets. The first market we consider is the market for outbound international services on the U.S.-U.K. route.

¹⁰³ As we observed in the *Bell Atlantic/NYNEX Order*, these capabilities and assets are similar to the factors used in cases applying the doctrine of actual potential competition. *See id.* at ¶ 64 & n.149.

¹⁰⁴ *Id.* at ¶ 65.

70. *MCI.* MCI is both an actual competitor and among the most significant participants in the market for U.S.-U.K. outbound calls. It is the second largest carrier on this route in terms of international message telephone service (IMTS) traffic billed in the United States. In 1995, the most recent year for which we have complete data, MCI had almost \$120 million in retained revenues (total revenue minus payout to foreign carriers) for U.S.-U.K. services billed in the United States.¹⁰⁵ For the first quarter of 1997, MCI reports that it had \$55 million in revenues on the U.S.-U.K. route.¹⁰⁶

71. *BT.* BT is both an actual and a precluded competitor and a significant participant in the market for U.S.-U.K. outbound international calls. We base our findings upon the fact that BT's U.S. affiliate, BTNA, currently provides service on a resale basis. As we describe below, BT has been precluded from providing service on the U.S.-U.K. outbound route on a facilities basis.

72. BT's U.S. subsidiary, BTNA, is currently authorized to resell switched voice services (including resold switched private line services, commonly referred to as "international simple resale" or "ISR") on the U.S.-U.K. outbound route.¹⁰⁷ BTNA currently has only a *de minimis* presence in the U.S.-U.K. outbound market, and primarily serves the business market. For the first quarter of 1997, BTNA had \$1,021 total revenue and no retained revenue on the U.S.-U.K. route.¹⁰⁸

73. BTNA has applications pending before the Commission to provide facilities-based service between the United States and the United Kingdom as a non-dominant carrier.¹⁰⁹ BT currently is a precluded competitor for facilities-based services on the U.S.-U.K. outbound route.¹¹⁰ BT has significant capabilities and incentives to enter the U.S.-U.K. outbound

¹⁰⁵ 1995 Section 43.61 International Traffic Data Report at 20, Table A32 (Feb. 1997) (*1995 International Traffic Data Report*).

¹⁰⁶ Letter from Carol Schultz, Senior Attorney, International Regulatory Affairs, MCI to Peter Cowhey, Chief, International Bureau, FCC (June 30, 1997).

¹⁰⁷ *See supra* note 25.

¹⁰⁸ Letter from Cheryl Lynn Schneider, attorney, BTNA, to William F. Caton, Acting Secretary, FCC (July 28, 1997).

¹⁰⁹ *See supra* note 25.

¹¹⁰ BT is a precluded competitor because, until last year, only BT and CWC (formerly Mercury) were legally permitted to hold U.K. international facilities licenses. Thus, the United Kingdom did not afford U.S. carriers the legal ability to enter the U.K. international facilities market, an important factor in our effective competitive opportunities analysis under Section 214. *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3891.

international services market. For example, BT has developed relevant network operating capabilities as a consequence of providing service on the U.K.-U.S. outbound route. With respect to the large international business market, BT also has some brand name recognition and reputation, as well as a small number of existing customer relationships, in the United States.

74. With respect to the mass market, however, BT lacks the necessary facilities, operational infrastructure, brand name recognition and reputation, and existing customer relationships to develop mass market retail capabilities on the U.S. end. In order to become among the most significant market participants, BT would need to make the costly investments necessary to develop a major presence in the provision of service to the U.S. mass market. Even if BT were to make such investments, it is unlikely that it would become among the most significant market participants given the greater capabilities and incentives of the other market participants discussed below.

75. *AT&T and Sprint.* In addition to MCI, AT&T and Sprint are interexchange carriers that are among the most significant market participants on this route. These three carriers together accounted for 97 percent of the IMTS traffic to the United Kingdom billed in the United States. In 1995, AT&T had a 63.2 percent share and Sprint had a 10.4 percent share on this route.¹¹¹ Both carriers thus have a substantial existing customer base on this route.

76. *BOCs and GTE.* The BOCs are precluded competitors and among the most significant participants in this market. These firms were barred from providing in-region long distance and international services until the passage of the 1996 Act. The BOCs remain precluded competitors for in-region U.S.-U.K. outbound international service until they receive authority under Section 271 of the Communications Act to provide in-region long distance services generally. All the BOCs have indicated, through public statements and regulatory filings, that they intend to provide in-region long distance services, which would presumably include service on the U.S.-U.K. outbound route. We expect that each of the BOCs ultimately will be authorized to provide in-region long distance services, including U.S.-U.K. outbound international services. For purposes of this proceeding, we will treat the BOCs collectively as a single, nation-wide in-region market participant.

77. Each of the BOCs has significant capabilities and incentives to provide in-region U.S.-U.K. outbound international service, both to the mass market and to large- and medium-sized business customers. The BOCs have critical resources that BT lacks. Through their current U.S. operations, the BOCs have high brand name recognition (at least in-region), good

¹¹¹ 1995 *International Traffic Data Report* at Table E1. MCI's share of U.S.-U.K. outbound IMTS traffic was 23.7 percent. By contrast, for the same time period, the fourth largest competitor, WorldCom, had 2.6 percent of the traffic. *Id.*

reputations in most cases, a large existing customer base, and an extensive operational infrastructure (both network and retail) that can be easily modified to handle U.S.-U.K. outbound calls. In providing international services, the BOCs would enjoy economies of scope throughout their retail and network operations. Although these firms in most cases do not currently own international transport capacity, we believe that they will be able to obtain such capacity in the near future.

78. GTE is an actual participant in this market and has many of the capabilities and incentives of the BOCs. We thus conclude that the BOCs and GTE are among the most significant participants in this market, for purposes of our analysis in this proceeding.

79. *Interexchange Carriers and CAPs.* There are also several hundred carriers that primarily resell the capacity of the largest interexchange carriers on this route. These include, among others, Cable & Wireless, ACC, Frontier, and Esprit. In addition, WorldCom¹¹² is the fourth largest facilities-based carrier on the U.S.-U.K. route.¹¹³ Teleport Communications Group, a competitive access provider (CAP), is also an actual participant in the U.S.-U.K. outbound international services market. It currently provides service on a resale basis, but has applied for Section 214 facilities-based authority to serve this route. These carriers primarily serve the same business market that we could expect BT to serve were it to enter the U.S. market, and have an existing brand reputation and customer base in the large business market segment. Given their capabilities and assets, we believe that these interexchange carriers and CAPs would be as significant as BT in the serving the medium- and large-sized business market segment. There is no evidence, however, that these interexchange carriers and CAPs have the brand name recognition and reputation that are critical assets for offering services to the mass market. We thus do not believe that these carriers are, or soon will be, among the most significant market participants on this route for the mass market.

80. *Satellite Service Providers.* Four satellite systems, PanAmSat, Orion, Columbia/TDRS, and the International Satellite Telecommunications Organization (INTELSAT), are actual competitors on the U.S.-U.K. route. These systems provide fixed-satellite services using geostationary-satellite orbit satellites.¹¹⁴ To the extent these carriers provide services to end users, they primarily serve the large business market segment. Only a relatively small amount of

¹¹² On December 31, 1996, WorldCom and MFS Communications Company, Inc. (MFS Communications) merged. As a result, MFS Communications and its subsidiaries (including their U.S. and U.K. operations) are now wholly-owned subsidiaries of WorldCom.

¹¹³ See *supra* note 111.

¹¹⁴ The term "fixed-satellite service" refers to the type of earth station used (*i.e.*, fixed-satellite service earth stations remain at a fixed point while transmitting or receiving signals to or from the satellite).

voice and data services provided on the U.S.-U.K. route are provided by satellite service providers. The delay and echo inherent in satellite transmissions appear to make satellite capacity a less attractive medium for international transport on the U.S.-U.K. route. Thus, it appears that the preferred medium for voice traffic on this route is fiber optic cable.

81. We note, however, that a new generation of fixed-satellite service systems have been proposed in the Ka-band, providing greater opportunities for high speed transmission services.¹¹⁵ The bandwidth in the Ka-band more than doubles the amount of bandwidth available in traditional C and Ku commercial bands,¹¹⁶ providing many new opportunities for high speed, high bandwidth services. It is difficult to predict how these systems will develop,¹¹⁷ and whether they will become significant competitors in the provision of basic voice and data services. There is the potential for new high-speed interactive digital voice, data, and video offerings, among other services,¹¹⁸ although the introduction of such services to the public will take a significant amount of time. We thus do not believe that satellite service providers are, or will soon be, among the most significant market participants in the provision of U.S.-U.K. outbound international services.

82. *Cable MSOs.* Incumbent cable multiple systems operators ("Multiple System Operators" or "MSOs") have facilities that are capable of being upgraded to provide local exchange and local exchange access services to residential and business customers.¹¹⁹ These operators would then be in a position to provide international services, including U.S.-U.K. outbound international services. Given the new transatlantic cable capacity expected, these operators may also provide facilities-based international services on the U.S.-U.K. outbound international services route.

¹¹⁵ The term "Ka-band" generally refers to the space-to-earth (downlink) frequencies at 17.7-20.2 GHz and the corresponding earth-to-space (uplink) frequencies at 27.5-30.0 GHz, or the "28 GHz band."

¹¹⁶ The "C-band" generally refers to the 3400-4800/5850-7025 MHz frequency bands. The "Ku-band" generally refers to the 10.7-12.75/13.75-14.5 GHz bands.

¹¹⁷ In July 1996, the Commission issued a *First Report and Order and Fourth Notice of Proposed Rulemaking* adopting, among other things, a final band plan for the Ka-band. Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed-Satellite Services, *First Report and Order and Fourth Notice of Proposed Rulemaking*, CC Docket No. 92-297, FCC 96-311 (rel. July 22, 1997).

¹¹⁸ The International Bureau has licensed 13 operators proposing to provide such services as interactive digital voice, data, and video; electronic messaging; facsimile; video telephony; video conferencing; satellite news gathering; computer access; direct-to-home video and telemedicine. *Id.* at ¶ 19.

¹¹⁹ See *Bell Atlantic/NYNEX Order* at ¶ 85.

83. As we indicated in the *Bell Atlantic/NYNEX Order*, MSOs have name reputation and a reputation with their customers (although not a reputation for providing telecommunications services).¹²⁰ MSOs have the capabilities and incentives that potentially enable them to become significant market participants for providing local exchange and exchange access services to residential and small business customers sometime in the future. Technical and financial constraints, however, may limit their ability to enter end-user mass markets as quickly as other market participants. We thus find that MSOs are not among the most significant market participants in the U.S.-U.K. outbound international services market.¹²¹

84. *Mobile Telephone Service Providers.* Providers of mobile telephone service via radio consist primarily of cellular and broadband personal communications services licensees, but also include digital specialized mobile radio providers. In the *Bell Atlantic/NYNEX Order*, we explained that mobile telephone service providers are currently positioned to offer products that largely complement, rather than substitute for, wireline local exchange.¹²² We concluded that mobile telephone service providers lack the requisite incentives and access to facilities that allow them to compete effectively in the local exchange markets examined.¹²³ We have no indication that the mobile telephone service providers' incentives and access to facilities are any greater with respect to international services, including U.S.-U.K. outbound international services. We thus conclude that, for purposes of our analysis in this case, mobile telephone service providers are not yet significant market participants in the U.S.-U.K. outbound international services market.

85. *Conclusion.* In conclusion, we find that MCI is among the most significant market participants in the market for U.S.-U.K. outbound international services. We also find that, although BT is a precluded competitor in the provision of facilities-based services on this route and has the capabilities and incentives to be a significant market participant, it is unlikely that BT would become among the most significant market participants, especially in serving the mass market. There are at least four other firms that have greater capabilities and incentives than BT to be among the most significant market participants. With respect to service provided to large business customers, where BT has the most potential significance, there are also additional competitors serving that market segment that are at least as significant as BT is likely to be in that market segment.

b. U.S. Local Exchange and Exchange Access Markets

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *Id.* at ¶ 89.

¹²³ *Id.*

86. We next consider whether MCI and BT are likely to be market participants in the U.S. local exchange and exchange access markets and whether they are likely to be among the most significant market participants.

87. *MCI.* In the *Bell Atlantic/NYNEX Order*, we found that MCI is both a precluded participant and among the most significant market participants in the provision of U.S. local exchange services to mass market customers. We found that MCI had the capabilities and incentives to acquire a critical mass of customers and to do so relatively quickly because it has an existing brand reputation and customers. We also noted that MCI has announced that it will invest \$2 billion to enter markets for local exchange and exchange access services.¹²⁴ We thus find that, for purposes of this proceeding, MCI is a precluded participant and among the most significant market participants in the market for local exchange services.

88. *BT.* Like MCI, BT could be considered to be a precluded competitor in the U.S. local exchange market. In the *Bell Atlantic/NYNEX Order*, we concluded that the universe of the most significant market participants in the provision of U.S. local services to mass market customers in one particular local service market (LATA 132), was limited to an in-region BOC (NYNEX), an out-of-region adjacent BOC (Bell Atlantic) and the three largest interexchange carriers (AT&T, MCI and Sprint). We also found that although there were many other companies that were either precluded competitors or actual market participants, none of them could be considered a most significant market participant.¹²⁵

89. We believe it is unlikely that BT would be as significant a market participant in the provision of U.S. local exchange services as any of the most significant market participants identified in the *Bell Atlantic/NYNEX Order*. With respect to the provision of local services to mass market customers, the focus of the *Bell Atlantic/NYNEX* proceeding, BT lacks brand reputation and existing customers. With respect to the provision of local services to large- and medium-sized businesses, BT lacks customers and facilities which other market participants already have.¹²⁶ There is no reason to believe that our findings with respect to BT's role would be different for any other U.S. local exchange and exchange access market. Consequently, we conclude that, although BT may be a precluded competitor in the markets for U.S. local exchange services, it is not likely to be a significant market participant in any U.S. local exchange market absent the proposed merger.

c. Global Seamless Service Market

¹²⁴ *Id.* at ¶ 82 & n.178.

¹²⁵ *Id.* at ¶ 94.

¹²⁶ *Id.* at ¶ 53.

90. We next consider BT's and MCI's participation in the global seamless service market.

91. *BT/MCI Alliance.* BT and MCI are actual competitors and together are one of the most significant participants through Concert Communications in the market for global seamless services. Concert Communications, the applicants' current joint venture, develops global seamless service products that are distributed by BT and MCI and their partners around the world. This joint venture is one of only a handful of major competitors world-wide in the global seamless service market.

92. *Other Alliances.* In addition to Concert Communications, there are several other global seamless service providers in this market. They consist mainly of various carrier alliances, including AT&T's alliance (with WorldPartners) and Sprint's alliance with DT and FT (Global One).¹²⁷ Each of these alliances has a number of partners world-wide that distribute its services. Although this market is still in the early stages of development, we find that Concert Communications is a significant market participant in this market, as are WorldPartners and Global One.

2. Input Markets

93. We next examine whether BT and MCI are among the most significant market participants in the relevant input markets.

a. International Transport for the U.S.-U.K. Route

94. The first relevant input market for which we identify market participants is the market for international transport for the U.S.-U.K. route. Our analysis focuses on the provision of international transport on a facilities basis.

95. *Background.* U.S. carriers seeking to terminate traffic in the United Kingdom and points beyond rely on submarine cables and satellite systems. The U.S.-U.K. route currently is served by a number of submarine cables owned by consortia of international telecommunications carriers (TAT-8, -9, -11, and -12/13), two private cables (PTAT and CANTAT-3), and satellite systems (INTELSAT, PanAmSat, Orion and Columbia/TDRS).¹²⁸

¹²⁷ See *Sprint Declaratory Ruling*, 11 FCC Rcd at 1864.

¹²⁸ *Cable & Wireless, Inc., Order, Authorization and Certificate*, 11 FCC Rcd 16486, 16496 (Int'l Bur., rel. 1996) (*C&W Order*) (citing Joint Application for a Cable Landing License to Construct and Operate a High Capacity Digital Submarine Cable Network between the United States, the United Kingdom and France, *Cable Landing License*, 8 FCC Rcd 4808 (1993) (*TAT-12/13 Cable Landing License*)).

96. Most cable facilities are jointly owned by a consortium of U.S. and foreign telecommunications carriers. Cable owners may purchase capacity from the consortium on a half-circuit or whole-circuit basis. To provide service on the cable, a half-circuit owner on one end of the cable matches with a half-circuit owner on the other end of the cable. Whole circuit owners may provide end-to-end service (assuming they have obtained appropriate authorizations on both ends). Non-owners may acquire capacity on this cable by either leasing or obtaining indefeasible rights of user (IRUs) from consortium owners.¹²⁹ For new entrants hoping to compete on an end-to-end basis, the burden of having to transact with two carriers holding "matching" half-circuits slows entry into international service and generates market power for incumbent carriers.

97. The majority of transatlantic traffic is transmitted over submarine cable facilities. Although satellite capacity is used for international transport, this capacity currently does not appear to be an adequate substitute for submarine cable capacity. As we noted above in paragraph 80, the delay and echo inherent in satellite transmissions appear to make satellite capacity a less attractive medium for international transport on the U.S.-U.K. route.

98. Among the cable facilities that are currently in service, the TAT-12/13 submarine cable system is considered "state-of-the-art" because its self-healing ring configuration permits instantaneous self-restoration.¹³⁰ It is also the most cost-effective submarine cable between the United States and Europe,¹³¹ and the largest currently operating cable, with five gigabits (Gbits) of capacity for traffic, approximately as much capacity as all of the other currently operating cables, combined.¹³²

99. *BT.* BT is both an actual participant and among the most significant providers in this market. BT currently owns approximately 38 percent of the TAT-12/13 half-circuits on the

¹²⁹ "An IRU interest in a communications facility is a form of acquired capital in which the holder possesses an exclusive and irrevocable right to use the facility and to include its capital contribution in its rate base, but not the right to control the facility or, depending on the particular IRU contract, any right to salvage The IRU is conveyed by a facility co-owner to a carrier that did not elect to become a facility co-owner or that as a facility co-owner did not purchase sufficient capacity to meet its projected demand over the life of the facility." *Reevaluation of the Depreciated-Original-Cost Standard in Setting Prices for Conveyances of Capital Interests in Overseas Communications Facilities Between or Among U.S. Carriers, Report and Order*, 7 FCC Rcd 4561, 4561 n.1 (1992).

¹³⁰ *TAT-12/13 Cable Landing License*, 8 FCC Rcd at 4808.

¹³¹ DT comments at 7. *See also* Sprint comments at 10.

¹³² *See* TeleGeography 1996/97, *Global Telecommunications Traffic Statistics & Commentary*, ed. Gregory C. Staple at 61 (TeleGeography 1996/97); U.K. Government reply comments at 29.

U.K.-end of the cable, far more than any other carrier.¹³³ Overall, BT is the second largest owner of capacity on TAT-12/13 with a total ownership share of 17.2 percent. It also owns significant shares in other common carrier transatlantic cables.¹³⁴ In addition, BT is the U.K. signatory to INTELSAT, which BT and other carriers use to provide service over satellite facilities.¹³⁵

¹³³ See TAT-12/13 Revised Schedules (effective June 9, 1997) (June TAT-12/13 Schedules). According to the most recent schedule of circuit allocations, BT has 509 of the 1336 U.K.-end half-circuits allocated between the Mastic Beach, New Jersey and Land's End, England system interfaces, and 624 of the 1674 U.K.-end half-circuits allocated between the Green Hill, Rhode Island and Land's End system interfaces. Thus, in total, BT has approximately 38 percent of the U.K.-end half circuits (1133 out of the total 3010 half-circuits). By comparison, CWC has only eight percent of the U.K.-end half-circuits (66 of the 1336 U.K.-end half-circuits allocated between Mastic Beach and Land's End, and 169 of the 1674 U.K.-end half-circuits allocated between Green Hill and Land's End). AT&T is the second largest owner of U.K.-end half-circuits with 13 percent of the total U.K.-end half-circuits (225 of the 1336 U.K.-end half-circuits allocated between Mastic Beach and Land's End, and 167 of the 1674 U.K.-end half-circuits allocated between Green Hill and Land's End). *Id.*

¹³⁴ TAT-8 Construction and Maintenance Agreement (C&MA) (revised schedule B-1, effective Oct. 16, 1989); TAT-9 C&MA (revised schedule B, effective Sept. 28, 1994); TAT-11 C&MA (revised Schedule B, effective Sept. 14, 1995).

¹³⁵ See *supra* ¶ 80. The courts have held that Comsat, acting in its capacity as U.S. signatory to INTELSAT, has immunity from liability under the U.S. antitrust laws. See *Alpha Lyracom Space Communications, Inc. (d/b/a Panamsat Corp) (Alpha Lyracom) v. Communications Satellite Corp. (Comsat)*, 1990 WL 135637 at 6-7 (S.D.N.Y.) *affirmed in part and reversed and remanded in part, Alpha Lyracom v. Comsat*, 946 F.2d 168 (2d Cir. 1991); *cert. denied, Alpha Lyracom v. Comsat*, 502 U.S. 1096 (1992); see also *Alpha Lyracom Space Communications, Inc. et al. v. Comsat*, 1996 WL 897666 (S.D.N.Y.), *affirmed, Panamsat v. Comsat*, 113 F.3d 372 (2d Cir. (N.Y.)). We do not believe that this type of immunity is either intended or appropriate for BT's operations in the U.S. market. Nevertheless, we are conditioning this grant on BT waiving any claim to immunity under the court's decision in *Alpha Lyracom v. Comsat* as it may apply to BT's provision of services in the United States. It is not our intention that such waiver affect BT in carrying out its responsibilities as the U.K. signatory to INTELSAT outside the jurisdiction of the United States, or that such waiver affect any sovereign immunity claims to which BT would be otherwise entitled.

100. *MCI.* MCI is the third largest overall owner of capacity on TAT-12/13 with a total ownership of approximately 16.8 percent.¹³⁶ It also owns significant shares in other transatlantic cables.¹³⁷

101. *Other Competitors.* Until December 1996, carriers other than BT and CWC¹³⁸ were precluded from owning and operating capacity on the U.K.- (or eastern) end of the U.S.-U.K. route.¹³⁹ A number of competitors are seeking to provide new international transport facilities on this route. For example, the International Bureau has authorized the construction and operation of four new cable systems on the U.S.-U.K. route, two of which will commence service in 1998.¹⁴⁰ Gemini, a private cable owned by WorldCom and Cable & Wireless (C&W), is expected to be operational in mid-1998.¹⁴¹ SSI Atlantic Crossing L.L.C. (SSI), a non-carrier company, is building another private cable system, to be known as the "Atlantic Crossing" cable system. This private cable system will consist of a fiber optic ring between the United States, the United Kingdom, and Germany. SSI anticipates that the U.S.-U.K. portion of the system will be in service in May 1998.¹⁴² Thus, C&W, WorldCom and SSI also are among the most significant

¹³⁶ June TAT-12/13 Schedules. AT&T is the largest overall owner of TAT-12/13 with a 22.7 percent ownership share. Prior to the U.K. Government's liberalization of the U.K. international facilities-based service market, MCI and AT&T could hold, but not use, the U.K.-end of their full TAT-12/13 circuits. Thus, these holdings were only complementary assets of MCI and AT&T. Upon licensing in December 1996, these companies' U.K. subsidiaries could begin using these assets, theoretically allowing MCI and AT&T to provide end-to-end facilities-based IMTS service for the first time on the U.S.-U.K. route.

¹³⁷ TAT-8 C&MA (revised schedule B-1, effective Oct. 16, 1989); TAT-9 C&MA (revised schedule B, effective Sept. 28, 1994); TAT-11 C&MA (revised Schedule B, effective Sept. 14, 1995).

¹³⁸ CWC was formerly known as Mercury. Several months ago, Mercury completed a merger with three cable companies (Bell Cablemedia, NYNEX CableComs, and Videotron) to create Cable & Wireless Communications (CWC). CWC is majority-owned by Cable & Wireless plc.

¹³⁹ In the United States, any carrier authorized to provide international facilities-based service could own and use half circuits on the U.S.- (or western) end.

¹⁴⁰ See Atlantic Express, *Cable Landing Licenses*, 11 FCC Rcd 7033 (Int'l Bur., Telecom. Div., 1996); MFS Globenet, Inc., *Cable Landing License*, 11 FCC Rcd 12732 (Int'l Bur., Telecom Div. 1996) *modified by* MFS Globenet, Inc., & Cable & Wireless, plc, *Modification of Cable Landing License*, DA 96-2151, File No. SCL 96-004(m) (change in ownership of the Gemini cable system); *C&W Cable Landing License*; SSI Atlantic Crossing L.L.C., *Cable Landing License*, DA 97-2034, SCL-97-002 (Int'l Bur., Telecom Div., rel. Sept. 23, 1997) (*Atlantic Crossing Cable Landing License*).

¹⁴¹ See MFS Globenet, Inc. Opposition to Petition to Deny, File No. SCL-96-004 at 3 (filed Aug. 1, 1996).

¹⁴² See AT&T Corp., News Release, "AT&T to Build World's Most Powerful Undersea Network" (March 24, 1997). SSI was formerly owned by AT&T.

competitors of international transport on this route. In addition, AT&T and Sprint, which have significant ownership interests in the international consortia cable on the route, are also among the most significant competitors.¹⁴³

b. U.K. Cable Landing Station Access

102. The second relevant input market for which we identify market participants is market for U.K. cable landing station access, including digital access cross-connection switches (DACS).¹⁴⁴ As described below, almost all international calls to the United Kingdom are transported over submarine cable facilities and enter the United Kingdom at cable landing stations, where they are connected to backhaul facilities by means of digital access cross connection-switches. Newly licensed U.K. facilities-based carriers must access their cable circuits through such cable stations. Although other facilities licensees may construct, own and operate a cable landing station and DACS, the owner of cable landing stations associated with the largest cables will have control over most U.K. international traffic.

103. *BT.* BT is both an actual participant and among the most significant participants in this market. BT is the sole owner and operator of the majority of U.K. cable landing stations, including the station at Lands' End, where TAT-12/13 lands in the United Kingdom.

104. *MCI.* MCI is a precluded competitor in this market, but is not likely to be a significant competitor. Although MCI has large traffic flows on the U.S.-U.K. route, there is no evidence that MCI would enter this market, for example, by constructing and operating its own cable station. Nor is there any evidence in the record that MCI possesses capabilities or incentives that exceed those of any number of precluded competitors that might enter this market.

105. *Other Competitors.* CWC is the only firm other than BT that currently owns cable landing stations in the United Kingdom. A new cable station is under construction in the United Kingdom by the owners of the Atlantic Crossing cable system.¹⁴⁵ The construction of

¹⁴³ As noted above, ownership of capacity in TAT-12/13 is fairly concentrated among the three largest owners (AT&T, BT and MCI). Before the merger, the market for capacity on TAT-12/13, as measured by the Herfindahl-Hirschman Index (HHI), would be characterized as "moderately concentrated" under the 1992 *Horizontal Merger Guidelines*. The HHI would be at least 1,236, within the "moderately concentrated" range. See 1992 *Horizontal Merger Guidelines*, 57 Fed. Reg. at 41558 § 1.5.

¹⁴⁴ DACS are used to translate optical signals emanating from the submarine cable into signals that can be carried over backhaul facilities.

¹⁴⁵ Letter from Claire Calandra, Secretary, SSI Atlantic Crossing L.L.C., to William F. Caton, Acting Secretary, FCC, File No. SCL-97-002 (Sept. 5, 1997) (indicating that the Atlantic Crossing cables will terminate at a newly constructed cable station located at Whitesands in Cornwall, United Kingdom). The owners of the Gemini

cable landing stations and DACS, like the construction of the submarine cables to which they correspond, requires significant sunk costs. Other market participants may arise as new cables are constructed.

c. U.K. Backhaul Market

106. The third relevant input market for which we identify market participants is the U.K. backhaul market. "Backhaul" describes a high capacity private line used to carry traffic between a cable landing station, where the vast majority of international calls enter the United Kingdom,¹⁴⁶ and a carrier's international switch or point of presence in the United Kingdom.

107. *BT.* BT is both an actual competitor and among the most significant participants in this market. Until recently, only BT and CWC provided backhaul lines used for delivering incoming international traffic to an international switch or point of presence, or delivering outbound U.K. international traffic to cable landing stations for conveyance overseas.¹⁴⁷

108. *MCI.* MCI does not compete in the provision of U.K. backhaul, nor is there any evidence in the record it plans to enter this market. In addition, there is no evidence that MCI possesses capabilities or incentives that are greater than those of several actual competitors in this market. We thus find that MCI does not appear to be a likely significant participant in this market.

109. *Other Competitors.* Two of the newly-licensed international facilities competitors, Energis and WorldCom, built out backhaul facilities from Lands' End (the site of the TAT-12/13 landing station) within three weeks of the grant of their international facilities licenses.¹⁴⁸ U.K. domestic and international licensees have or can apply for "code powers," which enable them to apply to courts for "compulsory wayleaves" (similar to eminent domain powers) and provide for a streamlined procedure for dealing with all relevant U.K. authorities. The U.K. Government asserts that the practical effect of the code powers is that backhaul can be constructed quickly.¹⁴⁹

cable system, WorldCom and C&W, plan to use an existing cable station owned by CWC.

¹⁴⁶ The remaining calls are carried by satellite systems, and enter through satellite earth stations.

¹⁴⁷ BT offers several interconnection options for international circuits terminating at its cable stations. In a typical arrangement, "backhaul" circuits can be leased from the cable station at Land's End cable station to the customer's switch nearest BT's international gateway switch in London.

¹⁴⁸ U.K. Government reply comments at 25.

¹⁴⁹ *Id.* at 26.

The U.K. Government expects alternative backhaul to be built to almost all U.K. cable landing stations within the next year.¹⁵⁰ Given the relative ease of entry, other actual market participants providing international services on the U.S.-U.K. route have incentives to enter this market.

d. U.K. Intercity Transport

110. The fourth relevant input market for which we identify market participants is the U.K. intercity transport facilities market. In order for international calls to terminate in the local exchange of the destination market, the calls must be transported from an international gateway switch or point of presence¹⁵¹ using intercity transport facilities. Intercity transport is provided within the United Kingdom by a number of facilities-based providers for eventual termination with the end-user customer. The U.K. market does not have the same clear separation between long distance and local carriers that currently characterizes the U.S. market.

