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

In the Matter of	)	
Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.	)	CC Docket No. 97-211

MEMORANDUM OPINION AND ORDER

Adopted: September 14, 1998 **Released: September 14, 1998**

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement; Commissioner Powell issuing a statement, and Commissioner Tristani approving in part, dissenting in part, and issuing a statement.

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I. INTRODUCTION

1. In this Order, the Commission considers the applications filed by WorldCom, Inc. (WorldCom) and MCI Communications Corporation (MCI) pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended (Communications Act),[1] for approval to transfer control of certain licenses and authorizations from MCI to WorldCom in connection with their proposed merger. In accordance with the terms of sections 214(a) and 310(d), WorldCom and MCI (collectively, Applicants) must persuade us that their proposed transaction will serve the public interest, convenience, and necessity before we can grant their applications.[2]

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[1] 47 U.S.C. §§ 214(a), 310(d).

[2] *See Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order,

For the reasons set forth below, we conclude that WorldCom and MCI have demonstrated that the transfer of the subject licenses and authorizations will serve the public interest, convenience, and necessity. Accordingly, we grant their applications for transfer of control. In so doing, however, we condition our approval on MCI's divesture of its Internet assets to Cable & Wireless plc (C&W) prior to the close of its merger with WorldCom. Further, although this Order permits the transfer to WorldCom of MCI's direct broadcast satellite (DBS) license, such transfer is subject to whatever action the Commission may take pursuant to the pending application for review of the initial license grant to MCI.

II. BACKGROUND

A. The Applicants

2. MCI is one of the largest telecommunications companies in the United States (U.S.), with 1997 revenues of $19.6 billion.[3] MCI is the second largest U.S. provider of long distance and international telecommunications services.[4] It also provides local exchange service in 62 U.S. cities through its MCImetro subsidiary.[5] At the time the instant merger application was filed, MCI was a major provider of Internet backbone and access services, which it provided over its national fiber network.[6]

3. WorldCom is also among the largest U.S. telecommunications companies, with 1997 revenues of $7.35 billion.[7] It is the fourth largest U.S. provider of long distance and international telecommunications services[8] and provides local exchange service in 111 U.S. cities through its subsidiaries Brooks Fiber Properties (Brooks Fiber) and Metropolitan Fiber

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12 FCC Rcd 19985, 19987 at paras. 29-36 (1997) (*Bell Atlantic/NYNEX Order*); *In the Matter of the Merger of MCI Communications Corp. and British Telecommunications PLC,* GN Docket No. 96-245, Memorandum Opinion and Order, 12 FCC Rcd 15351, 15353 at para. 2 (1997) (*BT/MCI Order*).

[3] MCI SEC Form 10-K, Annual Report (filed Apr. 15, 1998) (MCI Apr. 15, 1998 10-K).

[4] FCC, *Trends in Telephone Service* (Com. Car. Bur. July 1998) at 26, 53 (*1998 Trends in Telephone Service Report).*

[5] Letter from Andrew D. Lipman, Counsel for WorldCom, Swidler & Berlin, to Magalie Roman Salas, Secretary, FCC at Ex. 2 (filed June 24, 1998) (WorldCom June 24 *Ex Parte*).

[6] As discussed in section IV.C below, MCI has agreed to sell its Internet business to C&W in order to address competitive concerns raised in the review of the merger by European and U.S. antitrust authorities.

[7] WorldCom SEC Form 10-K, Annual Report (filed Mar. 27, 1998) (WorldCom Mar. 27, 1998 10-K).

[8] *1998 Trends in Telephone Service Report* at 26, 53.

Systems (MFS).[9] WorldCom is also a major provider of Internet backbone and access services, which it provides over its national fiber network.

B. The Merger Applications

4. The Applicants request the Commission's consent to the transfer of control of MCI's numerous Title II authorizations and cable landing licenses and Title III radio licenses to WorldCom.[10] WorldCom's first application was filed on October 1, 1997, in conjunction with its initial tender offer for MCI.[11] Following WorldCom and MCI's November 9, 1997 merger agreement, the companies jointly filed an amended application for transfer of control of MCI's licenses and authorizations to WorldCom on November 21, 1997.[12] On July 31, 1998, Applicants filed a minor amendment listing additional private land mobile radio licenses held by MCI, but not included in the initial application.[13]

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9 WorldCom June 24 *Ex Parte*, Ex. 2.

10 *See* Applications and Request for Special Temporary Authority, Vol. III at Tab I (listing the licenses and authorizations held by MCI) (filed Oct. 1, 1997) (WorldCom Oct. 1 Application). According to the Applicants, MCI holds 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 used to provide voice and video services as well as submarine cable landing licenses and a DBS license. Amendment to Applications of WorldCom, Inc. for Transfer of Control of MCI Communications Corporation at 3, n.3 (filed Nov. 21, 1997) (WorldCom/MCI Nov. 21 Amended Application); *see also* Minor Amendment to Applications of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation (filed July 31, 1998) (listing additional licenses held by MCI) (WorldCom/MCI July 31 Minor Amendment).