111. *BT.* BT is both an actual competitor and among the most significant participants in this market. Several commenters asserted that BT has the only ubiquitous intercity network in the United Kingdom and that BT could use it to discriminate against unaffiliated carriers.¹⁵² BT/MCI and the U.K. Government counter that BT faces considerable competition in the intercity market.¹⁵³ Although BT faces increasing competition in this market, it appears that it still controls the only ubiquitous network in the United Kingdom.

112. *MCI.* MCI is neither an actual nor a precluded competitor in the U.K. intercity transport market. We find no evidence in this record that, absent the merger, MCI might consider entering this market, or that it possessed capabilities or incentives that were superior to other actual participants and potential entrants into this market. We thus find that MCI is not a significant participant in this market.

113. *Other Competitors.* The primary facilities-based carriers for U.K. intercity transport are BT and CWC. BT/MCI note that CWC has built the most extensive competing

¹⁵⁰ *Id.*

¹⁵¹ BT has several international gateway switches in the United Kingdom, including one in London.

¹⁵² *See, e.g.,* AT&T comments at 2-3, 7-8; DT comments at 2; Energis comments at 1; FT comments at 7-8; Frontier comments at 2; Sprint comments at 2, 13-14; WorldCom comments at 2, 18.

¹⁵³ *See infra* ¶¶ 113-114.

network to the principal centers for long distance and international traffic; its all-digital U.K. trunk network extends to over forty-two U.K. cities and towns.¹⁵⁴

114. Energis, a subsidiary of the National Grid Company (NGC), and Scottish Telecom have used utility rights of way to construct extensive optical transmission systems and have installed several switches. In addition, the network of Racal-BR Telecommunication Limited (BRT) reaches into many U.K. communities and BRT already provides dark fiber to other operators.¹⁵⁵ Similarly, the U.K. affiliates of AT&T, Sprint (now Global One), and WorldCom hold domestic facilities licenses. AT&T is assembling a nationwide network by installing high speed switches in major metropolitan areas and leasing high capacity intercity circuits.¹⁵⁶ WorldCom's network already connects major metropolitan areas in the United Kingdom.

115. We thus conclude that there are several other competitors, with capabilities and incentives at least equal to MCI, that have entered, or appear likely to enter, this market.

¹⁵⁴ BT/MCI application at 38.

¹⁵⁵ *Id.* at 39-40. Racal Electronics plc purchased BRT in 1995 from British Railways. *Id.*

¹⁵⁶ *Id.* at 40-41.

e. U.K. Local Termination Access Market

116. The fifth relevant input market we consider is the U.K. termination access market. Local termination services are used to terminate U.S.-outbound calls in United Kingdom.

117. *BT.* BT is an actual competitor and among the most significant participants in the market for U.K. local termination services. With the only ubiquitous network in the United Kingdom, BT provides the overwhelming majority of U.K. termination services. Indeed, OFTEL, the U.K. telecommunications regulator,¹⁵⁷ currently imposes price caps on BT which classify BT's local termination service as a "non-competitive" service, one which is unlikely to become competitive in the foreseeable future.¹⁵⁸

118. *MCI.* MCI does not participate in this market, which has been open to new competitors since 1992. We are unaware of any plans by MCI to enter this market. Entry would require significant assets in order to construct facilities, particularly given the absence of local loop unbundling and resale in the United Kingdom. MCI would also face high hurdles in terms of developing brand reputation. We thus find that MCI is not among the most significant competitors in this market.

f. Local Originating Access in the United Kingdom

119. The sixth relevant input market for which we examine market participants is the U.K. local originating access market. Local originating access services in the United Kingdom are essential for the provision of global seamless service, which includes the ability to place local and long distance (including international) calls in the United Kingdom as well as in the United States. Without the ability to offer local originating access service in the United Kingdom, carriers are not able to provide global seamless service.

120. *BT.* BT is both an actual competitor and among the most significant participants in the market for U.K. local originating access. BT/MCI and the U.K. Government argue that BT faces increased competition in this market.¹⁵⁹ However, based on the number of exchange lines,

¹⁵⁷ See *infra* ¶ 243.

¹⁵⁸ OFTEL, *Network Charges from 1997* (May 1997) (*OFTEL 1997 Network Charges*) (unless otherwise noted, OFTEL documents are available at <<http://www.oftel.gov.uk>>).

¹⁵⁹ See *infra* ¶ 122.

BT's share of the U.K. local exchange market for both business and residential service is 91.4 percent.¹⁶⁰

121. *MCI.* MCI does not participate in the U.K. local originating access market. Given the significant commitment required to enter this market, MCI is unlikely to be a significant market participant.

122. *Other Competitors.* The U.K. Government notes that cable telephony firms are now capable of providing local exchange service to one-third of the U.K. population and are required to offer service to 70 percent of the U.K. population by the year 2000.¹⁶¹ From July to September 1996, the combined total of CWC's and the other cable companies' shares of the U.K. local exchange market was 7.7 percent. During the same period, all other market participants had 0.9 percent shares combined.¹⁶² WorldCom and COLT have constructed fiber optic facilities in urban areas, particularly London. Ionica, the most prominent fixed wireless provider of local service, is required by the terms of its license to offer service to 75 percent of England and Wales over the next three years.¹⁶³ In Scotland, two other companies will be providing similar fixed wireless services and other fixed access operators are also planning services.¹⁶⁴ We thus conclude that there are several other competitors, with capabilities and incentives at least equal to MCI, that have entered, or appear likely to enter, this market.

D. Analysis of Horizontal Competitive Effects

1. Overview

123. In this section, we assess the possible *horizontal competitive effects* of the merger. As previously discussed,¹⁶⁵ a merger can have a horizontal competitive effect on a particular relevant market if the merger would increase or slow the decrease of unilateral or coordinated

¹⁶⁰ OFTEL, *Market Information Update* 9, 12 (Apr. 1997) (*OFTEL Market Information Update*).

¹⁶¹ U.K. Government reply comments at 10.

¹⁶² As of September 1996, BT owned 27,496,000 exchange lines; CWC, 303,000; cable operators, 2,017,000 combined; others (including fixed wireless providers), 256,000. *OFTEL Market Information Update* at 9, 12.

¹⁶³ U.K. Government reply comments at 10.

¹⁶⁴ *Id.*

¹⁶⁵ *See supra* ¶ 36.

market power compared with the competitive conditions that would exist absent the merger.¹⁶⁶ We note that these horizontal competitive effects can occur regardless of whether the relevant market is an "end-user" market or an "input" market.

124. A merger may have an anti-competitive, or pro-competitive, horizontal effect on a relevant market that is dominated by a single firm possessing *unilateral market power*. For example, if a relevant market is concentrated and dominated by one of the merging companies, then the merger could result in the merged firm's gaining increased unilateral market power or slowing the decline of unilateral market power.¹⁶⁷ As a result, the merged company may have an increased ability, compared with competitive conditions in the absence of the merger, to raise price above competitive levels, reduce the quality of the relevant product or service, reduce innovation, or restrict output.¹⁶⁸ Alternatively, if neither of the merging firms has the ability to raise prices unilaterally or reduce output or quality in a relevant market dominated by a third firm, and if, as a result of the merger, the merged entity either enters the relevant market or becomes a stronger and more significant competitor in the relevant market, then the merger may have the effect of reducing the market power of the dominant firm in that market. In this case, the merger would have a pro-competitive horizontal effect.

125. Similarly, a merger may have an anti-competitive, or pro-competitive, horizontal effect on a relevant market that is concentrated and dominated by a small group of firms that collectively exercise market power through *coordinated interaction*.¹⁶⁹ A merger may have an anti-competitive horizontal effect if it "increases the potential for coordinated interaction by firms remaining in the post-merger market."¹⁷⁰ For example, a merger is likely to have an anti-competitive horizontal effect if both merging firms were among a limited number of significant

¹⁶⁶ As previously discussed, in analyzing mergers, we will consider horizontal competitive effects not only as of the time the merger is consummated, but also during the period after the 1996 Act and the WTO Basic Telecom Agreement have been more fully implemented. *See supra* ¶ 38.

¹⁶⁷ *See Bell Atlantic/NYNEX Order* at ¶¶ 101-102; *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 45558-45559 § 2.2.

¹⁶⁸ We note that the presence of regulation will not necessarily prevent the merged company from exercising its unilateral market power. For example, even if the merged firm were subject to price cap regulation, which prevented it from raising the price of the relevant product, this would not prevent it from either slowing the rate at which it otherwise would reduce the price of the relevant product or service, or reducing the quality of the relevant product or service.

¹⁶⁹ As previously indicated, "coordinated interaction" is defined as "actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others." *See supra* ¶ 37 (quoting *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. 45557-45558 § 2.1).

¹⁷⁰ *Bell Atlantic/NYNEX Order* at ¶ 121.

market participants in the market,¹⁷¹ because, "[a]s the number of most significant market participants decreases, all other things being equal, the remaining firms are increasingly able to arrive at mutually beneficial market equilibria, to the detriment of consumers."¹⁷² Although less likely, a merger can also have a pro-competitive horizontal effect to the extent that it prevents or limits coordinated interaction. For example, if one of the merging firms is an actual competitor that is a "maverick firm,"¹⁷³ then the merger may make it a stronger competitor that can better disrupt coordinated interaction by other firms in the market.¹⁷⁴

a. End-User Markets

126. We first examine whether the merger of BT and MCI will enhance competition in the relevant end-user markets, compared with the competitive conditions that would exist absent the merger. We reiterate that we are concerned with horizontal competitive effects, both at the time the merger is consummated and during the period after the 1996 Act and the WTO Basic Telecom Agreement have been more fully implemented.

127. *U.S. Local Exchange and Exchange Access Services.* Consistent with our conclusion in the *Bell Atlantic/NYNEX Order*, we find that MCI, along with AT&T and Sprint, are likely to be among the most significant market participants in the U.S. local exchange markets.¹⁷⁵ As we observed in the *Bell Atlantic/NYNEX Order*, each of the three largest interexchange carriers is "among the most significant market participants because each has the

¹⁷¹ A merger may also have an anti-competitive horizontal effect if the merging firms were precluded competitors but were among the firms that were most likely to be the most significant market participants in the relevant market.

¹⁷² *Id.* In that order, we explained that:

In general, increased concentration facilitates coordinated interaction for at least three reasons: (1) with fewer firms, the relative gains from 'cheating' against the other firms decrease (as the market share increases there are fewer customers to win from other providers); (2) it becomes easier to detect deviations from the coordinated conduct; and (3) other firms are more able to punish cheating by a deviant firm through retaliation. *Id.* (footnote omitted).

¹⁷³ The *1992 Horizontal Merger Guidelines* defines "maverick firms" as "firms that have a greater economic incentive to deviate from the terms of coordination than do most of their rivals (e.g., firms that are unusually disruptive and competitive influences in the market)." *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 45557-45558 § 2.12. See also *1997 Horizontal Merger Guidelines Revisions* at 1.

¹⁷⁴ For example, to the extent the merger increases the maverick firm's capacity, it also increases the merged firm's incentive and ability to act as a maverick and cheat on the agreed price. See *id.*

¹⁷⁵ *Bell Atlantic/NYNEX Order* at ¶ 82.

capabilities and incentives to acquire a critical mass of customers in the relevant markets and to do so relatively rapidly.¹⁷⁶ Moreover, MCI has announced its intention to invest \$2 billion to finance its entry into the local exchange markets.¹⁷⁷ On the other hand, there is no evidence in the record that BT has either the specific capabilities necessary, or the incentives to enter, the U.S. local exchange markets. Accordingly, we find that the merger of BT and MCI will not eliminate significant capabilities or assets from the U.S. local exchange markets. To the contrary, we find that the merger is likely to enhance MCI's position as among the most significant market participants in that market. More specifically, we believe that access to BT's financial and technical resources will only strengthen MCI's position as a major participant in U.S. local exchange markets. Accordingly, we find that the merger, by strengthening MCI as a local market participant, is likely to reduce the market power of incumbent local exchange carriers, compared to what it would be absent the merger, and thus is likely to enhance competition in this relevant market.

128. *U.S.-U.K. Outbound International Services.* We concluded above that the market for U.S.-U.K. outbound international services can be distinguished between mass market (including residential and small business) customers and large- and medium-sized business customers.¹⁷⁸ With respect to mass market customers, we find that MCI is an actual competitor in the market for U.S.-U.K. outbound international services, and that it is among the most significant participants in that market. We further find that AT&T and Sprint are also actual competitors with respect to this market segment and that they, likewise, are among the most significant market participants in this market. In addition, we find that the BOCs, although currently precluded competitors, have the capabilities and incentives to become among the most significant market participants in this segment.¹⁷⁹ By contrast, we conclude that BT is unlikely to become among the most significant market participants serving the mass market for U.S.-U.K. outbound international services, because it lacks any of the capabilities, operational infrastructure, brand name recognition and reputation among U.S. customers, and existing customer relationships to attract large numbers of customers quickly. Accordingly, we find that the elimination of BT as a possible competitor in the mass market segment for U.S.-U.K. outbound international service is unlikely to affect competition adversely either in the near term or in the foreseeable future.

¹⁷⁶ *Id.*

¹⁷⁷ *See supra* ¶ 87.

¹⁷⁸ *See supra* ¶ 50.

¹⁷⁹ As discussed above, *see supra* ¶ 78, we also find GTE among the most significant market participants in this market segment.

129. With respect to business customers, we find that BT has some brand name recognition and could possibly become a significant market participant in this segment of the U.S.-U.K. outbound international market. Nevertheless, we conclude that the three largest U.S. interexchange carriers, the BOCs, and GTE are likely to prove more significant market participants in this market segment than BT. These firms have greater established business relationships with business customers and greater brand recognition among business customers than BT. In addition, there are other likely market participants, including existing actual competitors such as WorldCom and C&W, that have capabilities and incentives to compete in this market that are at least equal to those of BT. Accordingly, we find that with respect to this market segment as well, the elimination of BT as a likely market participant in the U.S.-U.K. outbound international services market is unlikely to have any significant adverse effect on competition.

130. *Global Seamless Service Market.* The market for global seamless services is still in its early stages of development, and its services currently are not available to all classes of customers and do not reach all locations. Competition in these markets requires significant resources, which must extend throughout the world. Currently, three international joint ventures are the primary entities serving this market: Concert Communications (a joint venture between BT and MCI), WorldPartners (a joint venture with AT&T and several foreign monopoly providers), and Global One (a joint venture between Sprint, DT and FT).

131. We conclude that the merger of BT and MCI will not eliminate a likely significant market participant because, under the terms of the current joint venture, BT and MCI each are the sole distributors of Concert services in the United Kingdom and the United States, respectively.¹⁸⁰ Thus, the merger does not eliminate a significant market participant that, absent the merger, would have entered this market. We further conclude that the merger is likely to make Concert a more efficient and effective provider of global seamless services. More specifically, we believe that the merger, by replacing a joint venture organizational structure with a single-ownership structure, should generate significant efficiencies for the new Concert,¹⁸¹ which are likely to be passed on to consumers. The merged entity will be better able to coordinate and implement new network and service standards down through to the physical layer of the network, and such capabilities are likely to be important in developing advanced global seamless services. Accordingly, we find that the merger is likely to enhance competition and benefit consumers in the

¹⁸⁰ See *BT/MCI I*, 9 FCC Rcd at 3965.

¹⁸¹ It is widely recognized that the presence of multiple participants makes management of joint ventures more cumbersome, slower, and less efficient. See, e.g., J. Peter Killing, *Strategies for Joint Venture Success* 8 (1983); Michael E. Porter, *The Competitive Advantage of Nations* 66 (1990); David C. Mowery & Nathan Rosenberg, *Technology and the Pursuit of Economic Growth* 247 (1989); Michael E. Porter & Mark B. Fuller, *Coalitions and Global Strategy in Competition in Global Industries* 326 (Michael E. Porter, ed. 1986).

market for global seamless services, provided that other providers of global seamless service have the ability to originate traffic in the United Kingdom.¹⁸²

132. *Conclusion.* We thus conclude that the merger is unlikely to have any anti-competitive effects on any of the three relevant end-user markets. We further conclude that the merger is likely to enhance competition in two of the three relevant markets -- the market for U.S. local exchange and exchange access services and the market for global seamless services.

b. Input Markets

133. As discussed in Section IV.C above, BT is among the most significant market participants in each of the relevant input markets. In addition, with the exception of the international transport market, MCI is not currently an actual participant in any of these input markets, nor does it appear likely to become among the most significant market participants in any of these markets. In the following paragraphs, we discuss the likely competitive effect of the mergers on each of the relevant input markets.

134. *International Transport between the United States and the United Kingdom.* In order to evaluate the competitive effect of the BT/MCI merger on the international transport input market, it is necessary to consider two separate time periods. First, in the near term, we must assume that the transport capacity between the United States and the United Kingdom is fixed, and we must consider the competitive effect of the merger in light of this fixed capacity.¹⁸³ In order to evaluate the likely short-term competitive effects, we will focus first on the effects of the merger on the TAT-12/13 cable because this cable is currently the most cost-effective and reliable means of transporting calls from the United States to the United Kingdom.¹⁸⁴ In the slightly longer term, however, we expect the transport capacity between the United States and the United Kingdom to increase significantly, and we must consider the competitive effect of the merger in light of this expanded capacity and the possibility of further additions to capacity over time.

¹⁸² As we discuss below, the lack of equal access in the United Kingdom affects the ability of carriers to provide global, end-to-end services. *See infra* ¶ 189.

¹⁸³ As previously discussed, carriers seeking to transport calls from the United States to the United Kingdom generally must rely on submarine cables, either privately owned or owned by a consortium of international carriers, or on satellite systems. *See supra* ¶ 95.

¹⁸⁴ *See supra* ¶ 98.

135. As noted, in evaluating the short-term competitive effects of the merger, we will take existing international transport capacity between the United States and the United Kingdom as given, and focus initially on the TAT-12/13 submarine cable. We believe that the merger of BT/MCI will increase the merged entity's market power over U.S.-U.K. international transport only to the extent that the merger results in BT/MCI having increased control over whole circuits on TAT-12/13.¹⁸⁵ We acknowledge that the merger will increase BT/MCI's control over whole circuits somewhat, both because MCI and BT owned some whole circuits prior to the merger, and because some MCI western half-circuits were matched with BT eastern half-circuits.¹⁸⁶ Because the sale or lease of circuits, after the initial allocation, is not subject to any form of price regulation, the question then becomes: will BT/MCI's increased control over whole circuits on TAT-12/13 enable it to exercise increased market power, either through unilateral price increases or coordinated interaction with other carriers controlling whole circuits?¹⁸⁷

136. We conclude that, in the near term, the merger will increase concentration and thus possibly market power in the U.S.-U.K. international transport market. The exercise of this market power could harm U.S. consumers through unilateral price increases to competing carriers or through coordinated interaction with carriers controlling other circuits on this route. We find, however, that the commitments made by BT/MCI with respect to this market, along with other factors identified below, will prevent anti-competitive behavior by the merged entity in the near term. First, and most importantly, BT/MCI has agreed to take various steps to share capacity on

¹⁸⁵ We note that, prior to the merger, MCI owned primarily western half-circuits on TAT-12/13, while BT owned primarily eastern half-circuits. To the extent that these half-circuits are matched with circuits owned by *other* international carriers, the merger of these *half-circuits* should not have any significant competitive effect on the U.S.-U.K. transport market.

¹⁸⁶ See June TAT-12/13 Schedules. Currently, there are 3010 TAT-12/13 circuits allocated on the U.S.-U.K. route. Of these 3010 circuits, 1327 circuits are wholly owned (*i.e.*, carriers own both halves of these circuits) and the remainder are matched between different carriers on opposite sides of the Atlantic. BT has 245 whole circuits, MCI has 122 whole circuits, and BT and MCI jointly own 567 matched circuits. Thus, prior to the consummation of the merger, BT owns approximately 18.5 percent, and MCI owns approximately 9.2 percent, of the U.S.-U.K. whole circuits currently allocated on TAT-12/13. BT's whole circuits represents approximately 8.2 percent, and MCI's whole circuits represents approximately 4.1 percent, of the total U.S.-U.K. circuits on TAT-12/13. Post-merger, BT/MCI's matched half-circuits become whole circuits, increasing the number of whole circuits on TAT-12/13 to 1894. The merged entity will then own 934 whole circuits, or approximately 49 percent of the whole circuits on TAT-12/13. BT/MCI's whole circuits will then represent approximately 31 percent of the total U.S.-U.K. circuits, including both whole and half circuits, on TAT-12/13. See *id.*

¹⁸⁷ We note that, when circuits on TAT-12/13 were initially allocated, the price charged to consortium participants was based on the cost of constructing the cables, plus expected expenses, including maintenance and restoration expenses. Subsequent sales or leases of the circuits are not subject to any form of price regulation, however.

TAT-12/13 with new entrants.¹⁸⁸ More specifically, BT/MCI has committed to: (1) offer U.K. international facilities licensees a total of 147 whole circuits, for sale on an IRU basis to new entrants;¹⁸⁹ (2) allow certain U.K. international facilities licensees that are currently taking eastern end half-circuit international private leased circuits (IPLCs) for international simple resale to convert the IPLCs into IRUs; (3) sell to U.S. correspondents or their U.K. affiliates, upon request, eastern end matched half-circuits owned by BT and currently used for the provision of IMTS or international private line services between BT and the U.S. correspondents; and (4) offer to convert such international private lines leases into IRUs in such a manner that international simple resellers that become U.K. international facilities licensees will be in the same financial position as if their international private line leases had been scheduled to terminate on the date on which the conversion takes place.¹⁹⁰ Moreover, BT's commitments to sell these circuits under OFTEL's oversight at prices that approach BT's cost for these circuits and on reasonable, transparent, and nondiscriminatory terms should significantly constrain BT's ability to exercise any market power it may possess.¹⁹¹ We believe that these commitments by BT/MCI to make additional capacity on TAT-12/13 available to new entrants should largely counterbalance any increased market power the merged entity might acquire over international transport between the United States and the United Kingdom over the near term as a result of the merger.

137. Second, there exist other means of transport between the United States and the United Kingdom besides TAT-12/13.¹⁹² Although these other submarine cables and satellite systems may be less efficient and reliable than TAT-12/13, they do provide alternative transport capacity that also limits the ability of BT/MCI to exercise any market power it may have over TAT-12/13 circuits, either unilaterally or through coordinated interaction over the near term.

¹⁸⁸ BT/MCI proposed these commitments to the European Commission during the European Commission's review of the merger. The European Commission accepted the commitments as a condition of its approval of the merger. *See* Letter from James E. Graf, II, President of BT to William F. Caton, Acting Secretary, FCC (June 2, 1997) (June 2, 1997 BT letter).

¹⁸⁹ These 147 whole circuits will amount to approximately 7.8 percent of the whole circuit capacity of TAT-12/13 on the U.S.-U.K. route. *See supra* note 186.

¹⁹⁰ *See* June 2, 1997 BT letter at 2. The offer is made for 12 months after the date of the European Commission approval of the merger.

¹⁹¹ Through OFTEL's "modern equivalent asset" valuation, OFTEL attempts to estimate BT's "true cost" of acquiring these circuits.

¹⁹² *See supra* ¶ 95.

138. Finally, U.S. carriers will continue to be able to terminate calls in the United Kingdom at the current settlement rate of \$0.07 per minute.¹⁹³ Although the current settlement rate may exceed the economic cost of terminating calls, this alternative method of terminating calls should also tend to constrain the ability of BT/MCI to raise transport rates as a result of its increased control over whole circuits. For these reasons, we do not believe that the merger of BT and MCI should have any significant anti-competitive effect on U.S.-U.K. international transport during the near term.

139. We believe that the merger poses less of a competitive threat in the slightly longer term, as new transport capacity is added on this route. First, by February 1999, the capacity of TAT-12/13 will be doubled through the implementation of wave division multiplexing (WDM) technology.¹⁹⁴ After the WDM Upgrade Program is implemented, all current consortium owners that choose to participate in the program will receive additional whole circuits in proportion to their ownership shares.¹⁹⁵ BT/MCI's relative percentage ownership of whole circuits will decline.¹⁹⁶ Accordingly, implementation of the WDM Upgrade Program will reduce BT/MCI's percentage ownership of whole circuits on TAT-12/13 and thus mitigate any increased market power BT/MCI may have acquired as a result of the merger.

140. More important, the recent reduction in regulatory barriers to entry, combined with a decrease in the cost of constructing new transoceanic cables, should lead to the more rapid construction of cable capacity, which would tend to make the exercise of market power over this input market more difficult. Specifically, the United Kingdom now licenses carriers other than BT and CWC to own and operate U.K. international facilities, and has taken steps to ease the ability of licensees' to construct those facilities.¹⁹⁷

141. In addition, because of reductions in the cost of fiber optic cable and improvements in compression technology, the cost of capacity has fallen dramatically in recent years.¹⁹⁸ The fact that two new state-of-the-art cable systems connecting the United States and the United Kingdom, the Gemini and Atlantic Crossing cable systems, are currently under

¹⁹³ For a more detailed discussion of BT's settlement rate with U.S. carriers, *see infra* Section V.B.1.

¹⁹⁴ *See* Letter from Louise Ferrara, AT&T to J. Hedlund, FCC (July 16, 1997).

¹⁹⁵ *Id.*

¹⁹⁶ *See* June TAT-12/13 Schedules

¹⁹⁷ *See infra* ¶ 144.

¹⁹⁸ *See* TeleGeography 1996/97 at 60-61.

construction and will soon go into operation provides concrete support for this conclusion.¹⁹⁹ The fact that these two new submarine cable systems will soon become operational and that additional cables can be quickly authorized and constructed suggests that, over the longer term, BT/MCI is unlikely to be able to exercise market power in this input market.²⁰⁰

142. *U.K. Cable Station Access.* As discussed above,²⁰¹ we find that BT both is an actual competitor and appears likely to remain among the most significant participants in this input market. BT is the sole owner and operator of the TAT-12/13 cable landing station and DACS, over which most U.S.-U.K. traffic is transmitted for ultimate termination in the United Kingdom. We also find, however, that MCI, though until recently a precluded competitor, is neither a significant participant in this market currently, nor does it appear likely to become a significant market participant in the foreseeable future. CWC is the only firm other than BT that currently owns cable landing stations in the United Kingdom. A new cable station is currently under construction by the owners of the Atlantic Crossing cable system. As we noted earlier, other market participants may arise in the future as new cables are constructed.²⁰² We thus conclude that the merger will not result in the loss of a likely significant competitor in this market, and thus should not have any horizontal anti-competitive effect in this input market.

143. *U.K. Backhaul.* As discussed above, we find that BT and CWC are both actual competitors in this market and appear likely to remain among the most significant participants in this input market.²⁰³ We find no evidence that MCI would likely become a significant participant in this market, even absent the merger. More importantly, we further find that, due to recent regulatory changes in the United Kingdom, barriers to entry into this market have been significantly reduced.

144. As we found above, several newly-licensed international facilities competitors, including Energis and WorldCom, have recently entered, or are about to enter, the U.K. backhaul market. Other U.K. domestic and international licensees have or can apply for "code powers,"

¹⁹⁹ See *supra* ¶ 101.

²⁰⁰ We recognize that the mere construction of these two new cable systems will not necessarily result in deconcentration of this input market, since the level of concentration depends on how the new capacity is allocated among existing, competing carriers, including BT/MCI. We note, however, that the Commission retains the authority to reallocate capacity should it find that capacity on this route is becoming too concentrated. See *infra* note 211.

²⁰¹ See *supra* ¶ 103.

²⁰² See *supra* ¶ 101.

²⁰³ See *supra* ¶ 107.

which enable them to apply to courts for "compulsory wayleaves" (similar to eminent domain powers) and provide for a streamlined procedure for dealing with all relevant U.K. authorities.²⁰⁴

145. Given the quick entry of new firms and the ability of licensees to apply for code powers, we find no reason why additional competitors will not be able to enter this market in the future. We find no evidence in this record, however, that, absent the merger, MCI might consider entering this market, or that it possessed capabilities or incentives that were superior to other potential entrants into this market. Significantly, we further find that there are several other competitors, with capabilities and incentives at least equal to MCI, that are entering, or appear likely to enter, this market.

146. *U.K. Intercity Transport.* We find that BT is an actual competitor and appears likely to remain among the most significant participants in this input market. We find no evidence in this record, however, that, absent the merger, MCI might consider entering this market, or that it possessed capabilities or incentives that were superior to other potential entrants into this market. Significantly, we further find that there are several other competitors, with capabilities, assets and incentives at least equal to MCI, that are entering, or appear likely to enter, this market.

147. As we mentioned above, CWC has built the most extensive competing network to the principal centers for long distance and international traffic. Energis and Scottish Telecom have used utility rights of way to construct extensive optical transmission systems and have installed several switches. BRT's network reaches into many U.K. communities and BRT already provides dark fiber to other operators.²⁰⁵ In addition, AT&T, WorldCom, and Global One hold domestic facilities licenses and are assembling their own networks.²⁰⁶

148. Given the existing competitors in this market, we thus conclude that the BT/MCI merger will neither result in the loss of a significant competitor nor have any other horizontal anti-competitive effect on this input market.

149. *U.K. Local Services (Originating or Terminating).* As discussed above, we find that BT is an actual competitor and is likely to remain among the most significant participants in the markets for U.K. local originating and terminating services. We find no evidence in the record, however, that MCI, even absent the merger, would likely consider entering this market.

²⁰⁴ See *supra* ¶ 109.

²⁰⁵ BT/MCI application at 39-40.

²⁰⁶ *Id.* at 40-41.

Moreover, we find that there are other competitors, with capabilities and incentives at least equal to MCI, that have entered or are considering entering this market.

150. There are a number of actual competitors to BT in the U.K. local services market.²⁰⁷ CWC and a number of cable companies already compete with BT. From July to September 1996, the combined total of CWC's and the cable companies' shares of the U.K. local exchange market was 7.7 percent. In addition, Ionica, a current fixed wireless provider of local service, is required by the terms of its license to cover 75 percent of England and Wales over the next three years.²⁰⁸ In Scotland, two other companies will be providing similar fixed wireless services and other fixed access operators are also planning services.²⁰⁹ Other carriers, such as WorldCom and COLT, have constructed fiber optic facilities in city centers.²¹⁰

151. We thus conclude that the merger will not result in the loss of a likely significant competitor in this market and is not likely to have any horizontal anti-competitive effect on this market. Moreover, although we recognize that any carrier that provides terminating access services, including BT, possesses a certain degree of market power as a result of its control over terminating access, we see no reason why BT's current market power, arising from its control of terminating access, would be augmented by the merger.

3. Conclusion

152. In summary, we find that, with the exception of the international transport market, the merger will not result in the loss of a likely significant market participant in the relevant input markets and will not have any other significant horizontal anti-competitive effect on any of these input markets. Thus, we conclude that, with respect to the relevant input markets other than international transport, the merger generally will not increase the potential for the exercise of either unilateral or oligopolistic market power. As to the international transport market, we find that, although the merger of BT and MCI will lead to some increased concentration of transport facilities in the short term, there are mitigating factors, including BT/MCI's agreement to share its existing capacity with new entrants, that appears likely to offset the increase in market power resulting from this increase in concentration in international transport facilities. More importantly, the substantial increase in international transport capacity over the next two years, as a result of the introduction of WDM technology on TAT-12/13 and the construction of two new submarine

²⁰⁷ *Id.* at 27-37; U.K. Government reply comments at 9-11.

²⁰⁸ BT/MCI application at 34-35; U.K. Government reply comments at 10.

²⁰⁹ *Id.* at 10.

²¹⁰ *Id.*

cable systems, will act as a significant constraint against any horizontal anti-competitive effect caused by the merger.²¹¹

E. Analysis of Vertical Competitive Effects

1. Introduction: Analytical Framework

153. In this section, we consider the possibility that the merger of BT and MCI will have vertical effects that harm competition. We focus on the harmful vertical effects that, based on the parties' filings and our own independent analysis, appear most likely to result from the proposed merger.²¹² A merger may have vertical effects that benefit competition, as well as vertical effects that harm competition.

154. Vertical effects that benefit competition refer to various types of efficiencies arising from vertical integration, especially efficiencies that reduce the costs of producing the relevant goods and services, improve the quality of products, or increase the variety of alternatives available to consumers. Vertical effects that harm competition generally depend on the vertically integrated firm possessing market power in an upstream "input" market and taking actions in that input market that leverage this market power in the downstream "end-user" market. These downstream effects could harm consumers through increases in prices, decreases in quality, or a reduction in alternatives in end-user markets.²¹³ Our analysis in this section focuses on the possibility that the proposed merger will result in vertical effects that harm competition.²¹⁴ It is important to emphasize that a reduction in the profits of rivals without an adverse effect on consumers constitutes harm to competitors, but not necessarily harm to competition. Moreover, our focus is on the extent to which a proposed merger increases the

²¹¹ Nonetheless, we retain the authority to reallocate U.S. carriers' interests and capacity in the TAT-12/13 cable to accommodate additional carriers should we find it in the public interest to do so. *See TAT-12/13 Cable Landing License*, 8 FCC Rcd at 4815. We generally agree with the U.K. Government, however, that any further action to address availability of submarine cable capacity should be based upon a full record not limited to BT/MCI's involvement.

²¹² Other proposed mergers involving other firms and businesses may pose different possible vertical harms and thus may require different analysis.

²¹³ *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (Dec. 1986). *See also* ABA Antitrust Section, *Antitrust Law Developments*, 330-33 (3d ed. 1992); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513 (1995); Martin Perry, *Vertical Integration: Determinants and Effects*, in *The Handbook of Industrial Organization* 183 (Richard Schmalensee & Robert Willig, eds. 1989).

²¹⁴ The possible efficiencies of the merger are discussed below in Section VI.F.

likelihood of adverse vertical effects, and not on adverse vertical effects that likely would arise even in the absence of the merger.

155. In general, we are concerned whether the merger of BT and MCI will increase the ability or the incentive of the vertically integrated firm to affect competition adversely in any downstream end-user market. There are several ways in which consumers could be harmed by the vertical integration of this transaction. First, the integrated firm could engage in price and non-price discriminatory practices in the provision of those inputs to its rivals that could raise the costs of those rivals in the provision of a relevant end-user product, such as U.S.-U.K. outbound international calls. End users would be harmed by such actions if the rival firms passed on these higher costs, causing end users either to suffer higher prices or to substitute inferior alternatives in response to these higher prices. In addition, the integrated firm could use non-price discrimination strategies that lower the quality of rivals' products in relevant end-user markets, enabling the vertically integrated firm to raise the price of its end-user products, and causing end users to suffer the effects of higher prices and lower quality. Finally, the integrated firm could engage in predation, such as through a predatory price squeeze. Successful predation reduces the variety of alternative downstream products available to end users, and causes end users to suffer the higher prices and lower qualities that result from ultimate increases in market power in the relevant end-user markets.²¹⁵

a. Raising Rivals' Costs

156. In examining a vertical transaction, we focus upon whether the transaction either increases the incentives or the ability of the integrated firm to raise the costs of its rivals to the detriment of consumer welfare.

157. In the event that BT/MCI could raise its rivals' costs, the integrated firm could be able both to increase its own end-user prices and increase its end-user market share. The incentive to engage in such a strategy typically depends on the integrated firm's loss in profit in the input market compared with the gain in profit in the end-user market. The comparison will depend on a number of factors. First, raising rivals' costs via either a price discrimination or a non-price discrimination strategy could cause the integrated firm to lose sales in the input

²¹⁵ In the *LEC In-Region Interexchange Order*, we discussed our concern that harmful vertical behavior by incumbent LECs also could include harmful cost misallocation in addition to discrimination and predatory conduct. *LEC In-Region Interexchange Order* at ¶¶ 103-108. Although cost misallocation remains a concern regarding vertical activities of regulated LECs in the U.S. domestic context, we conclude below that this merger does not raise create any concerns that would warrant special separation requirements. We note, however, that the *Foreign Participation Notice* seeks comment generally on whether we should require some level of structural separation between a U.S. carrier and its affiliated foreign carrier. BT/MCI will be subject to any rules of general applicability adopted in that proceeding. *See infra* ¶ 317.

market.²¹⁶ The profitability of such a strategy thus is affected by the degree to which rivals would reduce their consumption of the integrated firm's input product. Second, the extent to which rivals reduce their consumption of the integrated firm's input product in response to a raising rivals' cost strategy depends on how cost-effective the alternative inputs are to which the rivals might turn as substitutes. This may depend in part on the extent to which there can be entry of new input suppliers or expansion by any other existing input suppliers in response to the raising rivals' cost strategy or the ability of the rivals to defend against such a strategy by their own vertical integration. Third, the ability of the vertically integrated firm to profit from a raising rivals' cost strategy depends on the extent to which rivals would pass on cost increases in higher prices to end users. If the rivals would not pass on the increases in cost at least partially, due to competitive conditions in end-user markets, then the downstream affiliate would gain no market power as a result of the strategy and end-user prices would not increase.

158. Fourth, the input firm's percentage ownership interest in the downstream affiliate can affect the vertically integrated firm's incentive to raise rivals' costs. For example, in this case, BT's interest in MCI, as a result of the merger, will rise from twenty percent to one hundred percent. This increased equity interest in MCI increases the profits that BT would obtain as a result of a successful raising rivals' cost strategy, which thereby increases the incentive for BT to engage in such a strategy. Moreover, BT's complete corporate control of MCI can be expected to result in changes in managerial incentives that cause the managers of MCI to act more fully in the interests of the overall enterprise. Finally, the ability of the firm to engage in such a strategy depends on the regulatory environment. For example, if the price of the input is regulated, and the quality of the input and other terms of its provisioning are well-monitored, then the firm may be unable to raise its rivals' costs.²¹⁷

159. A vertically integrated firm may adopt any of several strategies for raising its rivals' costs.²¹⁸ First, to the extent that the firm is the sole supplier of (or has market power over) an essential input in an input market, it could simply raise the price of the input to its downstream competitors, whether or not it raises the price to its own downstream affiliate (which, from the perspective of the fully integrated firm, pays economic cost regardless of the nominal transfer

²¹⁶ For example, if the firm raises the price of its input product, then the volume of the firm's sales of that product could decrease.

²¹⁷ We note that in evaluating the vertical effects of mergers, the presence of adequate regulation does not mitigate public interest harms. As we stated in the *Bell Atlantic/NYNEX Order*, "[i]n order to reach a pro-competitive, de-regulatory industry structure, market performance must improve to the point where competition, rather than regulation, effectively constrains market power." *Bell Atlantic/NYNEX Order* at ¶ 45.

²¹⁸ See *LEC In-Region Interexchange Order* at ¶ 111 (discussing similar discrimination strategies in the domestic long distance context).

price of the input).²¹⁹ Depending on market conditions, this could increase the vertically integrated firm's total profits, at the same time that it disadvantages its rivals and makes them less competitive in the end-user market. If the rival firms pass on the cost increase to end users, then the rival downstream firms will be less competitive relative to the integrated firm's downstream affiliate. This allows the downstream affiliate to capture more of the profits in the end-user market, by expanding market share, raising its price for the end-user service, or both. Such a result would increase the overall profitability of the integrated firm if the lost profits from input sales are not too great. Under these circumstances, end-users will ultimately face higher prices than they would in the absence of vertical interaction.

160. In addition to price discrimination, a vertically integrated firm could engage in other strategies that would have effects similar to raising directly the costs of its rivals. In particular, the integrated firm could adversely affect the timeliness or quality of the input product that it delivers to its rivals. For example, the firm may simply delay the delivery of the input product to its downstream rivals while continuing to provide the input to its own operations on a timely basis. For instance, BT could speedily fulfill its own orders for international transport facilities while "slow rolling" orders by its competitors. To the extent that such delays require the rivals to incur more costs (such as additional compression equipment in lieu of additional transatlantic capacity), those firms would be disadvantaged in the same manner as if the integrated firm simply had raised the price of the input. Similar strategies can be undertaken by degrading the quality level of the input (*e.g.*, signal attenuation in an interconnection arrangement). To the extent that such strategies result in rivals setting higher prices (or reducing the quality) for their services to reflect the increased cost in providing the services, they reduce the benefits available to consumers.

161. It is also important to note that in the event the integrated firm engages in this type of non-price discrimination, its downstream rivals may choose not to, or may be unable to, remedy the defect. For instance, if a rival encounters a degradation in signal quality on the BT-end of an international circuit, the rival may not be able to remedy this defect at reasonable cost. As a result, these strategies could cause the service offerings of the integrated firm's rivals to be below the level they would have chosen to offer had the incumbent not provided degraded inputs. Such reduction in quality, in certain instances, allows opportunities for the integrated firm to extract monopoly profits from end users. For example, to the extent that there may be significant demand for high-quality U.S.-U.K. outbound international calls that only BT/MCI could provide because of the poor signal quality in its input interconnection arrangements with its rivals, BT/MCI might be able to price its higher-quality services at monopolistic levels, at least for some consumers. Because monopolistic pricing harms consumers, it is important that our vertical

²¹⁹ Although raising rivals' costs in this manner may result in predation, raising rivals' costs is not necessarily predatory. *See infra* ¶ 162.

effects analysis consider the extent to which the transaction may increase the incentives and ability of BT/MCI to engage successfully in this type of strategy. We have previously articulated these concerns.²²⁰

b. Predatory Price Squeeze

162. In addition to the actions described above, a vertically integrated firm might engage in a predatory strategy -- known as a predatory price squeeze -- to drive its rivals from the market.²²¹ A vertically integrated firm might raise the price of its input (or lower the price of its end-user service) to the point where the price of its end-user product is less than the price of the input plus an efficient firm's cost of producing the final end-user service.²²² Such a strategy could be profitable only if the vertically integrated firm cannot already fully extract monopoly rents from its control of the input price, and even then only in certain circumstances. For instance, the integrated firm subsequently must be able to raise the downstream price of the end-user service long enough to recoup its losses after its rivals had exited the market, without inducing new entry.²²³ To the extent that new entry entails sunk cost investment, new entry into the market may be delayed -- or even put off entirely -- merely because the threat of a predatory price squeeze response by the incumbent could diminish the perceived *ex ante* return upon that sunk cost investment.

2. Application of Framework: Raising Rivals' Costs and Market Power in End-User Markets

163. We now apply the foregoing framework to the proposed merger. As previously discussed, BT is a significant market participant in each of the relevant input markets, including: (1) international transport between the United States and United Kingdom (particularly submarine

²²⁰ As we said of Sprint regarding its proposed relationship with FT and DT, "Sprint would receive [increased] returns simply because of its affiliation with FT and DT and not because of the superior quality, lower prices, or innovativeness of its services. At the same time, the costs of Sprint's rivals would be raised above competitive levels, which would tend to reduce competition in the market as a whole." *Sprint Declaratory Ruling*, 11 FCC Rcd at 1860.

²²¹ See Thomas G. Krattenmaker & Steven C. Salop, *supra* note 213; Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust in 1* The Handbook of Industrial Organization (Richard Schmalensee & Robert Willig, eds. 1989); see also *Bell Atlantic/NYNEX Order* at ¶¶ 115-16; *Access Charge Reform*, CC Docket No. 96-262, et al., *First Report and Order*, FCC No. 97-158 at ¶¶ 275-83 (rel. May 16, 1997) (*Access Charge Reform Order*).

²²² *Benchmarks Order* at ¶¶ 208-09 (defining price squeeze in the international context).

²²³ See *Access Charge Reform Order* at ¶¶ 275-82.

cable transport facilities); (2) U.K. cable landing station access; (3) U.K. backhaul; (4) U.K. intercity transport; (5) U.K. local terminating exchange access services; and (6) U.K. local originating exchange access services. In particular, we examine whether the transaction gives BT an increased incentive and ability to raise rivals' cost or obtain market power in end-user markets to the detriment of consumers.²²⁴ We then consider whether BT could engage in a predatory price squeeze given its market position in any of the relevant input markets.

a. International Transport on the U.S.-U.K. Route

164. As we noted above in Section IV.C, most transatlantic traffic travels over submarine cables.²²⁵ Since both BT and MCI have U.S.-U.K. submarine cable assets, the status of competition in the provision of submarine U.S.-U.K. cable capacity is important to determine whether the transaction increases the ability of the combined BT/MCI to use those assets to affect the relevant end-user markets. In addition, the complete acquisition of MCI's input and end-user market assets may also increase BT's incentive to use these submarine cable assets for such purposes. That incentive, however, would be greatly diminished if BT/MCI's rivals had adequate alternative sources of supply after the transaction.

165. We found above that the merger will, in the short-term, increase BT/MCI's control of whole circuits on the TAT-12/13 cable.²²⁶ We also found, however, that the merger will not significantly increase BT/MCI's near-term market power over U.S.-U.K. international transport for several reasons. In particular, as we describe above, BT/MCI has made several commitments regarding access to its TAT-12/13 holdings and its commitments to sell circuits under OFTEL's oversight at prices that approach cost on reasonable, transparent and nondiscriminatory terms. This commitment should significantly constrain BT/MCI's ability to exercise whatever market power it may possess by virtue of these transatlantic facilities. We also found that other existing means of U.S.-U.K. transport and the availability to carriers of a \$0.07 per minute settlement rate helps alleviate our near-term concerns.²²⁷ In the longer term, BT/MCI's ability to discriminate will be further constrained by the introduction by mid-1988 of substantial amounts of new

²²⁴ No party has alleged in this proceeding that either BT or MCI possesses or exercises market power in any U.S. input market. Nor does any party allege that BT/MCI, as a result of the merger, will obtain market power in any such input market. MCI, however, has committed to make U.S. backhaul available on a nondiscriminatory basis. *See infra* Section VI.C.

²²⁵ *See supra* ¶ 97.

²²⁶ *See supra* ¶¶ 135-141.

²²⁷ *See supra* ¶¶ 137-138.

transoceanic cable capacity.²²⁸ This increase in capacity should mitigate any market power BT/MCI might otherwise have in this input market as a result of the merger and thus prevent any price or non-price discrimination by BT/MCI. In addition, the recent reduction in regulatory barriers and the decrease in the cost of constructing new transoceanic cable should facilitate more rapid entry and thereby make the exercise of market power over this input market more difficult. For these reasons, we also conclude that it is unnecessary to impose any reporting requirements on BT/MCI, as requested by some commenters.²²⁹

b. U.K. Cable Landing Station Access

166. As previously discussed, BT currently controls important cable landing stations and digital access cross-connect switches in the United Kingdom, but MCI does not.²³⁰ We see no reason to conclude that the proposed merger will increase BT's ability to use this market position so as to impact any end-user market. It is important, however, to note that the merger with MCI might increase BT's incentive to utilize its market power to disadvantage its rivals in a manner that harms competition. Nevertheless, a combination of circumstances leads us to believe that BT's market position is effectively unusable to harm competition.

167. First, we find that the U.K. Government has taken steps to facilitate new cable landing station constructions, and new entry is occurring.²³¹ A new cable station is currently under construction by the owners of the Atlantic Crossing cable, which will land at the new station.²³² We further find no legal or regulatory barriers to the construction of new submarine cables and new cable landing stations associated with these new cables.

168. Second, in the near term, the presence of OFTEL regulation and the conditions contained in BT's licenses prevent BT from discriminating against unaffiliated carriers and ensure that competing carriers can obtain access to the cable landing stations at the same cost and under the same terms as BT. For example, Conditions 12 and 13 of BT's license require BT to provide

²²⁸ See *supra* ¶ 101.

²²⁹ See, e.g., Sprint comments at 10, WorldCom comments at 14.

²³⁰ See *supra* ¶¶ 103, 104.

²³¹ See *supra* ¶ 105.

²³² The owners of the Gemini cable, WorldCom and C&W, plan to use an existing cable station owned by CWC, a C&W affiliate.

in-span handover (which includes DACS activation) on cost-oriented terms.²³³ In addition, Condition 16A requires publication of the charges for these services; Condition 17 requires nondiscrimination and prohibits undue preference; and Condition 18A prohibits anti-competitive conduct. Given OFTEL's regulatory oversight and the conditions in BT's license, we conclude that BT could not use any market power it has over U.K. cable landing stations to discriminate successfully against nonaffiliated carriers. This combination of regulation, significant new entry, and the ease of further entry gives us confidence that BT will not be able to use its control over U.K. cable landing stations to discriminate against unaffiliated carriers to the detriment of U.S. consumers.²³⁴

169. Finally, we are not persuaded by WorldCom's complaint that BT unnecessarily delays access to BT's DACS.²³⁵ To the contrary, we find that BT's general practice of fulfilling an international facilities licensee's previously forecast, in-span handover orders in 35 business days, except in the unusual cases, appears to be reasonable.²³⁶ Accordingly, we find no reason to impose any additional conditions on BT/MCI that would require BT to improve the service intervals for DACS access. In response to ACC's argument that capacity ports have not been made available in units of 2 Mbps, BT counters that units of 2 Mbps are available at the Lands' End cable station. At other cable stations, however, BT currently does not have the necessary equipment to provide ports in units of 2 Mbps. BT has indicated that it is working with operators at those stations to determine how any additional requests might be accommodated.²³⁷ Although this situation is of concern, we are confident that future cable and cable landing station construction should, in the longer term, resolve our competitive concerns.

c. U.K. Backhaul

²³³ In addition, we note that OFTEL has proposed to classify in-span handover as a "non-competitive" interconnection service, meaning that it will set a starting charge based on forward-looking incremental costs to which it will apply an indexed (downward) price cap. U.K. Government reply comments at 27.

²³⁴ This is in contrast to the situation with respect to local exchange facilities in the United States, where the regulatory structure for competition is still largely incomplete, entry into mass market levels has not begun, and the possibility of further entry is uncertain for significant portions of the market.

²³⁵ WorldCom comments at 17.

²³⁶ Letter from Mary L. Brown, Senior Policy Counsel, MCI, to William F. Caton, Acting Secretary, FCC (June 11, 1997).

²³⁷ Letter from James E. Graf, II, President, BTNA, to William F. Caton, Acting Secretary, FCC (Aug. 13, 1997).

170. Although the addition of MCI's international market share might increase BT's incentive to use whatever market position it has in the provision of U.K. backhaul to disadvantage its rivals in a manner that harms competition, we find that the existence of facilities-based competitors in this input market, including CWC, Energis, and WorldCom, combined with a lack of regulatory or economic barriers to the entry of additional facilities-based competitors, effectively prevents BT/MCI from engaging in such a strategy. Indeed, we see no reason to conclude that the proposed merger will increase BT's ability to use the integrated firm's U.K. backhaul assets so as to impact any end-user market.

171. In this regard, we note that, as discussed above, OFTEL has granted the newly licensed facilities-based carriers "code powers" that allow them to build out backhaul facilities quickly.²³⁸ In addition, the fact that Energis and WorldCom constructed backhaul facilities to Land's End (the cable landing station for TAT-12/13) within three weeks of receiving authorization, provides further support for our conclusion that facilities-based entry into this input market is relatively easy. Accordingly, given the apparent ease of entry into this market, we conclude that BT/MCI will not be able to use its provision of U.K. backhaul to discriminate against rivals to the detriment of U.S. consumers.

d. U.K. Intercity Transport

172. Although the merger with MCI does not increase BT's U.K. intercity transport network capabilities in any way, the addition of MCI's international market share might increase BT's incentive to utilize whatever market position it has in the provision of U.K. intercity transport to disadvantage its international rivals in a manner that would harm to U.S. consumers.

173. There is significant debate in the record as to whether BT currently has the ability to utilize its U.K. intercity transport network to disadvantage its rivals in the provision of U.S.-U.K. outbound international services. Several carriers commented that BT has the only ubiquitous intercity network in the United Kingdom and that BT could use it to discriminate against unaffiliated carriers.²³⁹ BT/MCI and the U.K. Government counter that BT faces considerable competition in the intercity market.²⁴⁰ They state that CWC has built the most extensive competing trunk network consisting of over forty switches. Energis and Scottish Telecom have used utility rights of way to construct extensive optical transmission systems and have installed several switches. Finally, the applicants assert that these alternative facilities-based

²³⁸ See *supra* ¶ 144.

²³⁹ See, e.g., AT&T comments at 2-3, 7-8; DT comments at 2; Energis comments at 1; FT comments at 7-8; Frontier comments at 2; Sprint comments at 2, 13-14; WorldCom comments at 2, 18.

²⁴⁰ See *supra* ¶¶ 113-114.

providers have built tens of thousands of miles of transmission facilities, a substantial portion of which is fiber optic.²⁴¹

174. We find above that, although BT faces increasing competition in this market, BT still controls the only ubiquitous intercity network in the United Kingdom.²⁴² Accordingly, it appears that BT has market power in this market and that, in the absence of regulation, BT may have the incentive and ability to exercise that market power to restrain competition in one or more of the relevant markets.²⁴³ We find, however, that several factors will prevent BT from successfully engaging in price and non-price discrimination by virtue of its intercity facilities in the United Kingdom. First, OFTEL has established the rules necessary to permit the development of competing intercity networks, and continues its regulatory oversight of BT's interconnection rates.²⁴⁴ Second, entry in the form of competing intercity networks has begun, and there is the possibility of further entry in the form of new construction. The proposed merger should not affect OFTEL's regulation of BT in this market, nor should it impair the continued development of intercity networks by BT's competitors.

e. U.K. Exchange Access Services

175. Access to local exchange customers in the United Kingdom is needed for the termination of calls in the U.S.-U.K. outbound international market and for the origination of intercity calls and U.K.-U.S. outbound international calls in the United Kingdom. U.K. intercity and international calls are, in turn, two of many services that comprise the global seamless service market. In the Section IV.C above, we discussed the extent of BT's control over local exchange markets in the United Kingdom. In this section, we will discuss the potential leveraging of that control into the U.S.-U.K. international market (through terminating access services) and the global seamless service market (through both originating and terminating access services).²⁴⁵

176. Although the transaction does not improve BT's market position in the provision of access services, merger with MCI significantly enhances BT's incentive and ability to use its

²⁴¹ Letter from Michael H. Salsbury, Executive Vice President and General Counsel, MCI to Peter F. Cowhey, Chief, Int'l Bur., FCC (July 24, 1997).

²⁴² *See supra* ¶ 111.

²⁴³ *See supra* ¶ 111.

²⁴⁴ *See generally* Section V.A.1.

²⁴⁵ Other services, such as U.K. intercity services, also may fall under the umbrella of global seamless services. We will focus our analysis on U.K. originating access services, however, because such analysis applies to other U.K. originating services as well.

market position in an anti-competitive manner. With regard to incentives, full ownership of MCI would enhance BT's benefit from any increase in price or market share that MCI achieves in end-user markets as a result of anti-competitive activity on the part of BT. For example, the transaction would increase BT's incentive to provide itself access for outgoing and incoming calls with superior technical quality, speed of provisioning, or other characteristics that are more favorable than those afforded to its competitors for such calls. Because of MCI's large share of the U.S.-U.K. outbound international services market, benefits from anti-competitive activity would be large and the incentives correspondingly amplified. Also, BT's control of MCI's operations would facilitate their ability to engage in anti-competitive conduct.

177. As we discuss below, we find that the United Kingdom's policies with regard to equal access, unbundling of network elements, and resale exacerbate rather than relieve these potential problems. We recognize that, in certain areas of the United Kingdom, alternatives exist to the BT network that may assist in checking BT's market power.²⁴⁶ Although BT's market position in the access service markets appears to be diminishing over time, it will not diminish as quickly as it would if the U.K. regulatory regime included equal access to other carriers and unbundled local exchange network elements and resale. We anticipate, however, that European Union regulations and the U.K. Government's implementation of those regulations, as well as MCI's voluntary commitment (discussed below), will adequately address this problem.

²⁴⁶ For example, in approximately one-third of the United Kingdom, there is alternative local infrastructure provided by a cable television company. These companies are required to offer service to 70 percent of the U.K. population by the year 2000. In addition, fixed wireless operators such as Ionica are required by the terms of their license to offer service to 75 percent of the U.K. population by the year 2000. BT, however, still controls the only ubiquitous network in the United Kingdom. *See supra* ¶ 122.

i. U.K. Terminating Access Services

178. As we discussed above, BT's local termination services are subject to little competition.²⁴⁷ Accordingly, it appears that BT has market power in this market and that, in the absence of regulation, BT may have the incentive and ability to exercise that market power to restrain competition in one or more of the relevant markets. We find, however, that BT's ability to leverage its market power in the local exchange with regard to terminating access services is constrained by several factors. These factors mitigate some of the concerns that we have regarding this transaction's effect on BT's ability to engage in anti-competitive strategies.

179. First, the U.K. Government's regulation of BT constrains significantly BT's ability to engage in non-price discrimination.²⁴⁸ Section 17 of BT's license generally prohibits BT from exercising "undue discrimination" or "undue preference" with respect to certain standard interconnection services. BT may not discriminate unduly among its customers or in favor of any of its own affiliates to the disadvantage of competitors. Conditions 17B and 17C specifically prohibit undue discrimination with respect to the quality of any standard interconnect service.²⁴⁹ Also, BT is subject to cost-based price caps on access services, which constrains significantly its ability to engage in price discrimination.²⁵⁰ Moreover, as the size of competitive access networks grow, BT will have to meet competitively determined interconnection and quality standards with regard to terminating access services or risk losing customers to other networks.

180. Based on these considerations, we find that BT's ability to engage in anti-competitive conduct with regard to terminating access services is sufficiently constrained. In making this finding, we rely primarily on the fact that the United Kingdom's regulations regarding the terminating access services market prevents anti-competitive leveraging of BT's substantial market power in that market.

²⁴⁷ See *supra* ¶ 117.

²⁴⁸ See *infra* Section V.A.1.

²⁴⁹ See *supra* Section V.D.4. (finding that BT has market power in the local exchange market. For an explanation of BT's obligation to provide origination and termination services). See also *infra* Section V.A.1.b.

²⁵⁰ See *infra* ¶ 223.

ii. U.K. Originating Access Services

181. As we discussed above,²⁵¹ although BT faces increasing competition in this market, only a third of the customers in U.K. local exchange market can choose an alternative provider, and the economics of the business indicate that competitors cannot rapidly expand their operations or enter these markets quickly to counteract the exercise of market power in this market within a year or less.²⁵² Accordingly, it appears that BT has market power in this market and that, in the absence of regulation, BT may have the incentive and ability to restrain competition in one or more of the relevant markets.

182. U.K. originating access services are subject to many of same regulatory constraints as those described for terminating access services (*e.g.*, price caps and various license conditions regarding non-discriminatory behavior). Other U.K. regulatory policies, however, undermine these constraints and allow BT to leverage its market power over originating access market into the markets for end-user services that depend on originating access (*e.g.*, U.K. domestic and international services). As we describe below, these policies include the decision not to require BT to provide equal access to other long distance carriers, to provide unbundled local network elements to other carriers, and to resell local service at wholesale prices. Alternatives to BT's local network may grow in time and eventually constrain BT's control of originating access services, but they do not significantly do so at this time. In fact, the absence of equal access, unbundled local exchange network elements, and resale in the United Kingdom appears to create the conditions by which BT's market power over U.K. domestic and international services will be perpetuated.

183. *Equal Access.* Under U.K. law, BT is not required to provide its competitors with access to its local exchange customers for the provision of services on the same basis as BT

²⁵¹ See *supra* Section IV.C.

²⁵² See *Bell Atlantic/NYNEX Order* at ¶ 133.

affords itself such access.²⁵³ Dialing parity²⁵⁴ and carrier pre-selection²⁵⁵ are unavailable in the United Kingdom. Thus, if a BT customer wishes a carrier other than BT to carry its intercity or international calls, the customer must dial three or four extra digits or use special equipment to dial the extra digits automatically. If no extra digits (the other carrier's "indirect access code") are dialed, the customer's call is automatically routed to BT.²⁵⁶ BT is required to provide BT customers only with "indirect access" to new operators' networks for the completion of intercity and international calls. Indirect access involves customer choice, on a call-by-call basis, to route long distance or international traffic via the network of another operator, to which the customer is not directly connected. OFTEL considered requiring BT to provide carrier pre-selection and dialing parity, but declined to do so.²⁵⁷

184. A number of parties argue that the lack of equal access in the United Kingdom discriminates in favor of BT in the provision of intercity and international services.²⁵⁸ Competing carriers wishing to overcome the inconvenience of indirect access must be willing to incur additional substantial costs. According to ACC, indirect access allows BT to obtain significant "unearned" default traffic merely because customers forget to dial the additional digits required to

²⁵³ Such access is the "equal access" that most of the United States has had since the mid-1980s, defined as an exchange carrier offering access to all interexchange carriers that is "equal in type, quality, and price" to that provided to the exchange carrier's affiliate that is engaged in interexchange service. *United States v. AT&T*, 552 F. Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

²⁵⁴ "Dialing parity" exists when a caller must dial the same number of digits to make an intercity or international call regardless of which intercity or international operator the caller has chosen to carry the call.