11 WorldCom Oct. 1 Application. This application sought Special Temporary Authority (STA) for the interim transfer of MCI's licenses and authorizations to a voting trustee pursuant to the Commission's Policy Statement on Tender Offers and Proxy Contests. *See Tender Offers and Proxy Contests*, Policy Statement, 59 Rad. Reg. 2d. (P&F) 1536, 1584 (1986), *appeal dismissed sub. nom. Office of Communication of the United Church of Christ v. FCC*, 826 F.2d 101 (D.C. Cir. 1987). In its Amended Application WorldCom withdrew its request for an STA and for approval to transfer MCI Shares to a voting trustee. *See* WorldCom/MCI Nov. 21 Amended Application at 5-6.

12 WorldCom/MCI Nov. 21 Amended Application.

13 WorldCom/MCI July 31 Minor Amendment.

5. Under the terms of the merger agreement, MCI will become a wholly-owned subsidiary of WorldCom[14] and the combined company will be renamed MCI WorldCom.[15] Holders of MCI Common Stock will receive shares of WorldCom Common Stock according to an agreed upon exchange ratio.[16] Following the merger, current holders of MCI Common Stock will own approximately 45 percent of the combined company.[17]

6. The proposed merger was reviewed by European and U.S. Federal antitrust authorities. On July 8, 1998, the European Commission (EC) cleared the merger subject to the condition that MCI sell its entire Internet business.[18] The proposed merger was reviewed by the U. S. Department of Justice pursuant to the Hart-Scott-Rodino amendment to the Clayton Act.[19] On July 15, 1998, the U.S. Department of Justice (DOJ) issued a press release concluding that the merger of WorldCom and MCI may proceed after MCI sells its Internet business.[20] The instant Order represents the Commission's independent review of the merger based on its public interest standard.

7. Numerous parties filed timely comments opposing the application or petitions to deny the application. These parties assert that the transfer of control of MCI's licenses and authorizations to WorldCom is not in the public interest.[21] In addition, parties filed numerous procedural and related motions.[22]

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[14] WorldCom/MCI Nov. 21 Amended Application at 1-2.

[15] *Id*. at 5.

[16] *Id*. "The actual number of shares of WorldCom stock to be exchanged for each MCI share owned by investors in MCI other than BT will be determined by dividing $51 by the 20-day average of the high and low sales prices for WorldCom common stock prior to closing, but will not be less than 1.2439 shares (if WorldCom's average stock price exceeds $41) or more than 1.7586 (if WorldCom's average stock price is less than $29). In addition, under the Merger Agreement, BT will receive $51 per share in cash for each of its shares of MCI Class A Common Stock upon consummation of the merger." *Id.* at 5 n. 9.

[17] *Id.* at 5.

[18] *See* MCI July 15 Reply Comments, Attach. 2 (European Commission Press Release, "Commission Clears WorldCom and MCI Merger Subject to Conditions," rel. July 8, 1998) (EC Press Release).

[19] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18.

[20] MCI July 15 Reply Comments, Attach. 1 (DOJ Press Release, "Justice Department Clears WorldCom/MCI Merger After MCI Agrees to Sell its Internet Business," rel. July 15, 1998) (DOJ Press Release).

[21] Parties filing comments are listed in the Appendix.

[22] These motions are addressed below. *See infra* section VI.B.

III. PUBLIC INTEREST FRAMEWORK

A. Legal Standards

8. Pursuant to sections 214(a) and 310(d) of the Communications Act, the Commission must determine whether Applicants have demonstrated that granting a transfer of control of licenses and authorizations from MCI to WorldCom would serve the "public interest."[23] More specifically, under section 214(a) of the Communications Act, the Commission must find that the "present or future public convenience and necessity require or will require" WorldCom to operate the acquired telecommunications lines, and that "neither the present nor future public convenience and necessity will be adversely affected" by the discontinue of service from MCI.[24] Under section 310(d) the Commission must determine that the proposed transfer of wireless licenses "serves the public interest, convenience, and necessity" before it can approve the transaction.[25]

9. The public interest standard of sections 214(a) and 310(d) is a flexible one that encompasses the "broad aims of the Communications Act."[26] These broad aims include, among other things, the implementation of Congress' "pro-competitive, de-regulatory national policy framework designed to . . . open[] all telecommunications markets to competition,"[27] "preserving and advancing" universal service,[28] and "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services."[29] The

[23] 47 U.S.C. §§ 214(a), 303(r), 310(d) (1994). *See Teleport Communications Group Inc., Transferor, and AT&T Corp. Transferee,* CC Docket No. 98-24, Memorandum Opinion and Order, FCC 98-169 at para. 11 (rel. July 23, 1998) (*AT&T/TCG Order*); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20000, para. 29; *BT/MCI Order,* 12 FCC Rcd at 15364, para. 28. The Commission also shares jurisdiction with DOJ 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." *See* 15 U.S.C. § 18; 15 U.S.C. § 21(a) (recognizing the Commission's role as an antitrust agency with respect to acquisitions of "common carriers engaged in wire or radio communications or radio transmissions of energy").