²⁵⁵ "Carrier pre-selection" allows a customer to choose, on a permanent basis, a provider to carry all of the customer's long distance and international calls.

²⁵⁶ U.K. Government reply comments at 8.

²⁵⁷ OFTEL, *Indirect Policy Statement* at ¶ 25 (July 1996); U.K. Government reply comments at 8. In 1994, OFTEL undertook a cost-benefit analysis to consider whether to require BT to provide equal access. The study, conducted by the National Economic Research Associates (NERA), an economic consultancy, found that the costs of providing equal access (estimated at £160 million) far outweighed the benefits (ranging from £43 million to £79 million over 10 years). In light of the study's findings, the United Kingdom decided it was not appropriate to change its indirect access policy. U.K. Government reply comments at 14-15.

²⁵⁸ See, e.g., ACC comments at 5-9; AT&T comments at 22-26; Energis comments at 2-3; FT comments at 6; see also Bell Atlantic petition to deny at 4; BellSouth/Pactel/SBC comments at 6.

access a competitor's service.²⁵⁹ ACC also points out that BT is the only carrier required to provide even indirect access.²⁶⁰

185. These parties also argue that, in the absence of equal access, the proposed merger will harm competition by positioning the merged entity as the only provider enjoying the efficiencies of end-to-end 1+ dialing between the United States and the United Kingdom.²⁶¹ Similarly, AT&T argues that BT's dominant position, combined with the lack of dialing parity and carrier pre-selection, will allow BT to maintain the predominant share of U.K. outbound traffic to the United States.²⁶² Thus, several parties urge us to condition approval of the merger on requiring BT to implement equal access.²⁶³

186. BT/MCI and the U.K. Government respond that there is no need to require BT to implement equal access in order to ensure effective competition in the provision of U.K. outbound calls to the United States. Both BT/MCI and the U.K. Government state that the different regimes in the United States and the United Kingdom are due to differences in the development of the telecommunications markets and competition in the respective countries.²⁶⁴ More specifically, the U.K. Government states that its industrial policy of encouraging facilities-based competition would be undermined by the introduction of equal access.²⁶⁵

²⁵⁹ ACC comments at 5-6. FT indicates that this benefit to BT may increase over the next years as OFTEL has proposed to increase the length of the indirect access codes to 5 or 6 digits. FT reply comments at 8 (citing OFTEL Statement, *The National Numbering Scheme* at § 62 (Jan. 1997)).

²⁶⁰ Alternative local exchange and exchange access providers are not required to provide indirect access. ACC argues that for this reason, it cannot provide service to a large percentage of the population in areas where cable companies have gained up to 30 percent of the homes for local access service. ACC comments at 6-7.

²⁶¹ ACC comments at 7.

²⁶² AT&T reply comments at 12 n.14.

²⁶³ ACC comments at 8-9; AT&T comments at 31; Energis comments at 2. *See also* FT comments at 6, reply comments at 9.

²⁶⁴ BT/MCI opposition & reply at 17; U.K. Government reply comments at 8-9.

²⁶⁵ BT/MCI opposition & reply at 18.

187. We generally agree with the commenters.²⁶⁶ By not providing equal access to long distance carriers, BT is engaging in a form of non-price discrimination which allows it to leverage power over the local exchange to enhance its control over the U.K. long distance and international markets. Our experience has shown that equal access is an essential requirement for the development of a competitive intercity and international markets. For example, equal access in the United States allowed early competitors of AT&T to gain revenues faster than they otherwise would have in order to finance the construction of competing nationwide networks. In the period 1984 to the present, long distance competitors to AT&T increased their market share (total interstate minutes) from 15.8 percent to 47.2 percent.²⁶⁷ This was possible, in large part, because of equal access. The European Commission recently cited the United States's experience as an example to demonstrate the beneficial effects of equal access on competition.²⁶⁸

188. Although the United Kingdom's indirect access policy may have been intended to foster the development of alternative facilities-based local infrastructure, it also appears to have allowed BT to minimize its loss of intercity and international market share. BT continues to maintain relatively high market shares of domestic intercity revenues (89.5 percent for residential, 69.9 percent for business for third quarter of 1996) and, to a lesser degree, international revenues (80.6 percent for residential, 48 percent for business for period July to September 1996).²⁶⁹ It appears that the absence of equal access has allowed BT to leverage its near monopoly control over local exchange access (where it has a 91.4 percent share)²⁷⁰ to maintain high market shares for intercity and international services.²⁷¹

²⁶⁶ We disagree, however, with some commenters' assertions that BT/MCI's advantage in providing end-to-end 1+ dialing between the United States and the United Kingdom will provide it such significant efficiency advantages as to enable it to engage in anti-competitive conduct.

²⁶⁷ See Industry Analysis Division, Common Carrier Bureau, FCC, *Long Distance Market Shares: Third Quarter 1996* (Jan. 1997).

²⁶⁸ Commission of the European Communities, *Green Paper On A Numbering Policy for Telecommunications Services in Europe* COM(96) 590 (Nov. 20, 1996) at 32 (noting that introduction of equal access and balloting played a major role in AT&T's loss of market share during the late 1980s) (*European Commission Green Paper*).

²⁶⁹ *OFTEL Market Information Update* at 13, 17.

²⁷⁰ *Id.* at 9.

²⁷¹ By comparison, CWC, cable companies and other carriers had a 10.6 percent revenue share of the residential international service market. For international business service, CWC had a 22 percent revenue share, and other carriers (principally international resellers) had a 27.1 percent revenue share. Although the licensing of new competitors for the provision of these services should help diminish BT's market shares for these services, BT's control over local originating services has allowed it to remain a dominant carrier in the U.K. intercity and

189. We believe that the same prolonged high market share for originating access will make the global seamless services market less competitive than it would be if equal access were implemented, and that, as a result, rates for global seamless services paid by U.S. customers will be higher than they otherwise would be. Although we found above that the merger does not eliminate any significant market participant in this market, it is important to note that the complete absorption of MCI into BT by the proposed merger will increase the incentive for BT to leverage its market power over U.K. local access to adversely affect competition in the global seamless services market. Since U.S. consumers are expected to be significant consumers in this market, we find that this vertical effect of the proposed merger will adversely affect U.S. consumers. We further find that this undesirable vertical effect will retard competition and is therefore within the scope of our public interest analysis of the proposed merger.²⁷²

190. The European Commission is making efforts to require all European Union Member States, including the United Kingdom, to implement equal access. We support these efforts. On the basis of a Green Paper consultation,²⁷³ the European Commission, on May 21, 1997, issued a Communication to the European Parliament and the Council of Ministers recommending the implementation of equal access in E.U. Member States (including the United Kingdom).²⁷⁴ On June 26, 1997, the European Council reached unanimous political agreement on a draft Resolution on the implementation of, among other things, equal access and carrier pre-selection in the member states. The draft Resolution specifically recognizes the importance of the

international markets. See, e.g., *OFTEL Market Information Update* at 9.

²⁷² In the *Bell Atlantic/NYNEX Order*, we stated at ¶ 3 that "it is incumbent upon applicants to prove that, on balance, the merger will *enhance and promote*, rather than eliminate or retard, competition" (emphasis added) and at ¶ 5 that "[w]e do not believe that the best approach to promote competition is to refrain taking any actions to offset . . . incumbent LECs[s] market power."

²⁷³ In November 1996, the European Commission published a Green Paper on a Numbering Policy for Telecommunications Services in Europe presenting various options for certain numbering issues -- including equal access -- and inviting comments. The European Commission concluded that carrier selection mechanisms are mandatory to foster competition in main telecommunications markets. *European Commission Green Paper*, Annex II at 29. The Green Paper proposed to require all Member states to implement carrier pre-selection (equal access) by January 1, 2000 after having implemented carrier selection by January 1, 1998. According to the European Commission, the cost of introducing carrier selection is relatively small if compared with the benefits that can be derived. *European Commission Green Paper* at 15-16. It estimated that the cost to implement it in the European Union would be ECU 2 billion over 10 years and the savings to consumers would be ECU 20-25 billion per year. At an exchange rate of 1.06 ECU/dollar, the cost of implementing equal access would be approximately \$2.12 billion and the savings to consumers would be between \$21.2 billion and \$26.5 billion.

²⁷⁴ Commission to the European Parliament and the Council, *Communication from the Commission to the European Parliament and the Council Regarding the Consultation on the Green Paper on a Numbering Policy for Telecommunications Services in Europe* at 19 (May 21, 1997) (*European Commission Communication*).

availability of equal access and carrier pre-selection to the development of international and long distance competition. It calls for the introduction of carrier pre-selection (at least for operators with significant market power) immediately and, in any event, no later than January 1, 2000. The European Commission is expected to introduce draft regulations to the European Parliament and Council in September 1997 for final adoption.²⁷⁵

191. We agree with the European Commission that the implementation of equal access in the European Union will be an important step in furthering the goal of global telecommunications competition and will set a positive example for other liberalizing markets. In a July 28, 1997 letter to the FCC, MCI acknowledges the importance of equal access for fostering competition.²⁷⁶ It further states that it supports the European Union's intention to require most E.U. Member States, including the United Kingdom, to implement equal access no later than January 1, 2000. Therefore, as discussed Section VI below, we condition this merger on MCI's commitment not to accept BT traffic from the United Kingdom to the extent equal access has not been implemented as required by the U.K. Government.

192. *Unbundled Local Exchange Network Elements and Resale.* BT, unlike incumbent LECs in the United States under the 1996 Act, is not required to resell its local telecommunications services at a wholesale discount. Nor is BT required to provide unbundled local exchange network elements. Resale and unbundled network elements are means by which competitive entry into the local exchange can be facilitated on an expedited basis. Under Sections 251 and 252 of the Act, local exchange incumbents are required to satisfy a request by new entrants for wholesale local exchange service for resale to end users.²⁷⁷ Similarly, local exchange incumbents are required to satisfy a request by a carrier to lease at cost (including a reasonable profit) any component of the incumbent's local network that can be unbundled from the rest of the network (subscriber lines, switches, transport, signalling, etc.).

193. A few commenters note this difference between the U.S. and U.K. regulatory regimes.²⁷⁸ Commenters argue that the U.K. policy of not requiring BT to resell its local network at a wholesale discount favors facilities-based as opposed to resale competition.²⁷⁹ ACC argues

²⁷⁵ European Council, *Numbering Policy for Telecommunications Services in Europe* (June 27, 1997).

²⁷⁶ Letter from Michael H. Salsbury, Executive Vice President and General Counsel, MCI to Reed E. Hundt, Chairman, FCC (July 28, 1997).

²⁷⁷ 47 U.S.C. §§ 251-52.

²⁷⁸ Bell Atlantic petition to deny at 1 & 3; BellSouth/PacTel/SBC comments at 23.

²⁷⁹ Bell Atlantic petition to deny at 1 & 3; BellSouth/PacTel/SBC comments at 23; Frontier comments at 2.

that real competition on the U.S.-U.K. route cannot occur unless U.S. carriers can compete in the local loop in the United Kingdom, including access to unbundled local loop elements.²⁸⁰

194. The U.K. Government does not agree that "lineside" unbundling is necessary or appropriate in the United Kingdom. It argues that the cost advantages of lineside unbundling would be small in the United Kingdom because prices are in line with costs, interconnection charges are to be based on long-run incremental costs, and access deficit charges have been abolished. The U.K. Government also claims that making BT unbundle its local exchange network elements would be unlikely to promote local competition but would instead jeopardize the development of facilities-based local competition now underway.²⁸¹

195. Unbundling of local network elements and resale of local services are policies that foster competition in the local exchange and access markets and would, therefore, limit BT's ability to exercise market power by leveraging control over these markets into control over global seamless services. These policies encourage development of competition by facilitating entry into the local exchange by competitors who are not required to make prohibitively large capital expenditures or build out competing facilities. With unbundling on a reasonable and nondiscriminatory basis, carrier choice for residential and business customers is increased and the ability of a carrier with market power to inhibit competition is decreased. Carriers that are able to take advantage of resale and unbundling in order to gain access to the local customer are able to compete more effectively in the provision of global seamless services. The lack of unbundled network elements and resale of the local loop have inhibited the ability of BT's competitors to compete as flexibly and rapidly in the provision of global seamless services as they could if these features were available in the United Kingdom.

196. We find that, in the short term, the absence of resale and unbundled local exchange elements in the United Kingdom will unnecessarily prolong the merged entity's position as the dominant end-to-end provider of service there. The absorption of MCI into BT as a result of the proposed merger will make this situation less subject to improvement than it otherwise would be.

197. In the longer term, however, several factors should mitigate or even eliminate our concerns. First, WTO commitments provide market access for local basic telecommunications services.²⁸² The European Communities, including the United Kingdom, agreed to abide by certain regulatory principles, among which is the requirement to provide interconnection that is

²⁸⁰ ACC reply comments at 8-9.

²⁸¹ U.K. Government reply comments at 16.

²⁸² European Communities and Their Member States, *Schedule of Specific Commitments*, GATS/SC/31/Supple. 3 (April 11, 1997).

"sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided."²⁸³ As a result, once these commitments are implemented by the European Union and the United Kingdom, BT's competitors should be able to compete more effectively with BT in those markets that require access to the local origination market.

198. Second, other U.K. Government policies, which we have discussed above, strongly promote competition. For example, there is an open licensing regime with few restrictions, licensing fees are minimal and related to administrative costs, and new U.K. operators are free to enter into operating agreements with foreign carriers. These policies have helped fuel the notable amount of recent competitive entry into telecommunications in the United Kingdom at all levels, including the local services market. All of these policies, among others, promote a competitive global marketplace and are important in our decision to allow this merger to proceed.

3. Application of Framework: Predatory Price Squeeze

199. AT&T claims that BT/MCI could subject its competitors to a price squeeze by charging AT&T and other competitors of MCI, but not MCI itself, above-cost rates for the use of BT's essential facilities or inputs (*e.g.*, backhaul, terminating access).²⁸⁴ We described a price squeeze in paragraph 162 above. The best way to prevent a price squeeze is to ensure that input prices are set at competitive levels, either by a competitive input market or through government regulation of the input market. This prevents the would-be input monopolist from charging above-cost rates for the inputs, which is the *sine qua non* of a price squeeze.

200. We find that BT lacks the ability to effect a price squeeze at present and that the proposed merger will not increase its ability to do so. First, the existing competitors and possible new entrants in all the market segments discussed in the preceding Section of this decision have facilities by which the victims of any price squeeze attempted by BT may simply avoid dealing with BT. To the extent they had to use BT's facilities, BT's domestic intercity and local network interconnection rates are among the lowest in the world, and are expected to fall more (by about ten to twenty percent on average) as a result of the United Kingdom's new network interconnection price cap regime (to commence in October 1997).²⁸⁵ Second, OFTEL's regulation

²⁸³ *Id.* at 9.

²⁸⁴ *See* AT&T comments at 14-19.

²⁸⁵ *See infra* Section V.A.1.b.

of BT's network interconnection rates through price caps constrains BT's ability to leverage its significant market power by raising rivals' costs.²⁸⁶

201. Third, as we mentioned in paragraph 138 above, BT's settlement rate (*i.e.*, the rate it charges carrier to terminate U.S.-originated calls in the United Kingdom) with U.S. carriers is now \$0.07, which is below the "best practices" rate recently adopted in the Commission's *Benchmarks Order*.²⁸⁷ The number of facilities-based competitors and entrants on the U.S.-to-U.K. route will likely keep this rate low over time. Thus, unaffiliated U.S. carriers may hand off their traffic to BT for termination in the United Kingdom at a rate that is relatively close to cost. These factors lead us to conclude that BT would be unable to effect a price squeeze, even with respect to carriers that do not have access to alternative infrastructure in the United Kingdom. None of these factors will be diminished by the proposed merger.

4. Summary of Analysis of Harmful Vertical Competitive Effects

202. After careful examination, we conclude that the proposed merger presents the potential for harmful competitive effects because of BT's substantial market power in the provision of access services in the United Kingdom. The lack of equal access, resale, and unbundled network elements in the United Kingdom could ultimately increase the rates charged to U.S. consumers to levels slightly higher than they otherwise would be. We anticipate, however, that our concerns will be addressed through E.U. and U.K. regulatory processes, and MCI's commitment concerning equal access.

203. In general, we find that the combination of effective regulation by the U.K. Government, existing competition in the United Kingdom, and the possibility of additional competition by new entrants will prevent the other vertical harms to competition feared by the opponents of the proposed merger. Due to liberalization measures taken by the U.K. Government, there is significant existing or developing competition to BT in nearly every segment of telecommunications within the United Kingdom. The United Kingdom combines effective regulation of BT's market power in the near term,²⁸⁸ with the encouragement of new entry and competition as the best longer term control for BT's market power.

²⁸⁶ BT's license conditions also require BT to provide other facilities-based providers reasonable and nondiscriminatory DACS access at published prices.

²⁸⁷ See *Benchmarks Order* at ¶ 134.

²⁸⁸ Particularly important in controlling BT's market power are U.K. regulations that ensure proper cost allocation, timely and nondiscriminatory disclosure of network technical information, and protection of carrier and customer proprietary information against unauthorized disclosure. See *infra* Section V.A.1.c.

204. The presence of significant competition and the possibility of still more competition in each of the relevant input markets in the United Kingdom are the most important considerations in our analysis. Competition can protect consumers better than the best-designed and most vigilant regulation. Absent the existing and developing competition in the United Kingdom and the international transport market, the U.K. Government's pro-competitive regulatory policies, and the existence of an experienced, independent regulator with a strong track record, this proposed merger would be highly problematic.²⁸⁹ It is likely that numerous conditions would be needed to protect U.S. consumers from potential harm to competition.

F. Possible Efficiencies of the Merger

205. One of the range of potential public interest benefits of a merger that we must balance against the potential public interest harms is the extent to which the merger may enhance efficiency. In the *Bell Atlantic/NYNEX Order*, we defined these efficiency benefits as "the pro-competitive benefits of a merger that improve market performance," thereby benefiting consumers through, for example, "lower prices, improved quality, enhanced service or new products."²⁹⁰ In addition, we explained that only merger-specific efficiencies, *i.e.*, those that would not occur but for the merger or are unlikely to be achieved through less competitively-harmful means than the merger, are relevant to the public interest analysis.²⁹¹ Finally, we ruled that applicants bear the burden of proof, and cannot "carry their burden if their efficiency claims are vague or speculative, and cannot be verified by reasonable means."²⁹²

206. As discussed above, unlike the merger of Bell Atlantic and NYNEX, the proposed merger between BT and MCI is predominately one between firms in a vertical relationship (*i.e.*, they predominately interact through the supply of inputs to each other as opposed to through competing for customers). The antitrust laws have been characterized as consistent with the view that "cooperation among firms in a vertical relationship in general has greater efficiency potential than does cooperation among horizontal competitors."²⁹³ Among the potential efficiencies that

²⁸⁹ See *Bell Atlantic/NYNEX Order* at ¶ 15 ("For some potential mergers, the harm to competition may be so significant that it cannot be offset sufficiently by pro-competitive commitments or efficiencies. In such cases, we would not anticipate the applicants could carry their burden to show the transaction, even with commitments, is pro-competitive and therefore in the public interest").

²⁹⁰ *Id.* at ¶ 158 (citing *1997 Horizontal Merger Guidelines Revisions*).

²⁹¹ See *1997 Horizontal Merger Guidelines Revisions*.

²⁹² *Id.*

²⁹³ See, *e.g.*, Riordan & Salop, *supra* note 71 at 522. For example, efficiencies are given greater weight in vertical mergers than in horizontal mergers. *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41562 § 4.0.

may be produced by a vertical merger are: (1) better coordination in design and production between the firms than could be achieved if the firms were to remain separate and interact through contracts or other arrangements; (2) elimination of instances where one of the merging firms "free rides" before the merger by attempting to benefit from the activities of the other firm without contributing to the cost of those activities (resulting in less than the socially-optimal, efficient amount of the activity), a problem that may be overcome because the combined firm will have the incentive to take account of all of the costs and benefits of its actions; and (3) elimination of inefficiency associated with the double markup of costs (because there are two firms) in cases where input and output markets are not perfectly competitive and prices, and thus above economic cost, by permitting the combined firm to consider the actual economic costs of the inputs and use.²⁹⁴ These categories of potential efficiencies are given here solely for the purpose of illustration; we do not in any way imply that these are the only, or the most significant, kinds of efficiency benefits that may be associated with a merger.

207. In this case, BT and MCI declared in their application that the proposed merger would produce a "pre-tax synergy benefit . . . amounting to approximately \$2.5 billion over five years following close of the merger."²⁹⁵ In particular, they claim that the merger is expected to produce "economies of purchasing and procurement" and permit the "combination of the companies' operations."²⁹⁶

208. Although it appears that no party to this proceeding has challenged the BT/MCI assessment of the potential merger-specific efficiencies, we find that the evidence presented by the petitioners on this point is so meager that the efficiency benefits are either non-cognizable or entitled to very little weight in our public interest analysis. There may be reasons to suspect that the merger could produce significant efficiencies in the form of synergies that would be otherwise unobtainable, such as more efficient routing of calls and faster adoption and implementation of new technologies.²⁹⁷ Nonetheless, the petitioners' claims in this respect cannot satisfy their burden of proof because they are "vague or speculative, and cannot be verified by reasonable means."²⁹⁸ Moreover, even if we were to conclude that efficiencies are likely to result from the proposed

²⁹⁴ Riordan & Salop, *supra* note 71 at 523-27. The authors wrote that these categories of potential vertical efficiencies are not meant to be exhaustive, and referred readers to other discussions of vertical efficiencies. *Id.* at 523 n.29 (citing, *inter alia*, *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 54-57 (1977)).

²⁹⁵ BT/MCI application at 12.

²⁹⁶ *Id.*

²⁹⁷ See, e.g., Keesung Nam, *International Telecommunication Networks: Modelling and Analysis* (1994) (unpublished Ph.D. dissertation, University of Pennsylvania).

²⁹⁸ *Bell Atlantic/NYNEX Order* at ¶ 158.

merger, the evidence before us does not provide the necessary basis for measuring the public interest benefits associated with those efficiencies -- the evidence is simply too vague to attach meaningful weight to the claimed benefits.

G. Conclusion

209. We conclude that, on balance, the merger of BT and MCI will serve the public interest, convenience and necessity. In our analysis of the horizontal effects of the merger, we find that the merger is unlikely to have any anti-competitive effects on any of the three relevant end-user markets. We further conclude that the merger is likely to enhance competition in two of the three relevant markets -- the market for U.S. local exchange and exchange access services and the market for global seamless services. In addition, we find that, with the exception of the international transport market, the merger will not increase or slow the decrease of market power in the relevant input markets. As to the international transport market, we find that, although the merger of BT and MCI will lead to some increased concentration of transport facilities in the short term, there are mitigating factors, including BT/MCI's agreement to share its existing capacity with new entrants, and the expected substantial increase in international transport capacity over the next two years, that should mitigate any increase in market power resulting from this increase in concentration in international transport facilities.

210. In our analysis of the vertical effects of the merger, we find that the merger may give BT an added incentive to discriminate in favor of its U.S. affiliate in the U.S.-U.K. outbound market. We find, however, that BT's ability to discriminate will be adequately constrained. In the near term, regulatory safeguards will constrain BT's ability to discriminate. In the longer term, BT's ability to discriminate will be significantly constrained by competition. These constraints will be unaffected by the merger. The United Kingdom has taken a leading role in adopting regulatory policies that seek to introduce competition into all telecommunications markets. We are concerned, however, that the United Kingdom's policies limiting equal access and the availability of unbundled local network elements will disadvantage competitors of the merged entity. We anticipate that our concerns will be addressed through European Union and U.K. regulatory processes, and commitments we received from MCI.

211. Given these factors, we find that, on balance, the merger will enhance competition in the relevant markets. We thus conclude that the applicants have met their burden of demonstrating that the proposed merger serves the public interest, convenience, and necessity.

V. APPLICATION OF CURRENT MARKET ENTRY RULES TO BT'S ENTRY INTO THE U.S. MARKET

212. Because final rules implementing the WTO Basic Telecom Agreement have not yet been adopted, we examine BT's entry as a foreign carrier into the U.S. market under our current rules, which were established in our *Foreign Carrier Entry Order*.²⁹⁹ To make this showing, the applicants must demonstrate that the relevant destination market (in this case, the United Kingdom) offers U.S. carriers effective competitive opportunities (ECO) in each of the communications market segments the foreign carrier seeks to enter in the United States. We have proposed to eliminate our ECO analysis for countries that are signatories to the WTO Basic Telecom Agreement as part of our *Foreign Participation* proceeding.³⁰⁰ Until final rules are adopted, however, we must continue to apply our existing *Foreign Carrier Entry Order* framework.

213. In order to determine if BT's entry into the U.S. market complies with our current rules, we first determine whether the United Kingdom offers U.S. carriers effective competitive opportunities in each of the communications market segments that BT seeks to enter in the United States. We then consider other factors that may be considered as part of our public interest analysis, including whether BT offers U.S. carriers cost-based accounting rates, and concerns raised by the Executive Branch.

A. Effective Competitive Opportunities Analysis

214. In the *Foreign Carrier Entry Order*, we determined that foreign carriers or affiliates of foreign carriers³⁰¹ seeking to provide U.S. international services to destination countries in which they have market power must demonstrate that such destination countries offer effective competitive opportunities for U.S. carriers to offer like services. Under our rules, an applicant that is affiliated with a foreign carrier that is not a monopoly in a destination market bears the burden of submitting information sufficient to demonstrate that its foreign affiliate lacks

²⁹⁹ See *Foreign Carrier Entry Order*, *supra* note 23.

³⁰⁰ See *Foreign Participation Notice*, *supra* note 9.

³⁰¹ The Commission has defined "affiliation" in Section 63.18(h)(1)(i)(B) of our rules for purposes of determining those foreign carrier affiliates that are subject to the effective competitive opportunities analysis. This definition includes an ownership interest of greater than 25 percent, or a controlling interest at any level, in a U.S. carrier by a foreign carrier. 47 C.F.R. § 63.18(h)(1)(i)(B). See also *Foreign Carrier Entry Order*, 11 FCC Rcd at 3902-3909, 3912-3914.

market power.³⁰² No party disputes BT/MCI's claim that the only markets in which foreign carrier affiliates of BT or MCI may possess market power are Gibraltar and the United Kingdom.³⁰³ BT/MCI concede that BT's affiliate, GibTel, is the sole international services provider in Gibraltar,³⁰⁴ but argue that BT does not control bottleneck facilities or services in the United Kingdom.³⁰⁵ We found above that BT has market power in the U.K. local access markets through its control of the only ubiquitous local access network in the United Kingdom.³⁰⁶ We thus find BT controls facilities "necessary for the provision of international services" in the U.K. market, and we apply our ECO analysis to BT's entry into the U.S. market.³⁰⁷

1. Section 214 Authorizations

215. Under the ECO analysis, we first examine the legal or *de jure* ability of U.S. carriers to enter the destination foreign country and provide international facilities-based service. Next, we review the actual or *de facto* conditions of entry in the relevant foreign markets,

³⁰² 47 C.F.R. § 63.10(a)(3). "Market power" is defined as "the ability of the carrier to act anticompetitively against unaffiliated U.S. international carriers through control of bottleneck services or facilities on the foreign end." *Foreign Carrier Entry Order*, 11 FCC Rcd at 3917. "Bottleneck services or facilities" are "those that are necessary for the provision of international services, including inter-city or local access facilities on the foreign end."

³⁰³ BT/MCI certify that, upon consummation of the merger, MCI will have affiliations with foreign carriers in the following destination markets: Australia, Belgium, France, Germany, Gibraltar, Hong Kong, Ireland, Italy, Mexico, New Zealand, Russia, Spain, Switzerland, The Netherlands, and the United Kingdom. All but two of the foreign carrier affiliates in these countries are currently controlled by BT. BT/MCI application, Vol. 2, Part II.B, at 1-2.

³⁰⁴ We do not apply a separate ECO analysis for Gibraltar in this case because, as we discuss below, the traffic on this route is *de minimus*, and only a very small part of a much larger transaction that we conclude will enhance competition in the United States.

³⁰⁵ BT/MCI application, Vol. 2, Part II.B at 6.

³⁰⁶ *See supra* ¶¶ 178, 181.

³⁰⁷ As the International Bureau stated in the *TNZL Order*, the market power analysis required under the *Foreign Carrier Entry Order* does not turn on whether legal barriers to entry have been removed or whether international services competition exists, but on whether an applicant in fact controls bottleneck facilities through which it can discriminate against unaffiliated U.S. carriers. Telecom New Zealand Ltd., *Order, Authorization and Certificate*, File No. ITC 96-097, DA 96-2182 ¶¶ 6-9 (Int'l Bur., rel. Dec. 31, 1996); *Foreign Carrier Entry Order*, 11 FCC Rcd at 3917. We find that BT has such ability through its control of the only ubiquitous local exchange network in the United Kingdom. Because we find BT has market power in the local access market, a further examination of the United Kingdom telecommunications market is not required to determine whether the ECO analysis is warranted.

including the terms and conditions of interconnection, competitive safeguards, and the regulatory framework.³⁰⁸ We review the overall effect of these four elements on the opportunities for viable operation as a facilities-based carrier in the foreign market. If, however, any one of the factors of the effective competitive opportunities test is completely absent, we will deny authority to provide facilities-based service on that route, unless other public interest factors warrant a different result.³⁰⁹

a. Legal Ability to Enter

216. BT/MCI state that there are no legal restrictions in the United Kingdom on foreign ownership or participation in the provision of international facilities-based telecommunications services.³¹⁰ No petitioner or commenter has challenged this assertion. We agree with the applicants that there are no legal barriers to entry in the United Kingdom for international facilities-based services.³¹¹ We thus find that U.S. carriers have the legal right to own a U.K. facilities-based carrier to originate and terminate facilities-based telecommunications services.

b. Interconnection

217. Background. The second factor we examine in our ECO analysis is whether reasonable and nondiscriminatory charges, terms and conditions exist for interconnection to a foreign carrier's domestic facilities for termination and origination of international services, and whether adequate means exist to monitor and enforce these conditions (*e.g.*, published charges).³¹²

³⁰⁸ See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3892.

³⁰⁹ *Id.* at 3890.

³¹⁰ BT/MCI application at 20.

³¹¹ Applicants seeking to provide international facilities-based services must seek a license from the U.K. Department of Trade and Industry (DTI). In December 1996, DTI issued international facilities licenses to 45 carriers, including a number of U.S.-affiliated carriers. Application requirements are the same for foreign- and U.K.-based applicants, and there are no foreign ownership restrictions.

³¹² See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3892-93. We observed that, should a foreign carrier operate as a dominant provider of local access services, its terms and conditions for interconnection should be publicly available on a nondiscriminatory basis and at reasonable prices. This would prevent that foreign carrier from favoring its affiliated U.S. carrier over competing unaffiliated U.S. carriers in terms of both economic and technical interconnection with its facilities.

218. BT/MCI argue that the following factors combine to ensure reasonable access and interconnection to BT's network:

(a) *Requirement to interconnect.* Conditions 13 and 17 of BT's license require it to interconnect its network with those of other individually licensed carriers and to refrain from showing undue preference or undue discrimination in relation to its obligations under its license.³¹³

(b) *Nondiscrimination and publication.* BT's license also requires it to offer standard interconnection services at standard nondiscriminatory prices and to publish interconnection agreements or an adequate description of them.³¹⁴ Pursuant to Conditions 13 and 16B of BT's license, OFTEL, the U.K. telecommunications regulator, establishes standard charges based on BT's costs for interconnection services provided by BT to other operators. These charges must be offered to all operators on a nondiscriminatory basis, and they must be reflected by BT as internal transfer charges in BT's rates for its own retail services that employ the same elements of the BT network. In addition, Conditions 17B and 17C prohibit BT from discriminating among other operators, or between itself and other operators, in the quality of interconnection or private circuit services provided to other operators.³¹⁵

(c) *Interconnection charges.* As evidence of the reasonableness of U.K. interconnection prices, BT/MCI point to a consultant's study finding that BT's prices for interconnection in 1995 were the lowest of six countries studied.³¹⁶ OFTEL has proposed a new interconnection regime that would introduce long-run incremental cost-based (LRIC) prices beginning in October 1997 and would, according to the applicants, result in a "significant reduction in its interconnection

³¹³ BT/MCI application at 24. The applicants point out that the Commission has previously recognized that "these conditions make explicit the U.K. regulatory authorities' commitment to ensure that BT's competitors are able to interconnect their networks with BT's local exchange network." *Id.* (citing ACC Global Corp. and Alanna Inc., *Memorandum Opinion, Order and Certification*, 9 FCC Rcd 6240, 6252 (1994) (ACC/Alanna)).

³¹⁴ BT/MCI application at 24. In the United Kingdom, a standard service is a service which a carrier has requested from BT and which BT is required to provide under Condition 13 of its license. Generally, the charges payable for each standard service are determined by OFTEL. BT must publish and update the full list of standard services, which must identify the charges to be paid by a carrier for each standard service, whether determined by OFTEL or not. *See* OFTEL Explanatory Document, *Interim Charges for BT's Standard Services for Year Ending 31 March 1998*, ¶¶ 10-19 (July 1997); BT/MCI application at 24, n.41.

³¹⁵ BT/MCI application at 25-26.

³¹⁶ *Id.* at 27 (citing Ovum, Ltd., *An International Comparison of Interconnect Prices - A Report to BT*, (Feb. 1996)). Countries included in this study were Australia, Japan, New Zealand, Sweden, the United Kingdom, and the United States.

prices."³¹⁷ According to OFTEL, the use of LRIC will reduce interconnection charges by about ten to twenty percent on average.³¹⁸ Under the new regime, OFTEL would continue to require BT to offer the same charges to all operators and to use these charges as the basis for its internal transfer charges.³¹⁹

(d) *Openness of U.K. local and intercity markets.* BT/MCI assert that the openness of the U.K. local and intercity markets is a further indication that U.K. interconnection charges are fair and reasonable.³²⁰ The U.K. local market has a "wide variety of established entities offering alternatives to BT service at reasonable prices."³²¹ In addition, "the lack of *de jure* restrictions on intercity competition and the market penetration that BT's competitors have already achieved demonstrates that U.S. companies have effective competitive opportunities in the United Kingdom's national long distance market."³²²

219. Contentions of the Parties. Several parties dispute BT/MCI's claims. Frontier maintains that BT's interconnection rates remain above cost. In addition, it claims that new entrants face lengthy delays to interconnect their switches to BT's domestic network.³²³

220. FT generally asserts that BT is legally obligated in the United Kingdom to interconnect with other carriers on a nondiscriminatory basis.³²⁴ However, FT urges the Commission to limit its inquiry to whether the interconnection pricing methodology is "rational" and refrain from making any absolute price comparisons. FT also argues that BT/MCI's demonstration of the openness of the U.K. local and intercity markets is unnecessary to the ECO analysis.³²⁵

³¹⁷ BT/MCI opposition & reply at 12, n.26. OFTEL recently announced that implementation would be delayed until October 1997. *OFTEL Network Charges*, *supra* note 158.

³¹⁸ *OFTEL 1997 Network Charges* at 5.21.

³¹⁹ BT/MCI application at 27.

³²⁰ *Id.* at 27-43.

³²¹ *Id.* at 37.

³²² *Id.* at 43.

³²³ Frontier comments at 2-3.

³²⁴ FT comments at 15-20.

³²⁵ *Id.* at 18-19.

221. Bell Atlantic and BellSouth/PacTel/SBC argue that BT/MCI's application fails to demonstrate that reasonable and nondiscriminatory charges, terms and conditions for interconnection exist in the United Kingdom. Indeed, Bell Atlantic charges that BT/MCI cannot make this demonstration because BT is not subject to many of the requirements imposed on incumbent carriers in the United States, including the requirement to interconnect with non-facilities-based local service providers. Bell Atlantic and BellSouth/PacTel/SBC assert that BT is not subject to the same total element long-run incremental cost (TELRIC) pricing standards that the Commission has adopted for U.S. carriers,³²⁶ and that BT is permitted to recover fixed as well as variable costs.³²⁷ BellSouth/PacTel/SBC acknowledge that OFTEL may implement price caps for interconnection, but assert that the United Kingdom's proposed regime would not be as protective of competition as FCC regulations and would require OFTEL to rely on other powers to deal effectively and quickly with potential abuses of market power.³²⁸

222. BT/MCI reply that none of the petitions or comments undermine their contention that the United Kingdom offers U.S. carriers reasonable and nondiscriminatory charges, terms and conditions for interconnection to domestic facilities for termination and origination of international services.³²⁹

223. In its reply comments, the U.K. Government asserts that BT's license requires it to provide nondiscriminatory cost-oriented interconnection services to other operators. It also states that BT is required to charge itself for its own use of its network the same rate it charges other operators.³³⁰ Since March 1995, OFTEL has set most of BT's interconnection charges. The U.K.

³²⁶ Bell Atlantic petition to deny at 2-3.

³²⁷ BellSouth/PacTel/SBC comments at 7. U S West also argues that, given BT/MCI's statements about the effectiveness of the U.K. regime, MCI should be estopped from making what U S West views as contradictory arguments in opposition to future BOC applications under Section 271 of the Communications Act to provide in-region interLATA services. U S West comments at 3. In general, the Commission discourages parties from making contradictory arguments in different proceedings. If a party makes contradictory arguments across different Commission proceedings, and these contradictions are brought to the Commission's attention, the Commission will weigh heavily that party's behavior when considering its arguments.

³²⁸ BellSouth/PacTel/SBC comments at 9-10.

³²⁹ BT/MCI opposition & reply at 11-12. BT/MCI assert that the Commission previously reached this conclusion when we found that the United Kingdom afforded U.S. carriers equivalent opportunities to resell international private lines for the provision of switched services. *Id.* (citing *Foreign Carrier Entry Order*, 11 FCC Rcd at 3892; *ACC/Alanna*, 9 FCC Rcd at 6252).

³³⁰ U.K. Government reply comments at 19. According to the U.K. Government, OFTEL currently arrives at BT's interconnection charges as follows: "Each year, [OFTEL] specifies the charge for each service on BT's standard list of interconnection services on the basis of BT's fully allocated historic costs. These costs are drawn

Government further notes that OFTEL has proposed to: (1) change the cost base for determining interconnection charges from fully allocated costs to LRIC; (2) cease annual determinations of interconnection charges and establish a broad framework under which BT will have increased pricing flexibility, depending on the competitiveness of the service; and (3) publish transparent guidelines on how OFTEL will approach complaints about anti-competitive charging for interconnection services.³³¹

224. Discussion. We find that reasonable and nondiscriminatory interconnection terms and conditions are available to U.S. carriers in the United Kingdom with respect to the provision of international services. We first examined the United Kingdom's interconnection regime in *ACC/Alanna*, in which we found that the United Kingdom afforded U.S. carriers equivalent opportunities to resell international private lines for the provision of switched services.³³² In reaching this conclusion, we determined that Conditions 13 and 17 of BT's license oblige it to interconnect its network with those of other individually licensed carriers without "undue preference or undue discrimination" in fulfilling these obligations.³³³ We also noted that BT was required to offer a standard interconnection arrangement to U.K. licensed carriers on a nondiscriminatory and published basis.³³⁴ We therefore concluded that, for the purposes of an

from the Financial Statements - regulatory accounts - which BT is required to produce and publish and which show the activities of BT Network [wholesale services] as a business separate from BT Retail and other regulatory businesses. BT is required to attribute network costs to unbundled components of the network according to the principles set out in published Accounting Documents. The unbundled component costs are set out in the Financial Statements which also show how the costs of interconnection services are built up from the individual component costs. OFTEL excludes from its calculations (and BT's determined charges) costs incurred by BT that OFTEL considers are not relevant to the provision of network services." *Id.* at 20.

³³¹ *Id.* at 20-21; see also *OFTEL 1997 Network Charges*, *supra* note 158. For services determined by OFTEL to be "competitive," BT will be free to set its own rates (subject to the generally applicable provisions of its license, *e.g.*, conditions which prohibit discrimination and undue preference). For "prospectively competitive services," defined by OFTEL as those which are likely to become competitive during the period of controls, OFTEL will set a safeguard cap of the Retail Price Index (similar to the U.S. Consumer Price Index) + 0 percent. For bottleneck and non-competitive services (such as call termination), OFTEL will set price caps on two separate baskets of interconnection services to ensure that charges reflect efficiencies that BT could be expected to achieve in reducing its network costs. The weighted average charge for services in the baskets will be allowed to increase by no more than RPI-X ("X" has not yet been determined) each year. *OFTEL 1997 Network Charges* at 21.

³³² See *ACC/Alanna*, 9 FCC Rcd at 6248-6249.

³³³ *Id.* at 6248, 6252-6255.

³³⁴ *Id.* at 6254. Pursuant to Condition 16A, BT is required to publish new interconnection agreements, amendments to existing agreements, or, in the event that a contracting carrier requests confidentiality, an adequate description of the interconnection agreement, including the precise method of calculation of charges so that a third party can calculate the charges. *Id.* at n.42.

equivalency evaluation, the nondiscriminatory offering of published standard interconnect arrangements at standard prices was an adequate alternative to our regulatory approach of requiring tariffed service offerings and rates.³³⁵

225. We find that both the current and the proposed future interconnection regimes satisfy the interconnection element of the ECO test. Although Bell Atlantic and BellSouth/PacTel/SBC are correct in pointing out that there are differences between the U.K. and the U.S. regimes, we do not require, for purposes of our ECO analysis, that a foreign interconnection regime be identical to our own.³³⁶ Rather, we look to see whether U.S. carriers have the opportunity to obtain interconnection on reasonable and nondiscriminatory terms for the provision of international facilities-based service. We base our finding here on the following factors: (1) the legal requirement that BT provide interconnection upon request at rates that are fair and reasonable in relation to cost; (2) the legal requirement that BT publish its interconnection agreements, either in full or in adequate summary form; (3) public and private remedies for anti-competitive conduct, and the apparent willingness of OFTEL to utilize such public remedies; (4) the successful negotiation of a number of interconnection agreements; and (5) competition in the U.K. international and intercity facilities markets.³³⁷

226. BT's relatively low interconnection charges further demonstrate that interconnection is available in the United Kingdom at reasonable terms. Although the precise cost per minute of the interconnection arrangement depends on many variables,³³⁸ it is possible to make a rough estimate of the cost. The combined transport and termination charges average one

³³⁵ *Id.* at 6254.

³³⁶ These carriers appear to argue that, in order for BT to gain entry into the U.S. market, it must satisfy those requirements of Section 271 of the Communications Act that apply to BOCs seeking to provide in-region interLATA services. This argument is misplaced. Section 271, by its terms, applies only to BOCs seeking to provide in-region interLATA services. *See* 47 U.S.C. § 271.

³³⁷ We note that the International Bureau found the existence of such factors to be sufficient to satisfy the interconnection element of the ECO test in *Telia North America, Inc., Order, Authorization and Certificate*, File No. ITC 96-545, DA 97-511, at ¶ 20 (Int'l Bur., rel. Mar. 11, 1997).

³³⁸ The typical international call that terminates in the United Kingdom transits several different types of facilities before reaching the end user. In a typical arrangement, 2 Mbps backhaul circuits can be leased from the Land's End cable station to the customer's switch nearest BT's international gateway switch in London. From the customer's switch, the customer can arrange the delivery of traffic to end users anywhere on BT's network. Delivery involves leasing a 2 Mbps circuit between the customer switch and a BT domestic switch and paying BT distance-sensitive per-minute charges for conveyance of traffic to the end user's local exchange and for termination at the end user's location. Variables include the exchange rate, the amortization period for nonrecurring charges assessed by BT for circuit installation, whether the leased circuit has a speed of 2 Mbps or 140 Mbps, and the traffic fill amount on the leased circuit.

to two cents per minute, and the cost of leased circuits adds only a few cents per minute more.³³⁹ This cost compares favorably with the cost of interconnection in most other countries. A well-engineered arrangement enables a customer to terminate calls from Land's End to a BT customer in London for about five cents a minute.

227. In sum, based on the record before us, we find that the United Kingdom offers U.S. carriers reasonable and nondiscriminatory charges, terms and conditions for interconnection to domestic facilities for termination and origination of international services.

c. Competitive Safeguards

228. The third factor we examine in our ECO analysis is whether safeguards exist in the foreign country to protect against anti-competitive practices. The safeguards we consider important include: (1) existence of cost-allocation rules to prevent cross-subsidization; (2) timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities; and (3) protection of carrier and customer proprietary information.³⁴⁰

i. Cost Allocation Rules

229. We first examine whether the United Kingdom has cost allocation rules in place to protect against cross-subsidization. BT/MCI state that in March 1995, OFTEL and BT agreed to Condition 20B which prescribes accounting separation between specified BT "regulatory businesses."³⁴¹ For these regulatory businesses, BT is required to produce and publish separated and audited financial statements on both an interim and annual basis. BT/MCI assert that Condition 20B also gives OFTEL the power to investigate any alleged subsidy or cross-subsidy among any of these operations (*e.g.*, between BT's network and retail operations) and to direct BT to redress any such subsidy.³⁴²

³³⁹ Charges depend on distance and the number of BT tandem switches required to convey traffic from the customer's switch to a BT end user.

³⁴⁰ *Foreign Carrier Entry Order*, 11 FCC Rcd at 3893.

³⁴¹ BT/MCI application at 45. These "regulatory businesses" are broken down along BT's different lines of business as follows: Access Business (interconnection services), Network Business (wholesale services), Retail Systems Business (retail services), Apparatus Supply Business (equipment services), Supplemental Services Business and 'Residual' Business (enhanced and value-added service), as well as certain subdivisions of some of those operations. See BTNA *ex parte* filing entitled "Introduction to Regulation of Telecommunications in the United Kingdom with Particular Reference to BT" at 15-16 (Dec. 16, 1996).

³⁴² BT/MCI application at 45.

230. FT notes that BT/MCI's application does not provide any evidence of actual compliance by BT with the cost accounting rules or the extent to which OFTEL has undertaken any investigations or ordered remedial action. Nonetheless, FT argues the existence of the rules alone should suffice to demonstrate the presence of this safeguard.³⁴³

231. We find that cost allocation rules exist in the United Kingdom to protect against cross-subsidization. Under Condition 20B of its license, BT is required to publish separate and audited financial statements for its different regulatory businesses, and OFTEL has enforcement powers to redress any alleged cross-subsidy. As FT notes, the fact that there is no evidence of compliance by BT or enforcement by OFTEL is not determinative. There is no assertion or evidence in the record that OFTEL would not undertake an investigation or order remedial action if presented with a complaint.

ii. Disclosure of Network Information

232. We next address whether competitive safeguards exist in the United Kingdom to ensure disclosure of BT network information required for interconnection. BT/MCI state that BT and OFTEL have agreed to a "Code of Practice on Network Information Publishing Principles" that governs the disclosure of technical information regarding BT's network. Under this Code, BT is required to publish periodically a general description of its telephony network structure, and to publish quarterly a document detailing the types of numbering ranges of BT switching systems currently in service within each local numbering area, the specific town locations of each controlling switch, and any planned changes. BT/MCI also state that BT must provide details regarding its network plans that will affect interconnection for the next two years and, upon request, give specific information to individual operators.³⁴⁴ FT argues that the requirement that BT publish technical information regarding its network is sufficient and that it would be inappropriate and unnecessarily burdensome for the Commission to engage in an analysis of precisely what information is necessary.³⁴⁵

233. We find that there are adequate requirements in the United Kingdom to ensure that carriers receive the technical information necessary to interconnect with BT. The disclosure requirements implemented in the 1994 Code of Practice serve this purpose by requiring timely and nondiscriminatory disclosure of technical information needed to use or interconnect with BT's facilities. Moreover, no party has alleged that any carrier has been denied technical information

³⁴³ FT comments at 20-21.

³⁴⁴ BT/MCI application at 45-46.

³⁴⁵ FT comments at 20-21.

needed to operate a telecommunications network in the United Kingdom. Finally, we note that OFTEL has broad ability to act quickly against any conduct that distorts competition, such as the withholding of essential technical information needed to interconnect.³⁴⁶

iii. Safeguards for Carrier and Customer Proprietary Information

234. The final competitive safeguard we examine is whether carrier and customer proprietary information is protected in the United Kingdom. BT/MCI state that Condition 41A of BT's license provides that BT must enter into confidentiality agreements with any licensed operator with whom BT is discussing interconnection terms and conditions. Also, executed interconnection agreements must contain confidentiality requirements. According to BT/MCI, the legal and practical effect of these provisions (which include provisions on the use of confidential information, the standard of care in protecting information, and the requirement that confidential information only be used for the purpose for which it was disclosed) has been to erect "fire walls" between BT's wholesale and retail businesses. BT/MCI thus assert that information BT obtains to facilitate interconnection cannot be used by other divisions of BT.³⁴⁷

235. Similarly, BT/MCI argue that under Conditions 38 and 38A of BT's license, BT must produce and observe Codes of Practice on the disclosure of customer information. According to BT/MCI, the Codes prohibit BT from using such information to gain an unfair advantage and state that any information a customer provides must not be disclosed outside the particular BT division involved without the customer's prior consent. Any intentional disclosure outside the course of duty is a criminal offense under Section 45 of the Telecommunications Act 1984.³⁴⁸

236. FT states that the Commission should not require that all the safeguards cited in BT/MCI's application be present in order to meet the Commission's ECO standard.³⁴⁹ Sprint and DT do not address specific conditions in the United Kingdom. Rather, Sprint argues that there are special dangers posed by the vertical integration of BT and MCI, and therefore urges the Commission to prohibit the use of confidential information of non-affiliated U.S. carriers obtained by the new Concert or its subsidiaries to benefit MCI.³⁵⁰ Similarly, DT argues that a merged

³⁴⁶ See *infra* ¶ 245 (discussing the Fair Trading Condition in BT's license).

³⁴⁷ BT/MCI application at 46-47.

³⁴⁸ *Id.* at 47-48.

³⁴⁹ FT comments at 22.

³⁵⁰ Sprint comments at 8.

entity's bottleneck facilities will extend beyond the terms of BT's U.K. license and therefore the Commission should impose broad confidentiality requirements to protect customer and competitor proprietary information.³⁵¹

237. The record shows that BT has an affirmative obligation under U.K. laws and regulations to protect carrier and customer proprietary information in the United Kingdom. We believe the confidentiality requirements imposed under Condition 41A of BT's license are sufficient to protect carrier information. Likewise, BT must produce and observe Codes of Practice on the disclosure of customer information by its employees engaged in the systems (network) business and the supplemental services (value-added and data) Business. The Codes prohibit BT from using such information to gain an unfair advantage and state that any information a customer provides must not be disclosed outside the relevant BT division without the customer's prior consent. Any intentional disclosure outside the course of duty is a criminal offense under Section 45 of the Telecommunications Act 1984. The prohibition against disclosing information such as the amount of a bill, called numbers, call duration, and services used applies to both carrier and customer information.³⁵² We will address Sprint's and DT's arguments regarding the potential dangers of the vertical integration of BT and MCI in the "Other Matters" section below.

238. In sum, we find that the competitive safeguards implemented in the United Kingdom are sufficient to protect U.S. carriers against anti-competitive practices, and to ensure proper cost allocation, timely and nondiscriminatory disclosure of network technical information, and protection of carrier and customer proprietary information against unauthorized disclosure.

d. Regulatory Framework

239. The fourth factor we review under the ECO analysis is whether there is an effective regulatory framework in the relevant destination market to develop, implement, and enforce legal requirements, interconnection arrangements and other competitive safeguards. The focus is on whether there is separation between the foreign regulator and the operator of international facilities-based services, and whether there are fair and transparent regulatory procedures in the destination market.³⁵³

³⁵¹ DT comments at 14.

³⁵² BT/MCI application at 47-48.

³⁵³ *Foreign Carrier Entry Order*, 11 FCC Rcd at 3894.

240. BT/MCI state that the United Kingdom has an effective and independent telecommunications regulator,³⁵⁴ OFTEL, which has a new regulatory tool, the Fair Trading Condition (Condition 18A), in BT's license. Condition 18A broadly prohibits any act or omission that could prevent, restrict or distort competition and gives OFTEL, if it suspects a violation, the power to issue an order, either *sua sponte* or in response to a complaint, that takes immediate effect.

241. No petitioner or commenter disputes the independence of OFTEL. FT, however, disagrees with BT/MCI's assertion that the Commission found in the *Sprint Declaratory Ruling*³⁵⁵ that the United Kingdom has an effective regulatory authority that is independent of BT and employs fair and transparent procedures.³⁵⁶

242. We find that DTI and OFTEL, the U.K. governmental agencies responsible for telecommunications policymaking and licensing, are sufficiently separate from the carriers they regulate.³⁵⁷ DTI is a U.K. Government Ministry that issues licenses, defines the telecommunications system that the holder is allowed to run, and specifies the services that can be provided. DTI also retains primary responsibility for formulating and implementing general government telecommunications policies.³⁵⁸

243. OFTEL, the U.K. governmental agency responsible for the administration of the U.K.'s regulatory policies, is an independent regulatory body with no connection to any U.K. operator. OFTEL is a non-ministerial department not subject to direct control by the majority government. OFTEL is headed by a single individual, the Director General of Telecommunications, who is appointed for a term by the Secretary of State for DTI. OFTEL's Director General has the statutory duty to ensure that licensees comply with the conditions incorporated into their licenses, including conditions relating to competition and fair trading.³⁵⁹ OFTEL's responsibility for the day-to-day administration of the regulatory regime has established

³⁵⁴ BT/MCI application at 43.

³⁵⁵ *Sprint Declaratory Ruling*, *supra* note 92.

³⁵⁶ FT comments at 22-24.

³⁵⁷ The U.K. Government's recent decision to redeem its "special share" in BT further demonstrates that there is sufficient separation between the U.K. Government and BT. *See infra* Section V.A.2.d.

³⁵⁸ *See C&W Order*, 11 FCC Rcd at 16496.

³⁵⁹ *See OFTEL, A Guide to the Office of Telecommunications* (Nov. 1996) (*OFTEL Guide*).

it as the primary agency in implementing competition policy in the U.K. telecommunications market.³⁶⁰

244. We also find U.K. regulatory procedures to be fair and transparent. OFTEL monitors and enforces license conditions and, when necessary, initiates modifications to such conditions through a public consultative process. These license conditions include detailed descriptions of prohibited activity that reflect prior experience concerning anti-competitive conduct in the industry.³⁶¹ OFTEL may issue a provisional enforcement order taking immediate effect to deal with violations of license conditions. An OFTEL order can require a licensee to desist from conduct, or can require affirmative conduct by the licensee if necessary to comply with a condition.³⁶²

245. Because OFTEL's enforcement powers are defined by the terms of the relevant license conditions, the scope of these conditions is critical to OFTEL's effectiveness. Since January 1, 1997, BT and any other carrier found to be "well established" is subject to the Fair Trading Condition, described above.³⁶³ The Fair Trading Condition generally prohibits "any act or omission which has, or is intended to have, or is likely to have, the effect of unfairly preventing, restricting, or distorting competition" in the U.K. telecommunications markets.³⁶⁴ It is designed to prevent abuses of market power by a dominant operator, or agreements that restrict, distort or prevent competition in the field of telecommunications. The lawfulness of OFTEL's insistence on this condition was affirmed by Britain's High Court in December 1996. The Fair Trading Condition strengthens OFTEL's ability to deal with anti-competitive conduct.

246. In sum, we find that there is an effective regulatory framework in the United Kingdom that develops, implements and enforces legal requirements, interconnection and other

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² For example, in order to ensure compliance with a license condition requiring interconnection, OFTEL may make a determination setting out the terms of interconnection between two licensees if they cannot reach agreement between themselves. See *OFTEL Guide*, *supra* note 360.

³⁶³ See *supra* ¶ 240. OFTEL has identified a range of factors that tend to indicate whether an operator has sufficient market power to be determined to be a "Well Established International Operator." These factors include: market share; fluctuations in market share; number of competitors; entry barriers; extent of vertical integration; the countervailing powers of buyers; the degree of effective entry to the market; evidence of collusion or price leadership; and high profits. OFTEL, *Guidelines for the Operation of International Facilities License* (Nov. 1996).

³⁶⁴ OFTEL, *Pricing of Telecommunications Services From 1997* (June 1996).

competitive safeguards. Accordingly, we find that no actual or *de facto* conditions exist that warrant a denial under the ECO analysis for the transfer of MCI's Section 214 authorizations.

2. Section 310(b)(4) Licenses

247. By virtue of the proposed merger, BT would acquire a controlling interest in subsidiaries of MCI that hold radio licenses, including common carrier radio licenses.³⁶⁵ Section 310(b)(4) of the Act establishes a 25 percent benchmark applicable to foreign investment in and ownership of the parent company of a U.S. common carrier radio licensee, but gives the Commission discretion to allow higher levels of foreign ownership if the Commission determines that such ownership would not be inconsistent with the public interest.³⁶⁶

248. In the *Foreign Carrier Entry Order*, we found that an important part of our determination under Section 310(b)(4) is an examination of whether effective competitive opportunities exist in the particular radio-based service in the foreign entity's "home market" that is analogous to the service in which the foreign entity seeks to participate in the U.S. market.³⁶⁷

a. Appropriate Home Market

249. First, we must determine the appropriate home market for comparison.³⁶⁸ BT is registered under the laws of England and Wales; its principals, officers, and directors are U.K. citizens; its world headquarters is currently in the United Kingdom, although the merged company will have dual headquarters in the United States and the United Kingdom; the majority of its tangible property is in the United Kingdom; and the United Kingdom is the country from which it

³⁶⁵ BT/MCI application at 53. BT/MCI also proposes to transfer some non-common carrier wireless licenses. No party raises any concerns with respect to these licenses. Accordingly, we find it is in the public interest to approve the transfer of these non-common carrier wireless licenses.

³⁶⁶ 47 U.S.C. § 310(b)(4).

³⁶⁷ *Foreign Carrier Entry Order*, 11 FCC Rcd at 3949.

³⁶⁸ In determining a foreign entity's appropriate home market we need to identify: (1) the country of its incorporation, organization, or charter; (2) the nationality of its investment principals, officers, and directors; (3) the country in which its world headquarters is located; (4) the country in which the majority of its tangible property, including production, transmission, billing information and control facilities, is located; and (5) the country from which it derives the greatest sales and revenues from its operations. If all five factors indicate that the same country should be considered to be the entity's home market, we presume that country to be the entity's home market. This presumption may be overcome only on the basis of clear and convincing evidence. *Id.* at 3951-3952.

derives its greatest sales and revenues from its operations.³⁶⁹ Given BT's overwhelming nexus to the United Kingdom, we find that the United Kingdom is the appropriate home market for comparison.

b. Appropriate Market Segment

250. Second, we must determine the appropriate market segment for comparison. MCI currently controls common carrier radio licenses for point-to-point microwave, fixed satellite (earth station), and air-ground radiotelephone services. For each service, we will determine the appropriate market segment for comparison.³⁷⁰

251. According to BT/MCI, no comparable service to common carrier point-to-point microwave services is available in the United Kingdom, but terrestrial microwave facilities operating in ranges from 4-28 GHz are used in the United Kingdom to provide trunk networks and fixed access services. As in the United States, the United Kingdom's fixed- satellite service operates in the C-band, Ku-band, and Ka-band and is used for voice, video, and data service offerings.³⁷¹ Finally, the U.K.'s terrestrial flight telephony service (TFTS) is a radio service in the 800 MHz band in which operators are authorized to provide radio telecommunications service for a fee to subscribers in aircraft. Thus, TFTS is comparable to air-ground radiotelephone service in the United States.³⁷² No one has commented on the comparable services outlined by the applicant. We find that U.K. terrestrial microwave services are comparable to U.S. common carrier point-to-point microwave services; that U.K. fixed satellite services are comparable to U.S. fixed satellite services; and that U.K. TFTS is comparable to U.S. air-ground radiotelephone service.

c. De Jure and De Facto Restrictions

252. Having identified the relevant comparable service within the appropriate home market, we can conduct our ECO analysis. If we determine that no *de jure* restrictions exist and

³⁶⁹ BT/MCI application at n.129.

³⁷⁰ On May 6, 1997, the Wireless Telecommunications Bureau approved applications to assign two public coast stations from MCI-affiliate Western Union International, Inc. to Globe Wireless, Inc. See Applications of Globe Wireless, Inc., *Memorandum Opinion and Order*, File Nos. 878286, 878287, DA 97-957 (Wireless Telecom. Bur., rel. May 12, 1997), *recon. pending*. MCI and its affiliates hold no other public coast stations. Consequently, this *Order* does not make any ECO finding with respect to public coast stations.

³⁷¹ See *supra* notes 117, 118.

³⁷² BT/MCI application at 54.

U.S. interests are allowed to hold a controlling interest in a provider of the relevant service in the relevant home market, then the effective competitive opportunities analysis justifies placing no limit on the level of indirect alien ownership in the U.S. service provider, absent significant *de facto* barriers.³⁷³

253. According to the applicants, the appropriate U.K. licenses for comparison are radio licenses issued under the Wireless Telegraphy Act 1949 for use of radio frequencies and licenses issued under the Telecommunications Act 1984 for the running of systems required to provide radio-based services. These statutes, according to the applicants, contain no foreign ownership restrictions.³⁷⁴ No one has disputed BT/MCI's claims. We find that no *de jure* restrictions exist in the United Kingdom, and that U.S. interests are allowed to hold a controlling interest in companies licensed to provide terrestrial microwave, fixed satellite services, and TFTS in the United Kingdom.

254. BT/MCI also argue that there are no *de facto* limitations on the provision of terrestrial microwave, fixed satellite services, and TFTS by U.S. entities. BT/MCI argue that, in addition to fair and reasonable terms for interconnection, there are sufficient competitive safeguards and an effective regulator. Moreover, BT/MCI argue that DTI's Radiocommunication Agency, which allocates spectrum and assigns radio licenses to civilian users, has recognized that radio spectrum is critical to the expansion of competition in the U.K. telecommunications markets, and is engaged in an ongoing consultation on ways to manage the radio spectrum to ensure that spectrum scarcity does not become a barrier to radio-dependent services. Finally, BT/MCI assert that a substantial number of U.S. and foreign companies hold licenses under the Wireless Telegraphy Act 1949.³⁷⁵

255. Based on the record before us and our findings above in our Section 214 ECO analysis, we find that no legal or practical barriers exist in the United Kingdom for a U.S. entity to hold a controlling interest in a provider of the relevant services in the United Kingdom.³⁷⁶ We thus conclude that the United Kingdom affords U.S. entities effective competitive opportunities under Section 310(b)(4) of the Act.

d. The U.K. Government's "Special Share" in BT

³⁷³ *Foreign Carrier Entry Order*, 11 FCC Rcd at 3954.

³⁷⁴ BT/MCI application at 55.

³⁷⁵ *Id.* at 56-58.

³⁷⁶ *See supra* Section V.A.1. (finding ECO for Section 214 applications).

256. Only one commenter, WorldCom, raised an issue regarding the transfer of control of MCI's radio licenses. The issue raised involves the U.K. Government's "special share" in BT. BT's articles of incorporation provide for one "special share" to be held by the U.K. Government.³⁷⁷ WorldCom argues that, because the U.K. Government has a special share in BT, BT is prohibited under Section 310(a) of the Act³⁷⁸ from assuming control of MCI's radio licenses unless the U.K. Government relinquishes its special share.³⁷⁹

257. On September 10, 1997, the U.K. Government redeemed its special share in BT.³⁸⁰ Through the redemption, the U.K. Government terminated its shareholding in BT and thus eliminated any role it might otherwise have had in BT's corporate events as a special shareholder. We thus find that WorldCom's concern is moot.

3. Cable Landing Licenses

258. Background. In two recent decisions, we explained that in examining the application of a foreign carrier or its affiliates to land and operate a submarine cable system under the Cable Landing License Act, we determine whether the applicant or its affiliate has market power in the destination market of the relevant cable.³⁸¹ If we determine that an applicant does have market power in the destination market, we examine the legal or *de jure* ability of U.S. carriers to have ownership interests in submarine cables landing in that market. If no explicit legal restrictions on ownership exist, we examine other factors to determine whether U.S. carriers have the practical or *de facto* ability to have ownership interests in cable facilities in the destination market(s).

³⁷⁷ BT/MCI application, Vol. 3, Part III.E. Under the terms of the special share, the special shareholder (*i.e.*, the U.K. Government) must consent in writing to any proposals for amending, removing, or altering certain provisions of BT's articles of incorporation. These include provisions regarding special share rights, limitations on any individual shareholder owning 15 percent or more of BT, and directors (requiring, for example, that any director who is executive chairman of BT or chief or joint chief be a British citizen). The special shareholder is also entitled to certain rights with regard to major corporate events and to receive notice of, attend, and speak at general meetings.

³⁷⁸ 47 U.S.C. § 310(a) (stating that a radio license issued under Title III "shall not be granted to or held by any foreign government or the representative thereof").

³⁷⁹ WorldCom comments at 2, 19.

³⁸⁰ DTI Press Release, "Government Redeems the BT Special Share" (Sept. 10, 1997).

³⁸¹ *See TLD Order, supra* note 52 (applying effective competitive opportunities analysis under the Cable Landing License Act to a common carrier cable system); *C&W Cable Landing License, supra* note 52 (applying effective competitive opportunities analysis under the Cable Landing License Act to a private cable).

259. Finally, we determine whether there are other factors that weigh in favor of, or against, granting this application under the Cable Landing License Act. We will make this determination whether or not the applicant or its affiliate has market power in the destination market of the relevant cable.

260. Discussion. MCI holds ownership interests in numerous international submarine cable systems landing in the United States.³⁸² Several of these cable systems, including TAT-12/13, extend between the United States and the United Kingdom, among other countries. None of the cables in which MCI owns a joint interest lands in a country other than the United Kingdom in which BT controls or is affiliated with a foreign carrier with market power.

261. Having determined above that BT has market power in the destination market, we examine the legal or *de jure* ability of U.S. carriers to have ownership interests in submarine cables landing in the United Kingdom. With the recent grant of U.K. international facilities licenses to new entrants, U.S. carriers are able to construct and operate submarine cables landing in the United Kingdom. No party has suggested, and we have no indication, that there are any practical barriers to the landing of a submarine cable in the United Kingdom. Accordingly, we find that the United Kingdom affords U.S. carriers effective competitive opportunities to construct and own submarine cables and cable stations on the U.K. end.

262. The International Bureau informed the Department of State of this application.³⁸³ The Department of State, after coordinating with the Department of Commerce's National Telecommunications and Information Administration and with DoD, stated that it approves the transfer of control of MCI's and its subsidiaries' cable licenses to BT, subject to the Commission imposing two conditions.³⁸⁴ First, if the Commission does not accept the agreement among DoD, the FBI and MCI and BT (discussed below),³⁸⁵ the Department of State approval is subject to any cable landing station being at least 80 percent U.S.-owned. Second, any carrier seeking to provide a common carrier service through the acquisition or use of capacity on any cable on which MCI is a licensee must obtain Section 214 authorization. The Department of State also requests that the Commission notify it of any other filings under the Cable Landing License Act by

³⁸² BT/MCI application, Vol. 2, Part II.A.

³⁸³ Letter from Diane J. Cornell, Chief, Telecom. Div., Int'l Bur., FCC, to Steven W. Lett, Deputy U.S. Coordinator, Office of Int'l Communications and Information Policy, U.S. Department of State (Dec. 11, 1996). See 47 C.F.R. § 1.767(b); Exec. Order No. 10530, *reprinted as amended in* 3 U.S.C.A. § 301 at 1052 (1985).

³⁸⁴ Letter from Alan P. Larson, Assistant Secretary of State for Economic and Business Affairs, U.S. Department of State, to Peter Cowhey, Chief, Int'l Bur., FCC (July 28, 1997).

³⁸⁵ See *infra* Section V.B.2.

MCI or its subsidiaries, and provide an adequate opportunity for review and comment to the Commission, as appropriate.

263. As discussed in Section V.B.2. below, we condition our grant of the transfer of MCI's licenses to BT upon compliance with the agreement reached among DoD, the FBI and MCI and BT. Thus, we need not impose the cable station ownership restrictions mentioned by the Department of State. Also, Commission rules already require all carriers seeking to provide a common carrier service over a submarine cable or any other transmission facility to hold a Section 214 authorization from the Commission.³⁸⁶ Finally, under the Cable Landing License Act and accompanying Executive Order, we will notify the Department of State of any subsequent filings by MCI or its subsidiaries and provide an adequate opportunity for review and comment to the Commission, as appropriate.

³⁸⁶ 47 C.F.R. § 63.18.

264. After consideration of all of the relevant factors under our ECO analysis, we conclude that the United Kingdom offers effective competitive opportunities to U.S. carriers seeking to compete in each of the communications market segments that BT seeks to enter in the United States.

B. Additional Public Interest Factors Under the *Foreign Carrier Entry Order*

265. Under the framework set forth in the *Foreign Carrier Entry Order*, we consider other factors that are relevant to our overall public interest analysis for foreign carrier entry. These factors include cost-based accounting rates, and any national security or law enforcement issues, foreign policy, or trade concerns raised by the Executive Branch. We address these factors below. In addition, we consider the competitive impact of a foreign carrier's entry into the U.S. marketplace, which we have addressed above in Section IV, "Public Interest Analysis of the Merger."

1. Cost-based Accounting Rates

266. Background. The first additional public interest factor we consider is the presence of cost-based accounting rates. When BT/MCI submitted its application, the per-minute settlement rate³⁸⁷ used to calculate net settlement payments for imbalanced minutes on the U.S.-U.K. route for traffic terminated by BT was .075 SDR (\$0.11). Recently, the International Bureau approved a new, reduced settlement rate for this traffic of .05 SDR (\$0.07).³⁸⁸ Consistent with our International Settlements Policy (ISP), these rates must be made available to all U.S. carriers.³⁸⁹

267. As part of our ongoing effort to move accounting rates to more cost-based levels, we recently set caps on the settlement rates that U.S. international carriers may pay foreign

³⁸⁷ The settlement rate refers to each carrier's portion of the accounting rate. In almost all cases, the settlement rate is equal to one-half of the negotiated accounting rate. At settlement, each carrier nets the minutes of service it billed against the minutes the other carrier billed. The carrier that billed more minutes of service pays the other carrier a net settlement payment calculated by multiplying the settlement rate by the number of imbalanced minutes.

³⁸⁸ AT&T Request for Modification, ISP-97-M-207 (Apr. 4, 1997); WorldCom Request for Modification, ISP-97-M-222 (Apr. 10, 1997); Sprint Request for Modification, ISP-97-M-244 (Apr. 21, 1997); MCI Request for Modification, ISP-97-M-303 (May 8, 1997). None of these requests were opposed. Thus, under the Commission's rules, all were granted automatically 21 days after they were filed. 47 C.F.R. § 64.1001. These rates apply to all existing switched services, including mobile telephony, retroactively from April 1, 1997.

³⁸⁹ See *infra* Section VI.D.

carriers for the termination of switched traffic from the United States to other countries.³⁹⁰ As of January 1, 1999, a U.S. international carrier may pay no more than a settlement rate of \$0.15 to a carrier in the United Kingdom.³⁹¹ Moreover, as one of the conditions imposed on a carrier's authorization to provide international facilities-based services from the United States to an affiliated market, the International Bureau may, upon a finding of competitive distortion in the U.S. telecommunications market, require the carrier to reduce its settlement rate to our "best practice" rate.³⁹²

268. Contention of the Parties. AT&T argues that U.S. carriers are dependent on BT to terminate their traffic in the United Kingdom, and thus BT possesses market power to establish above-cost settlement rates for the completion of U.S. calls in the United Kingdom.³⁹³ According to AT&T, BT's ability to maintain its settlement rates at above-cost levels while it competes in the U.S. market provides the means for BT to distort U.S. competition to benefit itself.³⁹⁴ AT&T asserts that the only solution to prevent the potential for such outbound price distortion in the United States is to require BT to establish settlement rates for U.S. calls based on its forward-looking, total service long-run incremental cost of terminating U.S. calls.³⁹⁵ AT&T estimates this cost to be no higher than \$0.05-\$0.06 per minute.³⁹⁶

269. BT/MCI respond that AT&T's arguments ignore the existence of effective competitive opportunities in the United Kingdom, which, according to BT/MCI, constrain BT's ability to distort competition on the U.S.-U.K. route. Moreover, according to BT/MCI, BT's current settlement rate approaches cost and is below both the Commission's applicable average

³⁹⁰ *Benchmarks Order*, *supra* note 91.

³⁹¹ *Benchmarks Order* at ¶ 111 & Appendix C.

³⁹² *Benchmarks Order* at ¶¶ 207-231. The current "best practice" rate is \$0.08. *See, e.g., id.* at ¶ 231.

³⁹³ AT&T states that the U.K. regulatory rules do not require BT to lower its settlement rates to cost-based levels or to offer its correspondents BT's domestic interconnection rates. AT&T comments at 12 n.16.

³⁹⁴ AT&T argues that unaffiliated U.S. carriers will be required to design their prices to recoup their costs, including the artificially high settlement rates they must pay to BT. BT, on the other hand, will be able to price MCI's U.S. outbound service based on BT's forward-looking, total service long run incremental costs to terminate MCI's minutes. (That MCI may pay a settlement rate to BT is, according to AT&T, merely a "left pocket-to-right pocket" transfer.) Thus, according to AT&T, BT/MCI's ability to price their outbound U.S. services at or near the effective settlement rate U.S. carriers pay will discourage entry and limit the participation of existing carriers on the U.S.-U.K. route. *Id.* at 14.

³⁹⁵ *Id.* at 12-19.

³⁹⁶ *Id.* at 13 n.20.

benchmark for the first tier of countries and the U.K. country-specific benchmark rates.³⁹⁷ The U.K. Government argues that a merged BT/MCI entity is both a reflection of the economic realities of a liberalized U.K.-U.S. route and, given an appropriate environment, a likely active agent for lower accounting rates.³⁹⁸

270. Discussion. As we stated in our *Foreign Carrier Entry Order*, we do not require cost-based accounting rates as a precondition to foreign carrier entry into the U.S. market.³⁹⁹ We do, however, consider cost-based accounting rates as an additional public interest factor. In April 1997, BT agreed to lower significantly its settlement rate with U.S. carriers. The current settlement rate of \$0.07 on the U.S.-U.K. route not only falls below the relevant benchmark, it is also lower than the "best practices" rate that we apply to remedy competitive distortions. Indeed, the settlement rate on the U.S.-U.K. route is one of the lowest in the world.⁴⁰⁰ Given this development, we find that there is little risk of the market distortion AT&T fears. We thus decline to require further reduction to meet AT&T's estimate of a LRIC-based rate on this route. Moreover, we note that, like the FCC, OFTEL publishes U.K. carrier accounting rates for all U.K. international routes, promoting greater transparency in the international accounting rate process. Accordingly, we conclude that BT's proposed settlement rate on the U.S.-U.K. route is a positive public interest factor.

2. Executive Branch Concerns

271. We next address the national security, law enforcement and trade concerns raised by the Executive Branch in this proceeding. The public interest analysis articulated in the Commission's *Foreign Carrier Entry Order* requires us to consider certain Executive Branch concerns (*i.e.*, national security, law enforcement, foreign policy or trade concerns) regarding BT's entry into the U.S. market. Although the Executive Branch's comments were limited to

³⁹⁷ BT also states that U.S. carriers have the ability to send U.K.-destined traffic to their own U.K. affiliates, CWC, and other U.S.-owned international facilities licensees in the United Kingdom. These licensees, according to BT/MCI, can terminate traffic to BT customers at interconnection rates that are cost-based and nondiscriminatory, and that soon will be based on LRIC. BT/MCI opposition & reply at 29.

³⁹⁸ U.K. Government reply comments at 34. The U.K. Government also notes that the Commission's benchmark proposal is another possible mechanism for bringing down accounting rates expressed concern that, on competitive routes, this may create an artificial target price higher than the competitive level. *Id.*

³⁹⁹ *Foreign Carrier Entry Order*, 11 FCC Rcd at 3899.

⁴⁰⁰ See also MCI Request for Modification, ISP-97-M-402 (July 2, 1997) (settlement rate of .045 SDR (\$0.06) with Telenordia AB of Sweden).

merger-related issues, we address them here consistent with the framework established in the *Foreign Carrier Entry Order*.⁴⁰¹

272. Comments. DoD states that there are national security issues raised by the proposed merger and transfer of control because of MCI's strong commercial relationship with DoD. As an example, DoD states that it has over 20 contracts with MCI, some of which are classified.⁴⁰² The Federal Bureau of Investigation (FBI) offers no comment on whether the proposed merger is in the public interest, but does express concern that national security and law enforcement considerations were not sufficiently addressed by BT/MCI's original application. The FBI states that it would be imprudent to authorize the merger without a more thorough discussion of these concerns.⁴⁰³

273. In *ex parte* communications, DoD, the FBI, and MCI (on behalf of MCI and BT) have informed the Commission that they have reached an agreement that resolves the national security, law enforcement, and public safety concerns that arise as a result of this merger.⁴⁰⁴ The parties have submitted a copy of the executed agreement (Agreement), and propose that the Commission impose a specific condition requiring compliance with the principal components of the agreement. In brief, the Agreement provides that certain MCI and Concert facilities be located in the United States. The Agreement also states that Concert's subsidiaries providing domestic telecommunications services are required to adopt and maintain policies to prevent the improper use of Concert's network and facilities with regard to unauthorized electronic surveillance and unauthorized access to, or use or disclosure of, customer proprietary network information. MCI and Concert have also agreed to adopt and maintain certain policies with regard to confidentiality and security of electronic surveillance orders and authorizations, orders, legal process, and statutory authorizations and certifications related to subscriber records and information. Finally, MCI and Concert have agreed to implement certain measures requiring

⁴⁰¹ In the *Foreign Participation* proceeding, the Commission has proposed significant modification to the framework established in the *Foreign Carrier Entry Order* for applications from carriers from WTO-member countries to enter the U.S. market. However, it also proposes to continue to consider Executive Branch concerns in addressing such applications. *Foreign Participation Notice* at ¶ 43. If the Commission's proposals are adopted, we will continue to consider Executive Branch concerns in the context of foreign carrier applications to enter the U.S. market, either independently or by merger with existing U.S. carriers.

⁴⁰² DoD comments at 2.

⁴⁰³ FBI comments at 2.

⁴⁰⁴ Letter from Carl Wayne Smith, Acting General Counsel, Defense Information Systems Agency, to William F. Caton, Acting Secretary, FCC (May 28, 1997); Letter from John F. Lewis, Jr., Assistant Director in Charge, National Security Division, FBI, to William F. Caton, Acting Secretary, FCC (May 23, 1997); Letter from Stewart A. Baker, Steptoe & Johnson LLP, to William F. Caton, Acting Secretary, FCC (May 22, 1997).

personnel security clearances, secure storage facilities, and the prevention of access by unauthorized personnel to secure or sensitive network facilities and offices.

274. In addition, the Irish American Unity Conference (IAUC) has alleged that the merger may raise some national security concerns. For example, the IAUC alleges that the British Government may be involved in inappropriate wiretapping of BT's lines in Northern Ireland on behalf of the British intelligence agency.⁴⁰⁵ The IAUC also states that its national security concerns potentially raise privacy concerns and First Amendment issues. We make no finding on the substance of IAUC's allegations, which are beyond the scope of this proceeding. In any event, DoD and the FBI have carefully reviewed the U.S. national security implications of the proposed merger on behalf of the Executive Branch of the U.S. Government, and have indicated that all of their national security and law enforcement concerns are adequately addressed by their agreement with the parties. Moreover, the Executive Branch has not expressed concern that the proposed merger would negatively impact U.S. Government efforts in the United States or in Northern Ireland.

275. The Office of the United States Trade Representative (USTR), on behalf of the statutory inter-agency trade policy organization of the Executive Branch, also submitted comments requesting that we incorporate in this proceeding the Executive Branch comments filed in our *Foreign Participation* proceeding.⁴⁰⁶ USTR noted that "no WTO obligations affecting this proceeding will come into effect prior to January 1, 1998"⁴⁰⁷ Nonetheless, USTR urges the Commission to consider the impact of the proposed merger on competition in the United States as part of our overall public interest analysis.⁴⁰⁸

276. Discussion. We condition our grant of the transfer of MCI's licenses to BT on compliance with the Agreement signed by BT, MCI, DoD, and the FBI a copy of which is attached as Appendix A to this decision. We also incorporate USTR's comments from our *Foreign Participation* proceeding. We note that in Section IV "Public Interest Analysis of the Merger," above, we analyzed fully the competitive impact of the proposed merger as part of our public interest analysis.

⁴⁰⁵ See IAUC reply comments at 7; see also BT/MCI final reply comments (stating that the IAUC's comments are irrelevant to this proceeding).

⁴⁰⁶ USTR *ex parte* comments (filed Aug. 13, 1997).

⁴⁰⁷ *Id.* at 1.

⁴⁰⁸ *Id.* at 2.

277. In sum, we find that under the framework established in the *Foreign Carrier Entry Order*, BT's entry into the U.S. market is consistent with the public interest. We next consider whether MCI's transfer of control of its DBS license is in the public interest.

C. Analysis of Transfer of Control of MCI's DBS License

278. BT/MCI have requested to transfer control of MCI's DBS license to BT.⁴⁰⁹ The International Bureau, on delegated authority, granted MCI this license following MCI's successful participation in the Commission's DBS auctions.⁴¹⁰ Parties have filed applications for review of the Bureau's grant of this license.

279. The transfer of control of MCI's DBS license raises issues similar to those raised in the MCI DBS licensing proceeding. We defer consideration of these issues for resolution in connection with pending applications for review of the MCI DBS licensing orders. In the interim, BT will be permitted to acquire control of MCI's DBS license. However, that license will remain subject to reconsideration, and this approval of the transfer of control is specifically conditioned on whatever action the Commission may conclude is appropriate in connection with the pending applications for review.

280. Two additional matters warrant discussion. First, in the MCI DBS decision, the International Bureau indicated that the Commission "will consider all comments and public interest issues surrounding the proposed change in ownership of MCI as part of its separate and independent review of MCI's pending transfer of control applications."⁴¹¹ We do not view this Bureau statement as in any way limiting our ability to consider matters raised concerning the MCI DBS license in whichever proceeding is appropriate. We note that the Bureau also stated that its action did not "prejudge or predetermine any of the recently filed transfer of control applications by MCI and BT. . . ."⁴¹²

281. Second, we have received a letter from the Department of State, the Department of Commerce, and the Office of the U.S. Trade Representative requesting full Commission review

⁴⁰⁹ BT/MCI application, Vol. 2, Part II.J. The applicants seek authority for this transfer of control pursuant to Section 100.80 of the Commission's rules, 47 C.F.R. § 100.80.

⁴¹⁰ See MCI Telecommunications Corporation, *Order*, 11 FCC Rcd 16275 (Int'l Bur., 1996) (*MCI DBS Order I*), *Order*, DA 96-2165 (Int'l Bur., rel. Dec. 20, 1996) (*MCI DBS Order II*), *app. for review pending*.

⁴¹¹ *MCI DBS Order I*, 11 FCC Rcd at 16283.

⁴¹² *Id.* at 16278.

of issues related to foreign ownership of DBS subscription services.⁴¹³ These agencies ask that we "undertake and conclude a rulemaking proceeding" concerning these issues "prior to reaching a final determination on any application that may be affected by the outcome of the rulemaking."⁴¹⁴ In addition to the transfer of the DBS license, this proceeding involves the transfer of numerous other licenses and authorizations. We thus decline to withhold action on the instant transaction for the substantial additional time it would take to initiate and conclude a rulemaking proceeding. However, as we have indicated, our action is without prejudice to further consideration of these matters in connection with the MCI DBS licensing proceeding. We therefore do not view our action here as the type of "final determination" about which the Executive Branch agencies expressed concern.

VI. CONDITIONS AND SAFEGUARDS

A. Regulatory Treatment of MCI

282. BT/MCI have requested that MCI continue to be regulated as a non-dominant carrier on all routes, including those where BT or MCI is affiliated with a carrier in the destination market. Generally, the applicants argue that MCI's foreign-affiliated carriers do not have the ability to discriminate against unaffiliated U.S. carriers through the control of bottleneck services or facilities. Under the Commission's rules, a carrier that is affiliated with a foreign carrier that is not a monopoly in a destination market and that seeks to be regulated as a non-dominant carrier on that route bears the burden of demonstrating that its foreign affiliate lacks the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the destination country.⁴¹⁵ In brief, the applicant must demonstrate that its foreign affiliate lacks market power.

283. Carriers regulated as dominant on a particular route due to a foreign carrier affiliation are required, under Section 63.10 of our rules, to do the following: (1) file tariffs on no less than 14-days notice; (2) maintain complete records of the provisioning and maintenance of

⁴¹³ Letter from Amb. Vonya B. McCann, U.S. Coordinator International Communications and Information Policy, Department of State, Hon. Larry Irving, Assistant Secretary for Communications and Information, Department of Commerce, and Amb. Jeffrey M. Lang, Deputy U.S. Trade Representative, Office of the U.S. Trade Representative, to Reed E. Hundt, Chairman, FCC (May 5, 1997).

⁴¹⁴ *Id.* at 2.

⁴¹⁵ 47 C.F.R. § 63.10(a)(3).

basic network facilities and services procured from the foreign carrier affiliate;⁴¹⁶ (3) obtain Commission approval pursuant to § 63.18 before adding or discontinuing circuits; and (4) file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic.⁴¹⁷ These safeguards are to a great extent different than the safeguards the Commission traditionally has imposed on U.S. carriers regulated as dominant due to market power of the U.S. carrier on the U.S. end of a route.⁴¹⁸

284. In the *Foreign Participation Notice*, we tentatively concluded that the current dominant carrier safeguards should be revised to be both effective but no more burdensome than necessary to prevent anti-competitive conduct in the provision of U.S. international services and facilities.⁴¹⁹ To this end, the *Foreign Participation Notice* proposes, among other things, to modify our current safeguards applicable to carriers regulated as dominant because of a foreign

⁴¹⁶ The recordkeeping requirement for basic network facilities and services includes those facilities and services that the dominant carrier procures on behalf of customers of joint ventures for the provision of U.S. basic or enhanced services. *Foreign Carrier Entry Order*, 11 FCC Rcd at 3975.

⁴¹⁷ 47 C.F.R. § 63.10(c).

⁴¹⁸ Regulations associated with dominant carrier classification due to market power of the U.S. carrier on the U.S. end of a route include rate of return or price cap regulation to ensure that rates are reasonable, *see* 47 § 61.41(a)(1), and more stringent Section 214 requirements to prevent investment in unnecessary new plant and to bar service discontinuances in areas served by a single carrier. *See generally LEC In-Region Interexchange Order* at ¶¶ 85-86; *AT&T International Non-dominance Order*, 11 FCC Rcd at 17972-73; *Petition of GTE Hawaiian Telephone Co., Inc. for Reclassification as a Non-Dominant IMTS Carrier*, 11 FCC Rcd 20354, 20357 (Int'l Bur., 1996). In the *LEC In-Region Interexchange Order*, we concluded that the BOCs' and independent LECs' market power in the provision of local exchange and exchange access service did not warrant imposing these traditional dominant carrier safeguards on the BOCs' and independent LECs' provision of in-region and out-of-region domestic and international long distance services. We concluded that these safeguards generally were designed to prevent a carrier from raising prices by restricting its own output and that the BOCs and independent LECs could not leverage their local bottlenecks to this extent in the long distance marketplace. We also concluded that the benefits of these safeguards would be outweighed by the burdens that would be imposed on competition and that other statutory safeguards and regulations applicable to these carriers would address such concerns in a less burdensome and more effective manner. *LEC In-Region Interexchange Order* at ¶¶ 6-7. We noted in the *LEC In-Region Interexchange Order* the separate issue of whether a BOC, independent LEC, or any other U.S. carrier should be regulated as dominant in the provision of international service because of the market power of an affiliated foreign carrier in a foreign destination market. *Id.* at ¶ 8 n.22.

⁴¹⁹ *Foreign Participation Notice* at ¶¶ 82-114.

carrier affiliation.⁴²⁰ We expect final rules to be adopted in that proceeding on or before January 1, 1998, consistent with the U.S. Government's WTO commitments.

285. Contentions of the Parties. A number of parties have asked the Commission to regulate MCI as a dominant carrier on the U.S.-U.K. route after the merger.⁴²¹ Generally, these parties argue that BT controls bottleneck facilities in the United Kingdom and thus the merged entity will have the ability and the incentive to discriminate against unaffiliated U.S. carriers seeking to terminate U.S. international traffic in the United Kingdom. Parties in this proceeding also note that MCI, in a separate proceeding, has argued that BT remains the dominant carrier for international facilities-based services, controls over 90 percent of the termination points in the United Kingdom, and has the most fully developed long distance network to which international carriers must interconnect.⁴²² No party has argued for dominant carrier regulation of MCI on any other route.

286. Discussion. U.S.-U.K. Route. With respect to the United Kingdom, BT/MCI note that BTNA has separately requested a ruling that BT does not have the ability to discriminate against unaffiliated U.S. carriers through the control of bottleneck services or facilities.⁴²³ As we found above, BT retains market power in the United Kingdom through its ownership of the only ubiquitous local and intercity networks in the United Kingdom.⁴²⁴ Thus, under our rules, the merged entity is subject to our dominant carrier regulations. On our own motion, however, we waive the application of our current dominant carrier requirements to MCI pending the effective date of any new rules we adopt in the *Foreign Participation* proceeding. Instead, we will require

⁴²⁰ The *Foreign Participation Notice* proposes to adopt basic and supplemental dominant carrier safeguards. The basic safeguards would apply where the foreign destination market has authorized multiple international facilities-based competitors. *Id.* at ¶ 84. These "basic" safeguards would require that carriers regulated as dominant on particular routes to: (1) file their service tariffs on one-day's (rather than 14-days') notice, and such tariffs would be presumed lawful; (2) file quarterly notification of circuit additions rather than obtain Section 214 approval before adding or discontinuing circuits; (3) file quarterly traffic and revenue reports; and (4) maintain records on the provisioning and maintenance of basic network facilities and services procured from a foreign carrier affiliate. Supplemental safeguards would apply to carriers that do not meet the basic safeguard standard, (*i.e.*, legal barriers to international facilities-based competition remain in the country of the foreign affiliate and that country has not yet authorized multiple international facilities-based competitors). *Id.* at ¶¶ 92-104.

⁴²¹ See, *e.g.*, WorldCom comments at 18; FT comments at 7; DT comments at 12-14; Frontier comments at 4. See also AT&T comments at 2-3, Sprint comments at 9.

⁴²² See AT&T comments n.8; FT comments at 7-8 (citing MCI Comments in Motion to be Reclassified as a Non-dominant Carrier for U.S.-U.K. Service, ISP 96-007-ND (filed Aug. 2, 1996)).

⁴²³ BT/MCI application, Vol. 2, II.B, at 7.

⁴²⁴ See *supra* Section IV.C.

MCI to continue to comply with the safeguards we imposed on MCI in *BT/MCI I*,⁴²⁵ which are similar to the proposed basic dominant carrier safeguards in the *Foreign Participation Notice*.⁴²⁶ Once we adopt final dominant carrier regulations in the *Foreign Participation* proceeding, MCI will be fully subject to those requirements.

287. The Commission may waive its rules for "good cause shown."⁴²⁷ Waivers are appropriate if special circumstances warrant a deviation from the general rule and such deviation will not undermine the policy served by the rule.⁴²⁸ In this case, special circumstances warrant a deviation from the rule due to the short period of time between the consummation of the merger and the effective date of any new dominant carrier rules, which we expect to adopt by January 1, 1998, consistent with the U.S. Government's WTO commitments. We believe it would be unduly burdensome, and therefore not in the public interest, to require MCI at this time to comply with the current dominant carrier regulations which may be modified in a few months. Pending the effective date of the final rules in our *Foreign Participation* proceeding, MCI will continue to be subject to the safeguards imposed in *BT/MCI I*, which address our primary concerns with anti-competitive conduct by a foreign carrier with market power.⁴²⁹ Given these factors and the short duration of the waiver period, we do not believe that waiving our dominant carrier safeguards at this time will undermine our general policies on dominant carrier regulation.

⁴²⁵ *BT/MCI I*, 9 FCC Rcd at 3973.

⁴²⁶ *Foreign Participation Notice* at ¶ 92-103.

⁴²⁷ 47 C.F.R. § 1.3.

⁴²⁸ See, e.g., *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁴²⁹ Our primary concerns with anti-competitive conduct by a foreign carrier that has market power include: (1) routing calls to the U.S. affiliate in proportions greater than those justified under our proportionate return policy; (2) otherwise inappropriately manipulating the calculations and settlements payments to favor the U.S. affiliate wrongfully; (3) routing low-cost proportionate return traffic to the U.S. affiliate, and leaving the rest to its competitor; (4) providing the U.S. affiliate better provisioning and maintenance intervals and better quality of service for essential facilities in the destination country, including the foreign circuit and termination facilities for private network services; (5) undercharging the U.S. affiliate and/or overcharging its competitors for use of the same essential facilities in the destination country; (6) revealing to the U.S. affiliate the confidential information that the foreign carrier receives from the U.S. affiliate's competitors; (7) giving the U.S. affiliate advance notice of network changes and other information that the U.S. affiliate and its competitors will need to know; (8) refusing to implement a new service or capability in correspondence with an unaffiliated U.S. carrier until the U.S. affiliate is able to provide the service or capability; or (9) either as an agent or through an affiliated third party, selling the services of the U.S. affiliate in ways that use the foreign carrier's home market power. See *Sprint Declaratory Ruling*, 11 FCC Rcd at 1859-1860. See also *supra* Section VI.E.

288. Our current rules permit carriers to argue that effective regulation in the destination market weighs in favor of non-dominant treatment.⁴³⁰ We recognize OFTEL's active role in the United Kingdom in protecting against abuse of market power by BT. However, we do not believe that OFTEL's regulation of BT alone is sufficient to justify regulating MCI as non-dominant on the U.S.-U.K. route. Unaffiliated U.S. competitors of BT/MCI who must rely on BT in order to terminate traffic in the United Kingdom should be able to rely on our enforcement process to address complaints of discrimination. We also note that the *Foreign Participation Notice* proposes to eliminate consideration of the effectiveness of regulation in a destination market in determining whether to regulate a foreign-affiliated carrier as dominant on a particular route.⁴³¹

289. Accordingly, we require MCI to continue to comply with the safeguards articulated in *BT/MCI I*. MCI will then be subject to any final rules regarding dominant carrier regulation adopted in our current *Foreign Participation* proceeding.

290. *U.S.-Gibraltar Route.* GibTel, which is owned by BT, is the monopoly provider of international telecommunications services in Gibraltar. BT/MCI request the Commission to forbear from imposing dominant carrier treatment for MCI's services on this route. BT/MCI argue that the Commission's decision in the *AT&T International Non-dominance Order* supports the request. In that decision, the Commission ruled that AT&T would not be classified as a dominant carrier on routes in which it was the sole facilities-based IMTS provider but on which the actual amount of U.S.-billed revenues on the route was *de minimis* compared to the overall number of total U.S.-billed revenues. The Commission found that on these routes dominant carrier regulation was not necessary to ensure that prices remain just and reasonable or to otherwise protect consumers. Moreover, the Commission found that the economic cost of regulating AT&T as dominant on such routes could actually impede, rather than promote, competitive market conditions.⁴³²

291. BT/MCI indicate that total U.S.-billed minutes to Gibraltar is *de minimis* in that it amounts to .00021 percent of total U.S.-billed minutes.⁴³³ BT/MCI also argue that the rule forbidding special concessions will prevent discrimination against unaffiliated U.S. carriers. No one has challenged BT/MCI's request that MCI be regulated as a non-dominant carrier on the U.S.-Gibraltar route, and we conclude that it is appropriate at this time to forbear from regulating

⁴³⁰ See 47 C.F.R. § 63.18(h)(8)(ii); see also 47 C.F.R. § 63.10(a).

⁴³¹ *Foreign Participation Notice* at ¶ 87.

⁴³² *AT&T International Non-dominance Order*, 11 FCC Rcd at 17998-99.

⁴³³ BT/MCI application, Vol. 2, Part II.B at 6.

MCI as dominant on the U.S.-Gibraltar route. We agree with BT/MCI that the amount of traffic on this route is *de minimis*. The economic costs of requiring MCI to adhere to our current dominant carrier requirements, which may be modified shortly in the *Foreign Participation* proceeding, are not justified for a route with such a low volume of traffic. These safeguards, including the 14 days' notice requirement for tariff changes, would have little practical utility in the near term in ensuring that rates on this route are just and reasonable and not unreasonably discriminatory. Nor do we foresee a near term need to control circuit additions or changes on this route by MCI or to require that MCI file quarterly traffic and revenue reports or maintain provisioning and maintenance records. BT/MCI are correct that our no special concessions prohibition, and other safeguards that we impose on all U.S. international carriers, will continue to apply to MCI's dealings with GibTel. We reserve the right, however, to revisit our determination to forbear from imposing dominant carrier regulation on MCI for the U.S.-Gibraltar route once final rules are adopted in the *Foreign Participation* proceeding.

292. *All other routes.* We find no reason to impose dominant regulatory treatment on MCI for service on any other route where BT and MCI currently have affiliates. We agree with the applicants that these affiliates (other than those in the United Kingdom and Gibraltar) lack market power. Consequently, we will continue to regulate MCI as a non-dominant carrier on all U.S.-international routes other than the U.S.-U.K. route.

B. Equal Access Implementation

293. As we noted above, a number of parties urge us to condition our approval of this merger upon the implementation of equal access in the United Kingdom.⁴³⁴ BT/MCI observe that we have previously concluded that the lack of equal access does not preclude a finding of ECO or equivalency.⁴³⁵ We continue to believe, however, that the swift implementation of equal access is necessary to eliminate the unfair competitive advantage BT and MCI would enjoy in providing end-to-end services between the United States and the United Kingdom after the merger. On July 28, 1997, MCI filed with the Commission a letter stating a commitment not to accept BT traffic originated in the United Kingdom to the extent equal access has not been implemented as required by the U.K. Government. We accept MCI's commitment on equal access.

294. Given the U.K. Government's proven record of implementing European Union telecommunications directives promptly and completely, we expect that the U.K. Government will follow the same course with respect to any European Union equal access requirement. We also

⁴³⁴ See, e.g., ACC comments at 7; AT&T comments at 4, 6-7; BellSouth/PacTel/SBC comments at 6, 23; Enigis comments at 2; FT comments at 6, 9; WorldCom comments at 2-3.

⁴³⁵ BT/MCI opposition & reply at 16 (citing *Foreign Carrier Entry Order*, 11 FCC Rcd at 3893); *ACC/Alanna*, 9 FCC Rcd at 6263 and *fONOROLA*, 7 FCC Rcd 7312, 7315 n.32 (1992).

expect, and will look to, the United Kingdom and the European Union to enforce vigorously such requirements when implemented. Accordingly, we condition grant of this license transfer upon MCI's non-acceptance of BT traffic originated in the United Kingdom to the extent BT is found to be in non-compliance with U.K. regulations implementing the European Union's equal access requirements.

C. Access to MCI's U.S. Backhaul Facilities

295. In its recent review of the merger, DoJ indicated that concerns had been raised about the availability of backhaul in the United States. DoJ noted that currently there are only three entities that own backhaul facilities from the TAT-12/13 cable stations located in the United States (AT&T, MCI and Sprint), and none of these entities are required to make backhaul facilities or services available to other carriers. DoJ has referred this matter to the Commission. It also has stated that it will later seek a modification of the Final Judgment if it concludes that BT/MCI could discriminate against new entrants by denying or delaying their access to backhaul facilities in the United States.⁴³⁶

296. On July 7, 1997, MCI filed with the Commission a letter stating a commitment to offer backhaul services as a condition of our approval of the merger. BT/MCI commit that MCI will offer backhaul capacity in four phases equivalent to 147 2-Mbps circuits between the TAT-12/13 cable stations located in the United States and two points served by MCI's existing backhaul facilities. For two years, MCI will make this backhaul capacity available on a first-come, first-served basis to any carrier that purchased from BT/MCI capacity that BT/MCI must sell as a condition of the European Commission approval of the mergers. These backhaul circuits will be available for one, two, three, four, and five year terms at prices that are substantially the same as the tariffed rates for similar domestic private line circuits, adjusted to recover costs related to the provision of backhaul services.⁴³⁷

297. We welcome BT/MCI's voluntary commitment to offer backhaul capacity in the United States. This commitment should help eliminate a potential bottleneck that the new competitors might otherwise face. New carriers purchasing capacity on TAT-12/13 from BT/MCI will now be assured of being able to obtain matching backhaul capacity in the United States. Consequently, this commitment should facilitate the introduction of increased competition on the U.S.-U.K. route. We thus condition our grant of the transfer in this case upon MCI selling

⁴³⁶ *Memorandum in Support of MFJ* at 14-15.

⁴³⁷ Letter from Mary L. Brown, Senior Policy Counsel, MCI to Peter F. Cowhey, Chief, Int'l Bur., FCC (July 7, 1997).

the capacity it is committed to sell in accordance with its voluntary commitment, the terms of which are set forth in Appendix B.

D. Applicability of International Settlements Policy

298. Background. The Commission's international settlements policy (ISP) is designed to support competing U.S. carriers in their bilateral accounting rate negotiations with foreign carriers. This policy, which prevents foreign monopolies from using their market power to obtain discriminatory rate concessions from competing U.S. carriers (*i.e.*, "whipsawing"), requires: (1) the equal division of accounting rates; (2) nondiscriminatory treatment of U.S. carriers; and (3) proportionate return of inbound traffic.⁴³⁸

299. Our recent *Flexibility Order* took a critical step in reforming our settlement rate policies by recognizing that we should allow for entirely new alternatives to the traditional correspondent accounting rate model where competitive markets exist in both the originating and terminating markets.⁴³⁹ Accordingly, we established a more flexible framework which permits carriers to take their IMTS traffic off the traditional settlement rate system where competitive conditions permit and to negotiate alternatives for terminating international calls that more closely track underlying costs.⁴⁴⁰

300. Contention of the Parties. Parties argue that the Commission should specifically impose the ISP on the U.S.-U.K. route for BT/MCI because of the potential for abuse and the cost advantages that otherwise will accrue to BT/MCI.⁴⁴¹ Parties also urge the Commission either to impose structural safeguards to ensure the new merged entity's compliance with the ISP or to initiate a separate proceeding to address accounting rate and international traffic flow

⁴³⁸ See Implementation and Scope of the International Settlements Policy for Parallel Routes, *Report and Order*, 51 Fed. Reg. 4736 (Feb. 7, 1986), *modified in part on recon.*, 2 FCC Rcd 1118 (1987), *further recon.*, 3 FCC Rcd 1614 (1988). See also Regulation of International Accounting Rates, *Report and Order*, 6 FCC Rcd 3552 (1991), *on recon.*, 7 FCC Rcd 8049 (1992).

⁴³⁹ Regulation of International Accounting Rates, Phase II, *Fourth Report and Order*, 11 FCC Rcd 20063 (1996) (*Accounting Rate Flexibility Order*).

⁴⁴⁰ Pursuant to the *Accounting Rate Flexibility Order*, U.S. carriers may negotiate alternative international settlement payment arrangements that deviate from the requirements of our ISP where appropriate market and regulatory conditions permit. We noted that the ISP's restraints on competition may be counterproductive in markets where competitive forces are emerging. *Accounting Rate Flexibility Order*, 11 FCC Rcd at 20069.

⁴⁴¹ See, *e.g.*, AT&T comments at 15 (arguing that the combination of relaxing legal proportionate return rules on this route and the lack of equal access will provide BT/MCI cost advantages); FT comments at 8-11; Frontier comments at 4-5.

deviations.⁴⁴² FT and Worldcom argue that the ISP requirements should not be removed unless the Commission grants a specific request of the newly merged entity.⁴⁴³

301. The U.K. Government argues that the economic welfare of both the United Kingdom and the United States would be augmented and the degree of competition would be enhanced if there is a multiplicity of operators with end-to-end control.⁴⁴⁴ The U.K. Government points out that the United Kingdom has lifted the requirements for parallel accounting and proportionate return for routes that are subject to competition, including the U.S.-U.K. route. Retention of proportionate return, according to the U.K. Government, reduces the flexibility of operators to pass and receive different volumes of traffic.⁴⁴⁵

302. BT/MCI argue that the parties' concerns about ISP flexibility on the U.S.-U.K. route after the merger are misplaced in the short term and, in the longer term, are antithetical to the pro-competitive thrust of the FCC's *Flexibility Order*. BT/MCI argue that no special license conditions are needed because the services offered by MCI and BT will continue to be governed by the ISP until the FCC approves an alternative arrangement after public notice and comment. However, as competition grows on the U.S.-U.K. route, the need for strict adherence to the ISP will dissipate.⁴⁴⁶

303. Discussion. We agree with BT/MCI that the services offered by BT and MCI will be governed by our ISP until such time as MCI proposes -- and we approve -- an alternative arrangement under our *Flexibility Order*.⁴⁴⁷ Until then, there is no record evidence to support the

⁴⁴² DT comments at 12-13; FT comments at 8-11.

⁴⁴³ FT comments at 8-11; WorldCom reply comments at 9.

⁴⁴⁴ The U.K. Government states that BT currently does not have end-to-end control, although AT&T, Worldcom, Sprint, ACC and other companies do. U.K. Government reply comments at 32.

⁴⁴⁵ U.K. Government reply comments at 32-34. The U.K. Government also argues that, although it agrees with the overall policy of our *Flexibility Order*, it believes the Commission has placed a greater emphasis on regulation than on competition. Our requirement that operators with a market share of 25 percent or greater on any in-bound or outbound route ensure that their arrangements do not contain unreasonably discriminatory terms and conditions will inhibit the reduction of prices, according to the U.K. Government, because a lower accounting rate offered to one other party would immediately be available to all other parties. Awareness of the price would lead other parties to make simultaneous price reductions, consequently no rational operator would reduce its price because no compensatory gain in market share would result. *Id.* at 34.

⁴⁴⁶ BT/MCI opposition & reply at 30-31.

⁴⁴⁷ We will examine such flexibility requests on a case-by-case basis after interested parties have had a full opportunity to comment.

need for special safeguards to enforce this requirement on BT and MCI. Moreover, given our finding above that the United Kingdom provides effective competitive opportunities to U.S. carriers and the increasing competitiveness of this route, we see no reason to foreclose the possibility of future flexible arrangements between BT and MCI or other carriers on this route.

E. Applicability of "No Special Concessions" Requirement

304. Background. We currently prohibit all U.S. carriers, regardless of their regulatory status or whether they have a foreign affiliate, from agreeing to accept special concessions from any foreign carrier or administration.⁴⁴⁸ MCI's Section 214 authorizations were amended under *BT/MCI I* to prohibit MCI from agreeing to accept, directly or indirectly, any special concessions from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any foreign country. Numerous other cable landing licenses and Section 214 authorizations held by MCI and its subsidiaries contain essentially the same prohibition against accepting "exclusive arrangements" from any foreign carrier or administration.⁴⁴⁹

305. Contentions of the Parties. DT and FT urge the Commission to make clear that its "no special concessions" requirement applies to MCI's dealings with BT.⁴⁵⁰ Sprint and DT also argue that there are special dangers entailed by the vertical integration of BT and MCI and that the Commission should prohibit the use of confidential information of unaffiliated U.S. carriers obtained by the new Concert or its subsidiaries to benefit MCI.⁴⁵¹

306. Discussion. We confirm that, after the BT/MCI merger is consummated, the services offered by MCI generally, including its dealings with BT, will continue to be governed by our "no special concessions" requirement as articulated in *BT/MCI I*.⁴⁵² These prohibitions will ensure that BT will not be able to leverage its control over bottleneck services and facilities in the

⁴⁴⁸ See 47 CFR § 63.14. The Commission's Rules define "special concessions" as "any arrangement that affects traffic or revenue flows to or from the United States that is offered exclusively by a foreign carrier or administration to a particular U.S. international carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route." 47 C.F.R. § 63.18(i)(1).

⁴⁴⁹ See, e.g., AT&T, MCI Int'l, et al., *Cable Landing License*, 7 FCC Rcd 130, 132-33 (1992) (*TAT-10 Cable Landing License*); MCI Telecommunications Corp., *Memorandum Opinion, Order and Authorization*, 10 FCC Rcd 3187 (Int'l Bur., 1995) (Section 214 authorization to provide switched services via international private lines interconnected to the public switched networks in the United States and the United Kingdom).

⁴⁵⁰ DT comments at 11; FT comments at 9-10, reply comments at 13-14.

⁴⁵¹ DT comments at 14; Sprint comments at 8-10.

⁴⁵² See *BT/MCI I*, 9 FCC Rcd at 3967.

United Kingdom into the U.S. international services market. Without these prohibitions, for example, BT could use its market power in the United Kingdom to discriminate against unaffiliated U.S. carriers by offering MCI better provisioning and pricing of facilities and services. Continued application of the "no special concessions" rule to MCI is therefore consistent with our goal of promoting competition on the U.S.-U.K route.⁴⁵³

307. We also note that in our *Foreign Participation Notice*, we propose to give greater specificity to our "no special concessions" requirement by delineating the types of conduct that we consider to be prohibited by this requirement.⁴⁵⁴ Any final rules adopted in our current *Foreign Participation* proceeding regarding the no special concession requirements will apply to this merger.

VII. OTHER MATTERS

A. Number Portability

308. A number of parties raise concerns that the United Kingdom has been slow to implement some forms of number portability, particularly portability of "non-geographic" numbers (*i.e.*, numbers such as those used for 800 services and country direct services).⁴⁵⁵ According to the U.K. Government, the regulatory regime in the United Kingdom obliges BT to provide portability of all numbers, regardless of the services for which they are used. In the case of non-geographic numbers, however, BT needed some additional time to undertake some network

⁴⁵³ See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3972.

⁴⁵⁴ We proposed to interpret the no special concessions provision to prohibit any U.S. carrier from agreeing to accept from a foreign carrier with market power in the destination country an exclusive arrangement that affects traffic or revenue flows to or from the United States not offered to similarly situated U.S. carriers involving: (1) operating agreements for the provision of basic telecommunications services; (2) distribution or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times; (3) any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers; (4) any proprietary or confidential information obtained by the foreign carrier from competing U.S. carriers in the course of regular business activities with such U.S. carriers, unless specific permission has been obtained in writing from the U.S. carrier involved; and (5) arrangements for the joint handling of basic U.S. traffic originating or terminating in third countries. *Foreign Participation Notice* at ¶ 117.

⁴⁵⁵ See, *e.g.*, ACC comments at 9-10.

systems development.⁴⁵⁶ Thus, at the time of BT/MCI's application, BT only provided portability of "geographic numbers" (*i.e.*, numbers assigned to residential and business customers).⁴⁵⁷

309. In its comments, the U.K. Government stated it expected that the portability of non-geographic numbers would become available starting in July 1997.⁴⁵⁸ Recently, OFTEL confirmed that implementation of non-geographic number portability has in fact been introduced by fixed network operators.⁴⁵⁹ Accordingly, given that number portability by fixed network operators is now available for both geographic and non-geographic numbers (including country direct services), we decline to impose any number portability requirements as a condition of approval of this merger. We anticipate the U.K. Government will ensure the full roll-out of number portability of "non-geographic" numbers as quickly as possible to promote full competition among U.K. carriers.

B. Reorigination and Switched Hubbing

310. Contention of the Parties. AT&T requests the Commission to prohibit BT from routing foreign-originated minutes through MCI in the United States to third countries.⁴⁶⁰ AT&T claims that a merged BT/MCI will be able to raise unaffiliated U.S. carriers' costs on U.S.-third country routes through selective reorigination of BT-third country traffic through MCI's U.S. network. According to AT&T, BT will be able to send to third countries only that volume of minutes that matches the volume each third country sends to it, with the result that BT would have no settlements outpayment. Additional minutes generated by BT's customers would then be delivered through MCI's network, thereby earning MCI greater proportionate return minutes than it would have had absent BT's reoriginated traffic. AT&T claims that MCI's additional return minutes would lower its settlements costs on third-country routes while those of its U.S.

⁴⁵⁶ U.K. Government reply comments at 17.

⁴⁵⁷ OFTEL, *The National Numbering Scheme*, at ¶¶ 71-72 (Jan. 1997). OFTEL defines number portability as "a facility whereby customers are able to keep their telephone numbers when they change operators." *Id.* at ¶ 71.

⁴⁵⁸ U.K. Government reply comments at 17. *See also* OFTEL, *Number Portability: Modifications to Fixed Operators' Licenses* at ¶ 9.2 (April 1997).

⁴⁵⁹ *See* OFTEL, *Number Portability in the Mobile Telephony Market* (July 1997) at ¶ 2.16. OFTEL will require mobile operators to provide number portability by June 30, 1998. *Id.* at ¶ 2.12.

⁴⁶⁰ AT&T comments at 19-21.

competitors would rise correspondingly.⁴⁶¹ In response, BT/MCI argue that reorigination is an industry-wide matter that should be considered in a separate rulemaking proceeding, if at all.⁴⁶²

311. AT&T further claims that BT/MCI will have an unfair short-term advantage over unaffiliated carriers seeking to hub traffic through the United Kingdom (a practice known as "switched hubbing") since BT is the only U.K. carrier with direct facility arrangements with all foreign points. As such, AT&T states that BT will be uniquely situated to capture a significant share of third-country traffic destined to the United States that it can hub through the United Kingdom.⁴⁶³

312. Discussion. At this time, we decline to restrict BT/MCI's ability to reoriginate BT-third country traffic via MCI's U.S. network, or hub third-country traffic destined to or from the United States through the United Kingdom. The Commission has not found that reorigination should be prohibited or limited generally⁴⁶⁴ and we perceive no need to impose such a restriction uniquely on BT/MCI. We may revisit this issue in the future if it appears that distortions in settlement payments or proportionate return traffic are so great as to justify restricting this practice. For now, however, AT&T (and other U.S. carriers) will have an equal incentive and ability as BT/MCI to reoriginate traffic through the United States. Consequently, we find no reason to impose any restrictions regarding reorigination on BT/MCI.

313. As for BT/MCI's advantages with respect to switched hubbing on the U.S.-U.K. route, we note that any U.S. carrier authorized on this route has the ability to engage in switched hubbing.⁴⁶⁵ BT/MCI may have a short-term advantage due to BT's greater number of correspondent relationships on U.K.-third country routes. However, there is no record evidence to indicate that BT's competitors will be disadvantaged in establishing correspondent relationships on U.K.-third country routes such that restrictions on BT/MCI's ability to engage in switched hubbing on the U.S.-U.K. route are warranted.

C. Structural Separation of U.S. and U.K. Affiliates

⁴⁶¹ *Id.*

⁴⁶² BT/MCI opposition & reply at 30 n.69.

⁴⁶³ *Id.* at 19 n.28.

⁴⁶⁴ We note that MCI has pending before the Commission a petition for declaratory ruling that reorigination of traffic through the United States violates FCC rules and policies. See MCI Petition for Declaratory Ruling, ISP-95-004 (filed Feb. 2, 1995).

⁴⁶⁵ See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3936-3939.

314. Contention of the Parties. Some parties argue that, at a minimum, MCI must remain a separate entity (*i.e.*, maintain separate books of accounts) from all other subsidiaries of its U.K. parent (Concert).⁴⁶⁶ Without such separation, these parties argue, it would not be clear whether the price, terms, and conditions that BT/MCI offers itself are different from those it offers to competitors. Thus, according to Sprint, all agreements between MCI, on the one hand, and Concert and all other subsidiaries of Concert, on the other, which affect traffic and revenue flows in the U.S. international market should be: (1) on an arms-length basis; (2) reported to the FCC; (3) made available for public inspection; and (4) offered to all U.S. carriers. FT and DT argue that there should be structural and accounting separation between the national (U.K. and U.S.) and international operations of the combined BT/MCI. DT also argues that there should be non-discrimination requirements that the separate entities offer third parties the same terms, conditions and rates they offer each other, including international accounting and settlement rates. According to DT, where a unified company owns facilities at both ends of a route, the FCC's ISP requirements of proportionate return, nondiscrimination, and no special concessions lose their effectiveness.⁴⁶⁷

315. BellSouth/PacTel/SBC note that BOCs will, for a minimum of three years, provide in-region interLATA service pursuant to the structural safeguards of Section 272, backed up by implementing regulations designed to prevent improper cost allocation and discrimination between the BOC and its Section 272 affiliate. BellSouth/PacTel/SBC also argue that MCI's assertions that local, intercity and international operations can be operated by a single entity without any risk to competition in the United Kingdom are also true for BOCs in the United States.⁴⁶⁸

316. In response, BT/MCI argue that BT's operations are governed by a comprehensive set of U.K. and E.C. competitive safeguards that protect new entrants against anti-competitive practices and that the license conditions sought by FT, DT, and Sprint are duplicative of existing requirements.⁴⁶⁹ BT/MCI note that BT's license prohibits BT from subsidizing its competitive operations from its local service, and rigorous cost allocation procedures ensure compliance and

⁴⁶⁶ Sprint comments at 8; *see also* DT comments at 11-12; FT comments at 6-7.

⁴⁶⁷ Specifically, DT argues that a unified BT and MCI would have both the motive and the opportunity to cross-subsidize and discriminate and that the U.K. safeguards will not suffice because of the global dimension of a unified BT and MCI. DT comments at 13.

⁴⁶⁸ BellSouth/PacTel/SBC comments at 11-12.

⁴⁶⁹ BT/MCI opposition & reply at 22-25. BT/MCI argue that the FCC should not extend its authority to cover U.K. jurisdictional matters that OFTEL has "well in hand." *Id.* at 24-25.

require nondiscriminatory treatment by BT of its competitors.⁴⁷⁰ BT/MCI also note that MCI will be a subsidiary of Concert separate from BT. Thus, MCI's Section 214 authorizations will be held by the same MCI subsidiaries that hold them today, not by Concert. Any change to this structure would be preceded by additional applications for authority under Section 214 or for other appropriate Commission approval, BT/MCI argue.

317. Discussion. Although our current rules do not require structural separation among MCI and its affiliates, our *Foreign Participation Notice* seeks comment generally on whether we should require some level of structural separation between a U.S. carrier and its affiliated foreign carrier.⁴⁷¹ BT/MCI would be subject to whatever rules of general applicability are adopted in the *Foreign Participation* proceeding. Moreover, the applicants specify that MCI will continue to hold FCC authorizations and licenses as a subsidiary of Concert separate from BT. Any significant change to this structure must be preceded by additional applications for Section 214 authority or for Commission approval of appropriate transfer or assignment of license applications.⁴⁷² Accordingly, we will have the opportunity to review any such changes to ensure they do not raise anti-competitive concerns. The parties have not demonstrated in this record that this merger creates special concerns that warrant safeguards in addition to those imposed under our current rules that apply to all other foreign carriers with U.S. affiliations, whether the affiliation is created through a merger or otherwise. Accordingly, we conclude that imposing structural separation between MCI and BT or the creation of new structurally separate affiliates is not necessary as a condition of our approval of this merger. We reiterate, however, that any new approach adopted in our current *Foreign Participation* proceeding will apply to this merger.

VIII. CONCLUSION

318. For the reasons discussed above, we grant the applicants' request to transfer control of MCI's licenses and authorizations to BT.

⁴⁷⁰ BT/MCI opposition & reply at 24 (BT/MCI argue that the following conditions, discussed above, ensure against discrimination: Conditions 13 (interconnection), 16 (publication of charges and terms), 16A (publication of interconnection agreements), 16B (standard services), 17 (prohibition on undue preference and discrimination), 17A (differential charging), 17B (prohibition on undue preference and discrimination in quality of service), and 18 (prohibition on cross-subsidies)). *Id.* n.58.

⁴⁷¹ *Foreign Participation Notice* at ¶¶ 111-113.

⁴⁷² BT/MCI opposition & reply at 23.

IX. ORDERING CLAUSES

319. Accordingly, IT IS ORDERED that the applications filed by MCI Communications Corporation and British Telecommunications plc in this proceeding, GN Docket No. 96-245, are GRANTED.

320. IT IS FURTHER ORDERED that MCI shall be regulated as a dominant carrier, pursuant to Section 214 of the Act, 47 U.S.C. § 214, and Section 63.10 of the Commission's Rules, 47 C.F.R. § 63.10, on the U.S.-U.K. route.

321. IT IS FURTHER ORDERED that MCI shall not be subject to the application of the Commission's dominant carrier regulations until final rules regarding dominant carrier regulation are effective in the Commission's *Foreign Participation* proceeding.

322. IT IS FURTHER ORDERED that MCI shall continue to comply with the safeguards imposed in *BT/MCI I* until final rules regarding dominant carrier regulation are effective in the Commission's *Foreign Participation* proceeding.

323. IT IS FURTHER ORDERED THAT grant of this license transfer is conditioned upon MCI's non-acceptance of BT traffic originated in the United Kingdom to the extent BT is found to be in non-compliance with U.K. regulations implementing the European Union's equal access requirements.

324. IT IS FURTHER ORDERED THAT MCI and Concert shall make available backhaul capacity equivalent to 147 E-1 circuits between the TAT-12/13 cable stations located in the United States and point(s) served by MCI's existing backhaul facilities, in accordance with MCI's voluntary commitments (*see* Appendix B).

325. IT IS FURTHER ORDERED THAT MCI's licenses and authorizations are subject to the outcome of all final rules of general applicability adopted in the Commission's *Foreign Participation* proceeding.

326. IT IS FURTHER ORDERED THAT MCI is subject to the outcome of all rules of general applicability relating to DBS licenses and the outcome of any pending applications for review of MCI's license grant.

327. IT IS FURTHER ORDERED THAT the authorization and the licenses related thereto are subject to compliance with provisions of the Agreement between BT, MCI, and the United States Department of Defense and Federal Bureau of Investigation, dated May 22, 1997, which Agreement is fully binding upon Concert and its subsidiaries providing telecommunications

services within the United States, and which provides that: (1) all facilities for network management of MCI's domestic U.S. telecommunications infrastructure and all Concert facilities used to direct, control, supervise, or manage telecommunications within the United States shall be in the United States; (2) Concert's subsidiaries providing domestic telecommunications services shall adopt and maintain certain policies and measures for preventing the improper use of Concert's network and facilities for unauthorized electronic surveillance and unauthorized access to, or use or disclosure of, Customer Proprietary Network Information in violation of U.S. law or the Agreement; (3) Concert's subsidiaries providing domestic telecommunications services shall adopt and maintain certain policies and measures for protecting the confidentiality and security of electronic surveillance orders and authorizations, other orders, legal process, and statutory authorizations and certifications related to subscriber records and information; and (4) Concert's subsidiaries providing domestic telecommunications services shall implement certain measures requiring personnel security clearances, the use of trustworthy persons who have passed appropriate U.S. Government background checks, secure storage facilities, and the prevention of access by unauthorized personnel to secure or sensitive network facilities and offices, all as covered in the Agreement. Nothing in this Agreement or the Implementation Plan referenced in the Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. § 222(a) and (c)(1) and the FCC's implementing regulations. This Condition shall also be binding upon any and all successors to and assigns of BT, MCI, and Concert with respect to the provision of U.S. telecommunications service.

328. IT IS FURTHER ORDERED that BT shall submit within 90 days of the release of this decision a waiver of any claim to immunity from U.S. antitrust laws acting in its capacity as signatory to INTELSAT under the court's decision in *Alpha Lyracom v. Comsat* (see *supra* note 136) as such immunity may apply to BT's provision of services in the United States.

329. IT IS FURTHER ORDERED that the Petition to Deny of Bell Atlantic IS DENIED.

330. This Order is effective upon release. Petitions for reconsideration under Section 1.106 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Separate Statement of

Commissioner Rachelle B. Chong

Re: In the Matter of the Merger of MCI Communications Corporation and British Telecommunications, plc, GN Docket No. 96-245, Memorandum Opinion and Order

I support the Commission's decision today to approve the merger of MCI Communications Corporation (MCI) and British Telecommunications plc (BT) subject to important conditions and safeguards that will serve the public interest. To my mind, the key benefit of this merger is its potential to enhance competition in the domestic local telephone market. Already a strong player in the long distance market, MCI has well developed business plans to provide local telephone service to domestic consumers. This merger with BT will assist MCI in realizing such plans by bringing MCI financial resources and BT's expertise in serving local markets. The applicants have also demonstrated that many important efficiencies will be gained, and that this merger is likely to promote competition on the global telecommunications market.

This merger is notable because BT and MCI have turned their backs on the old regime of a nationally organized international communications market, and instead have chosen to make beautiful music together with Concert, an integrated global telecommunications company. Up to now, the paradigm has been the organization of the international telecommunications market around nationally-based carriers exchanging traffic with other nationally based carriers. Greatly simplified, this market structure can be thought of as "half circuits to the mid-point of the ocean." One problem with this old structure was that it resulted in a separate and often highly inefficient interconnection pricing regime for international traffic.¹ Mergers like BT/MCI represent a new era of integrated service provision and will provide important incentives for others to follow suit.

¹ See *In re International Settlement Rates*, IB Docket No. 96-261, *Report and Order*, FCC-97-280, at para. 2 (August 18, 1997)

APPENDIX A

AGREEMENT BETWEEN (A) BRITISH TELECOMMUNICATIONS PLC AND MCI COMMUNICATIONS CORPORATION; AND (B) THE UNITED STATES DEPARTMENT OF DEFENSE AND FEDERAL BUREAU OF INVESTIGATION

WHEREAS, the U.S. telecommunications system is essential to the U.S. economy and to U.S. national security, law enforcement, and public safety;

WHEREAS, the U.S. Government considers it critical to maintain the viability, integrity, and security of that system;

WHEREAS, the U.S. Government has a strong interest in ensuring the security of U.S. telecommunications and records and information related thereto in order to protect the privacy of Americans and to prevent espionage, including economic espionage;

WHEREAS, the U.S. Government must ensure the confidentiality of lawful governmental Electronic Surveillance and related activities;

WHEREAS, MCI Communications Corporation, a Delaware corporation with its headquarters in Washington, D.C., operates a major U.S. telecommunications network under licenses granted to it and its subsidiaries by the Federal Communications Commission ("FCC");

WHEREAS, British Telecommunications plc ("BT"), a company registered under the laws of the United Kingdom, and MCI wish to enter into a merger;

WHEREAS, following the merger of BT and MCI Communications Corporation, the merged company would become Concert plc ("Concert"), a company registered under the laws of the United Kingdom, and Concert through MCI would then control a major U.S. telecommunications network;

WHEREAS, a transfer of control of FCC licenses to a foreign entity may proceed only if approved by the FCC, and such approval may be made subject to conditions relating to national security, law enforcement, and public safety;

WHEREAS, on January 24, 1997, the Federal Bureau of Investigation ("FBI") filed comments with the FCC expressing national security, law enforcement, and public safety concerns about the merger;

WHEREAS, on January 24, 1997, the Department of Defense ("DoD") filed comments with the FCC expressing national security concerns about the proposed transaction;

WHEREAS, the U.S. Government has a continuing and long-term need to protect the integrity of the U.S. telecommunications system, to prevent unauthorized electronic surveillance and improper access to U.S. subscriber records and information, and to preserve the security and confidentiality of lawful governmental Electronic Surveillance and acquisitions of records and information;

WHEREAS, BT and MCI Communications Corporation wish to merge and wish thereby to create in Concert a global telecommunications enterprise that will combine the substantial financial resources and global position of BT with the growth, momentum and market expertise of MCI Communications Corporation and will provide benefits for the shareholders, customers and employees of both companies;

WHEREAS, because it is difficult to predict exactly how Concert may wish to conduct its business in the future due to advances in technology and other factors, the Parties intend to work closely together and to share information to permit the Government to monitor the implementation and assess the efficacy of this Agreement over time;

WHEREAS, the DoD and the FBI have considered the potential ramifications of foreign control in the particular circumstances of this merger and have concluded that governmental concerns pertaining to national security, law enforcement, and public safety can be addressed by means of this Agreement;

NOW, THEREFORE, BT and MCI Communications Corporation are entering into this Agreement with the DoD and the FBI in order to address all objections that the DoD and the FBI might otherwise have to transfer of control of MCI Communications Corporation's FCC licenses pursuant to the merger.

I. General Provisions

A. Certain of the rights and obligations of the Parties under this Agreement are set forth in further detail in an Implementation Plan, which is consistent with this Agreement. Affiliates shall comply with that Implementation Plan, as it may be modified from time to time by the Parties, consistent with the provisions of this Agreement.

B. As used in this Agreement and the Implementation Plan, the following terms shall have the following meanings:

"Affiliates" means BT, MCI, and Concert, and each of them individually, and includes all entities that control or are controlled by any or all of them and all successors and assigns of BT, MCI, Concert, or other entities that control or are controlled by them.

"Customer Proprietary Network Information ('CPNI')" means information as defined in 47 U.S.C. §§ 222(f)(1)(A) & (B).

"Domestic Telecommunications" or "Domestic Telecommunications Services" means the provision of telecommunications services from one U.S. location (any state, district, territory, or possession of the United States) to another U.S. location.

"Domestic Telecommunications Infrastructure" means facilities and/or equipment that transmit Domestic Telecommunications, and any telecommunications facilities and equipment physically located in the United States.

"Electronic Surveillance" means interception of wire, oral, or electronic communications as defined in 18 U.S.C. §§ 2510(1), (2), and (12), respectively, and electronic surveillance as defined in 50 U.S.C. § 1801(f); access to stored wire or electronic communications, as referred to in 18 U.S.C. § 2701; acquisition of dialing or signaling information through pen register or trap and trace devices or other devices or features capable of acquiring such information; and acquisition of location-related information concerning a telecommunications service subscriber.

"Lawful Process" means Electronic Surveillance orders or authorizations, other orders, legal process, statutory authorizations and certifications regarding access to Subscriber Information.

"MCI" shall include the subsidiary of Concert established to provide Domestic Telecommunications Services, its successors and assigns, and all entities controlled by it.

"Sensitive Information" means unclassified information regarding (i) the persons who are the subjects of Lawful Process, (ii) the identity of the government agency or agencies serving such Lawful Process on MCI, (iii) the location or identity of the line, circuit, transmission path or other facilities or equipment used to conduct Electronic Surveillance, (iv) the means of carrying out Electronic Surveillance, (v) the type(s) of service, telephone number(s), records, or other communications subject to Lawful Process, and (vi) other unclassified information designated in writing by an authorized government official as "Sensitive Information."

"Sensitive Network Monitoring Personnel" means personnel responsible for performing network management, operations, maintenance, or security functions who have regular access to facilities, systems, or equipment which enable monitoring of subscribers' wire or electronic communications, including any such communications that are in electronic storage. This term excludes personnel who (i) perform outside plant operations and maintenance functions, (ii) perform network-level monitoring without the responsibility to monitor the content of a subscriber's communications, or (iii) monitor telemarketing calls by MCI personnel or customer-originated calls to MCI.

"Subscriber Information" means information of the type referred to and accessible subject to procedures specified in 18 U.S.C. § 2703(c) or (d) or 18 U.S.C. § 2709, or other legal process established by state law.

C. In response to all reasonable requests made by the DoD or the FBI, Affiliates agree to provide access to information concerning technical, physical, management or other measures and other reasonably available information for the DoD and the FBI to assess Affiliates' compliance with this Agreement and the Implementation Plan and to determine whether additional measures are needed.

D. Any Party may propose additional or alternative reasonable measures (i) for the purpose of preventing violations of this Agreement and the Implementation Plan, or (ii) for the purpose of addressing significant changes in communications technology or the manner in which Affiliates conduct their business. The Parties will consider and discuss all such proposals in good faith.

E. MCI will establish written policies and procedures to ensure compliance with the provisions of this Agreement and the Implementation Plan.

F. MCI will provide training and periodic reminders to MCI's officers and employees of MCI's obligations under this Agreement and the Implementation Plan.

G. Upon reasonable notice and during reasonable hours, the DoD and the FBI may visit any telecommunications facility of any Affiliate in the United States, and may inspect any part of any Affiliate's Domestic Telecommunications Infrastructure for the purpose of verifying compliance with the terms of this Agreement and Implementation Plan. Upon reasonable notice from the DoD or the FBI, Affiliates will make available for interview any of Affiliates' officers or employees located in the United States who are in a position to provide information for verification that the Affiliates are complying with their obligations under this Agreement or the Implementation Plan.

H. As further provided in the Implementation Plan, Affiliates agree to report to the FBI and, as appropriate, the DoD, any information regarding: (i) a breach of this Agreement or the Implementation Plan; (ii) unauthorized electronic surveillance conducted through the Domestic Telecommunications Infrastructure; (iii) access to or disclosure of CPNI relating to Domestic Telecommunications Services in violation of law or regulation or this Agreement; or (iv) improper access to or disclosure of classified information or Sensitive Information in the possession of Affiliates. Affiliates agree to cooperate with the DoD and the FBI in investigating (i) breaches of this Agreement and the Implementation Plan; (ii) unauthorized electronic surveillance conducted through the Domestic Telecommunications Infrastructure; (iii) access to or disclosure of CPNI relating to Domestic Telecommunications Services in violation of law or regulation or this Agreement; or (iv) improper access to or disclosure of classified information or Sensitive Information in the possession of Affiliates.

I. The DoD and the FBI shall take reasonable precautions to protect from improper public disclosure all information submitted by Affiliates to the DoD and the FBI in connection with or in furtherance of this Agreement or the Implementation Plan, and clearly marked with the

legend "MCI RESTRICTED," "MCI CONFIDENTIAL," "BT CONFIDENTIAL," "CONCERT CONFIDENTIAL," "IN STRICTEST CONFIDENCE," or similar designation. Such marking shall represent to the DoD and the FBI that the information so marked constitutes "trade secrets" and/or "commercial or financial information obtained from a person and privileged or confidential" within the meaning of 5 U.S.C. § 552(b)(4) or that the information so marked constitutes information from files, the disclosure of which information "would constitute a clearly unwarranted invasion of personal privacy" within the meaning of 5 U.S.C. § 552(b)(6). For purposes of 5 U.S.C. § 552(b)(4), the Parties agree that such information is voluntarily submitted. In the event of a request under 5 U.S.C. § 552(a)(3) for information so marked, the DoD or the FBI, as appropriate, shall notify Affiliates of such request and consult with them as to any contemplated release (including release in redacted form) of such information. The DoD or the FBI, as appropriate, shall notify the Affiliates of any proposed release of such information under 5 U.S.C. § 552(a)(3).

J. Nothing in this Agreement or the Implementation Plan shall prevent the DoD or the FBI from disseminating information as appropriate to seek enforcement of this Agreement or the Implementation Plan, or otherwise necessary in furtherance of the missions, responsibilities or obligations of the DoD or the FBI, provided that the DoD or the FBI shall take reasonable precautions to protect from improper public disclosure information marked as described in the preceding paragraph; where feasible, the DoD and the FBI will make information available for inspection rather than providing copies thereof.

K. Nothing in this Agreement or the Implementation Plan is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. § 222(a) and (c)(1) and the FCC's implementing regulations (*e.g.*, the DoD or the FBI will only request the details of CPNI pursuant to Lawful Process or prior customer approval).

II. Domestic Network Control Facilities

A. Affiliates' facilities that are part of or are used to direct, control, supervise, or manage all or any part of the Domestic Telecommunications Infrastructure owned, managed, or controlled by the Affiliates, or that are both capable of and specifically configured as a primary, backup, or alternate facility for such direction, control, supervision, or management, shall at all times be located within the United States. Control of the Domestic Telecommunications Infrastructure, and monitoring and diagnosis of problems arising in the Domestic Telecommunications Infrastructure, shall be performed in the United States by trustworthy persons. This provision applies except to the extent and under the conditions concurred in by the DoD and the FBI.

B. Affiliates' facilities referred to in the preceding paragraph will be capable of complying and configured to comply, and Affiliates' officials in the United States will have unconstrained authority to comply, with all National Security and Emergency Preparedness rules, regulations, and orders issued by the FCC pursuant to the Communications Act of 1934, as

amended (47 U.S.C. § 151 *et seq.*), as well as with the orders of the President in the exercise of his authority under § 706 of the Communications Act of 1934, as amended (47 U.S.C. § 606), and under § 302(e) of the Aviation Act of 1958 (49 U.S.C. § 40107(b)) and Executive Order 11161 (as amended by Executive Order 11382), as well as future amendments to any of the above authorities, in an effective, efficient, and unimpeded fashion.

C. Affiliates represent that they currently comply with Paragraphs II(A)-(B) above.

D. Nothing in this Agreement or the Implementation Plan shall be interpreted as limiting or expanding any authority over Affiliates' facilities located outside the United States that the Government may possess by virtue of international agreement or the Constitution or laws of the United States.

III. Use of Network and Information

A. MCI agrees to establish and implement effective measures and procedures for the purpose of preventing MCI's employees and others (i) from using MCI's telecommunications network facilities to conduct electronic surveillance of communications in the United States not authorized to be conducted by Federal and State law or regulation; and (ii) from accessing, using or disclosing CPNI arising from the provision of Domestic Telecommunications Services contrary to law or regulation or to the terms of the Agreement or the Implementation Plan. These measures and procedures shall take the form of detailed technical, organizational, and personnel-related measures and written procedures, as set forth or referenced in the Implementation Plan.

B. The Implementation Plan shall include, inter alia, appropriate provisions aimed at preventing (i) unauthorized personnel from gaining access to network elements where electronic surveillance can be conducted; (ii) access, use or disclosure of CPNI contrary to the terms of the Agreement or the Implementation Plan; and (iii) unauthorized access to classified information and Sensitive Information.

C. Sensitive Network Monitoring Personnel

1. As further provided in the Implementation Plan, MCI shall verify the recent employment and residence history of persons who assume positions in the category of Sensitive Network Monitoring Personnel working in any part of the Domestic Telecommunications Infrastructure. MCI shall provide this information, as well as personal identifying information for such persons (including name(s), alias(es), date and place of birth, social security number, visa and passport numbers) to the FBI. The purpose of this provision is to ensure the trustworthiness of Sensitive Network Monitoring Personnel.

2. Following the receipt of this information, if the FBI reasonably believes that a person is not sufficiently trustworthy to occupy a position in the category of Sensitive Network Monitoring Personnel and so notifies MCI, the person shall not be permitted to hold a position in such a category; provided, however, that after fourteen (14) days shall have passed after the provision of required information to the FBI by MCI, and no adverse notice shall have been received from the FBI, that person shall be deemed suitable to begin work as Sensitive Network Monitoring Personnel.
3. If the DoD or the FBI provides information to MCI regarding any person occupying a position in the category of Sensitive Network Monitoring Personnel that reasonably would have precluded that person's occupying a position in the category of Sensitive Network Monitoring Personnel at the outset, then the FBI and MCI shall promptly review this information and promptly make a determination concerning that person's trustworthiness and the appropriateness of such person's continuing to occupy such position in the category of Sensitive Network Monitoring Personnel. If adverse information material to the trustworthiness of a person within the category of Sensitive Network Monitoring Personnel comes to the attention of MCI, then MCI shall either remove the person from such position or promptly provide information about the matter to the FBI. MCI may provide such information to the FBI in a manner that maintains the anonymity of such person, to the extent feasible and proper.

D. Customer Proprietary Network Information -- Domestic Customers

1. For purposes of this subsection and related provisions of the Implementation Plan, "Domestic Customer" means a customer who subscribes to Domestic Telecommunications Services provided by Affiliates and whose international service is not provided pursuant to a contract or tariff arrangement for international services or similar volume discount arrangement. Use of a telephone calling card or similar device outside the United States does not change a customer's status as a Domestic Customer.

2. Except for CPNI generated as a result of international calls, it is MCI's general practice to store and maintain all CPNI for Domestic Customers within the United States. Affiliates have no intention of materially increasing in the near future the degree of access from outside the United States to CPNI pertaining to Domestic Customers.

3. The FCC presently has pending before it a rulemaking proceeding concerning CPNI (Common Carrier Docket 96-115). The FBI and MCI may submit to the FCC in this Docket comments regarding the issue of access to and storage of CPNI outside the United States. Until the earlier of March 31, 1998, or the effective date of FCC regulations specifically related to this issue, CPNI pertaining to Affiliates' Domestic Telecommunications Services (i)

shall be stored and maintained exclusively in the United States, and (ii) shall not be accessible from outside the United States to a materially greater degree than at present. The preceding sentence shall not apply to any Domestic Customer who has approved having his or her CPNI accessible from outside the United States. After the earlier of March 31, 1998, or the effective date of any FCC regulations specifically related to this issue, Affiliates (i) shall comply with those regulations, and (ii) shall in any event, store and have accessible in the United States a copy of all CPNI retained by MCI in the ordinary course of business pertaining to telecommunications that originate or terminate in the United States. The Parties' agreement on provisions relating to CPNI in this Agreement and the Implementation Plan shall be without prejudice to the positions they may choose to take in any proceeding with respect to this issue.

IV. Electronic Surveillance and Subscriber Information

A. MCI shall designate points of contact within the United States with the authority and responsibility for carrying out Lawful Process issued in accordance with Federal or State law or regulation. These points of contact shall be eligible for and shall have been granted appropriate security clearances; foreign ownership of MCI shall not, of itself, make an MCI employee ineligible for a security clearance.

B. MCI shall protect the confidentiality and security of all Lawful Process and the confidentiality and the security of classified information and Sensitive Information in accordance with Federal and State law or regulation and the Implementation Plan.

C. MCI's compliance with its obligations under Paragraphs IV.A. and B. shall take the form of technical, organizational, and personnel-related measures and written procedures set forth or referenced in the Implementation Plan.

D. The Implementation Plan shall set forth, inter alia, appropriate measures (i) for the purpose of preventing unauthorized access to data or facilities that reveal classified information or Sensitive Information; (ii) providing that MCI will assign employees who are U.S. citizens and who meet high standards of trustworthiness for maintaining the confidentiality of Sensitive Information to positions which handle or which regularly deal with information identifiable to such person as Sensitive Information subject to Part IV of this Agreement; (iii) specifying that personnel handling classified information shall be eligible for and shall have been granted appropriate security clearances (employment by MCI shall not make an individual ineligible for a security clearance); (iv) providing that the points of contact described in Paragraph IV.A. shall have sufficient authority over those employees' handling of information relating to the subject of Part IV of this Agreement to maintain the confidentiality of classified information and Sensitive Information; and (v) specifying that MCI will maintain appropriately secure facilities (*e.g.*, offices) for the handling and storage of classified information and/or appropriately secure facilities for the handling and storage of Sensitive Information.

E. MCI's obligations with respect to Lawful Process shall be limited by and to the undertakings set forth in this Agreement, as elaborated in the Implementation Plan between the Parties unless and until they are modified. Nothing in this Agreement or the Implementation Plan is intended to limit any obligation imposed by Federal or State law or regulation.

V. Modification of Agreement and Implementation Plan

This Agreement and the Implementation Plan (to the extent consistent with the Agreement) may be modified by agreement of the Parties. Modifications may be proposed by Affiliates, the DoD, or the FBI. If Affiliates propose a modification, the DoD and the FBI must approve or disapprove the proposed modification within forty-five (45) days. If the DoD or the FBI proposes a modification, Affiliates must approve or disapprove the proposed modification within forty-five (45) days. Any substantial modification to the Agreement shall be reported to the FCC within 30 days after approval by the Parties.

VI. Dispute Resolution and Enforcement of Agreement

A. The Parties shall use their best efforts to resolve any disagreements that may arise under this Agreement or the Implementation Plan, including disagreements arising under Paragraph I.D. or Part V of this Agreement. Disagreements will be addressed in the first instance at the staff level, by the Parties' designated representatives. Any disagreement that has not been resolved at that level shall be submitted promptly to an inter-Party panel of senior officials, unless the DoD or the FBI believes that important national interests can be protected only by resorting to the measures set forth in Paragraph VI.B. Affiliates' senior official(s) appointed to the panel shall be U.S. citizens and senior corporate officers of Affiliates' principal U.S. affiliate. If the disagreement involves classified information, Affiliates' senior official(s) shall possess the appropriate security clearances. If the disagreement involves the FBI, the FBI's senior official(s) shall be the Assistant Director of the National Security Division and/or his or her designee(s). If the disagreement involves the DoD, the DoD's senior official(s) shall be the Director of the Defense Information Systems Agency and/or his or her designee(s). The panel shall hear a presentation from each Party to the dispute and then attempt to resolve the dispute. If, after the presentations, the Parties' senior officials are unable to agree, any Party may have recourse to the procedures referred to in Paragraph VI.B.

B. Subject to prior compliance with Paragraph VI.A., if any Party believes that any other Party has breached or is about to breach this Agreement or the Implementation Plan, that Party may bring an appropriate action for relief (including equitable relief) before a court of competent jurisdiction. Moreover, subject to prior compliance with Paragraph VI.A., if the FBI or DoD believes that any of the Affiliates has breached or is about to breach this Agreement, the FBI or DoD alternatively may bring an action for relief (including equitable relief) before the FCC. Subject to prior compliance with Paragraph VI.A., Affiliates may petition the FCC for a declaratory ruling with respect to Affiliates' obligations under this Agreement. Nothing in this Agreement shall waive any defenses to or immunities from suit that a Party may otherwise have.

C. Nothing in this Agreement or the Implementation Plan is intended to confer or does confer any rights on anyone other than the Parties hereto.

D. With the exception of service of Lawful Process, all requests for information, visits or interviews, proposed modifications, reports, and notices under this Agreement and the Implementation Plan shall be made by and to the Parties' designated representatives. The Parties shall designate their representatives within thirty (30) days of the execution of this Agreement. Until such time, the representatives shall be:

MCI
General Counsel
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006

BT
President, BT North America Inc.
North Building, Suite 725
601 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Federal Bureau of Investigation
Assistant Director
National Security Division
935 Pennsylvania Ave., N.W.

Washington, D.C. 20535

Department of Defense
General Counsel
1600 Defense Pentagon
Washington, D.C. 20301

VII. Non-Objection

Based on the execution of this Agreement and assuming the approval thereof and the adoption of the Condition to FCC Licenses by the FCC, the DoD and the FBI (i) will notify the FCC that they have no objection to the proposed transfer of control of MCI's FCC licenses, and (ii) will not make any objection they otherwise would have made concerning the merger to the Committee on Foreign Investment in the United States or the President.

VIII. Effective Date of Agreement and Implementation Plan

The provisions of this Agreement and the Implementation Plan shall take effect on the date of consummation of the merger between BT and MCI Communications Corporation, except that the following provisions shall take effect as follows:

A. The provisions of Paragraph III.C., relating to Sensitive Network Monitoring Personnel, shall take effect on the date thirty (30) days after the date of consummation of the merger.

B. The provisions of Paragraph III.D., relating to CPNI for Domestic Customers, and related provisions of the Implementation Plan shall take effect immediately upon the execution of this Agreement.

C. The provisions of Part VII, relating to withdrawal of objections by the DoD and the FBI, shall take effect immediately upon the execution of this Agreement.

This Agreement executed as follows:

British Telecommunications plc

Date: _____

James E. Graf II
President, BT North America Inc.

MCI Communications Corporation

Date: _____

Michael H. Salsbury
Executive Vice President and
General Counsel
MCI Communications Corporation

United States Department of Defense

Date: _____

Hon. Emmett Paige, Jr.
Assistant Secretary of Defense
(Command, Control, Communications
and Intelligence)

Federal Bureau of Investigation

Date: _____

John F. Lewis
Assistant Director
National Security Division

APPENDIX B

STATEMENT OF VOLUNTARY COMMITMENT IN JULY 7, 1997, MCI *EX PARTE* LETTER

On behalf of MCI and BT, MCI, in its July 7, 1997, *ex parte* letter states that it commits to offer a backhaul service as follows:

1. MCI and Concert will make available backhaul capacity equivalent to a total of 147 E-1 circuits, pursuant to the schedule described below, between the TAT-12/13 cable head-ends (*i.e.*, landing stations) located in the United States and a point or points served by MCI's existing backhaul facilities.
2. MCI and Concert will make these circuits available in four phases:
 - a. capacity equivalent to a total of 63 E-1 circuits will be available on the date that the Commission releases its order approving the merger;
 - b. capacity equivalent to a total of 42 additional E-1 circuits will be available within 30 days after the Commission releases its order approving the merger;
 - c. capacity equivalent to 21 additional E-1 circuits will be available within 60 days after the Commission releases its order approving the merger; and
 - d. capacity equivalent to 21 additional E-1 circuits will be available within 90 days after the Commission releases its order approving the merger.
3. This backhaul capacity will be offered on a first-come, first-served basis to any carrier (directly or through its authorized representative), which is not a U.S. cable head-end owner or collocated at a U.S. cable head-end, that purchased from MCI, BT, or Concert the indefeasible right to use the U.S. end of the 147 whole circuits on TAT-12/13 that the parties offered pursuant to the terms of the decision of the European Union dated May 11, 1997, relating to the proposed merger between MCI and BT. Each such carrier shall be eligible to purchase an amount of backhaul capacity equivalent to the capacity it purchased on TAT-12/13 pursuant to the terms of this decision, and for use in connection with the capacity that it purchased on TAT-12/13 pursuant to this decision.
4. These circuits will be offered in each phase as a priority as DS-3 circuits and then as E-1 circuits. If more DS-3 or E-1 circuits are ordered simultaneously than are available in the next phase, MCI will select on a random basis the order or orders to be filled in that phase and will fill the remaining orders in the following phase. No later than the day following release of the Commission order approving the merger, MCI will send to eligible carriers a written offer for backhaul service that includes all the terms and conditions described in this Appendix, including specific recurring and nonrecurring charges. Any order will be deemed received on the business day it is physically received by MCI, unless it is received

less than fourteen days after the date of MCI's written offer, in which case it will be deemed received on the date fourteen days after the date of that letter.

5. The obligation to make these circuits available shall end two years after the date the Commission releases its order approving the merger.
6. MCI and Concert will make these backhaul circuits available by carrier-to-carrier contract for terms of one, two, three, four, and five years pursuant to terms and conditions, including prices for the interoffice channel component, that are substantially the same as those reflected in MCI's then-effective interstate tariff for TDS 45 service for DS-3 backhaul circuits and in MCI's then-effective interstate tariff for TDS 1.5 service for E-1 backhaul circuits, adjusted to recover different costs related to the provision of backhaul services. MCI will make circuits ready for use by the requesting carrier within a reasonable period of time. The contracts will not unreasonably restrict the ability of any carrier to resell these circuits.