[24] 47 U.S.C. § 214(a).

[25] 47 U.S.C. § 310(d).

[26] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19987, para. 2 & n.2 (and cases cited therein); *BT/MCI Order,* 12 FCC Rcd at 15353, para. 3.

[27] H.R. Rep. No. 104-458 at 1; Preamble to Pub. L. No. 104-104, 110 Stat. 56 (1996).

[28] *See* 47 U.S.C. § 254.

[29] *See* H.R. Rep. No. 104-458 at 1. *See also*, *e.g.*, 47 U.S.C. §§ 259, 332(c)(7), 706.

public interest analysis may also include an assessment of whether the merger will affect the quality of telecommunications services provided to consumers or will result in the provision of new or additional services to consumers.[30] In evaluating whether the proposed transaction furthers the aims of the Communications Act, the Commission may consider the trends within, and needs of, the telecommunications industry, the factors that influenced Congress to enact specific provisions of the Communications Act, and the nature, complexity, and rapidity of change in the telecommunications industry.[31] Of course, we note that this list of considerations is not exhaustive, and an assessment of other factors may be appropriate in the future.

10. The statutory standards that the Commission must apply in this case necessarily involve a balancing process that weighs the potential public interest harms against public interest benefits[32] and, under both standards, Applicants bear the burden of proof.[33] Ultimately, we must determine whether the Applicants have demonstrated, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest, considering both its competitive effects and other public interest benefits and harms.[34] Where necessary, the Commission may attach conditions to the approval of a transfer of licenses in order to ensure that the public interest is served by the transaction. Section 214(c) of the Communications Act also authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the

[30] *See, e.g., AT&T/TCG Order* at para. 11; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 158; *BT/MCI Order,* 12 FCC Rcd at 15430, para. 205 (describing "lower prices, improved quality, enhanced service or new products" as examples of consumer benefits resulting from merger-specific efficiencies that are relevant to the public interest analysis).

[31] *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20003, para. 32; *BT/MCI Order,* 12 FCC Rcd at 15365, para. 29.

[32] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157.

[33] *See, e.g.*, 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant); *American Telephone and Telegraph Co. and MCI Communications Corporation Petitions for the Waiver of the International Settlements Policy*, File No. USP-89-(N)-086, Memorandum Opinion and Order, 5 FCC Rcd 4618, 4621, para. 19 (1990) (applicant seeking a waiver of an existing rate bears the burden of proof to establish that the public interest would be better served by the grant rather than the denial of the waiver request); *LeFlore Broadcasting Co., Inc.*, Docket No. 20026, Initial Decision, 66 FCC 2d 734, 736-37, paras. 2-3 (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).

[34] *AT&T/TCG Order* at para 12*; Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20001, 20007, paras. 29, 36; *BT/MCI Order*, 12 FCC Rcd at 15367, para. 33.

public convenience and necessity may require."[35] Similarly, section 303(r) of the Communications Act authorizes the Commission to prescribe such restrictions or conditions, not inconsistent with law, as may be necessary to carry out the provision of the Act.[36]

11. The Commission shares concurrent antitrust jurisdiction with the DOJ with respect to this merger.[37] We acknowledge this shared responsibility and respect the expertise that DOJ brings to bear in analyzing the competitive effects of proposed transactions. We also acknowledge that the DOJ and the Commission's competitive effects analysis may, in certain respects, overlap. Our reliance in this Order on the analytical framework contained in the *1992 Horizontal Merger Guidelines* is an example. Thus, we believe it is appropriate for us to take this shared responsibility and analytical overlap into consideration in carrying out our obligations under the Communications Act.[38]

12. Because our public interest authority under the Communications Act is sufficient to address the competitive issues raised by the proposed merger, we decline to exercise our Clayton Act authority in this case.[39] Pursuant to our authority under the Communications Act,[40]

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[35] 47 U.S.C. § 214(c). *See, e.g., MCI Communications Corp*, File No. I-S-P-93-013, Declaratory Ruling and Order, 9 FCC Rcd 3960, 3968, para. 39 (1994); *Sprint Corp.*, File No. I-S-P-95-002, Declaratory Ruling and Order, 11 FCC Rcd 1850, 1867-72, paras. 100-33 (1996); *GTE Corp.*, File No. W-P-C-2486, Memorandum Opinion and Order, 72 FCC 2d 111, 135, para. 76 (1979).

[36] 47 U.S.C. § 303(r). *See, e.g., FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (*Nat'l Citizens)* (broadcast-newspaper cross-ownership rules properly adopted pursuant to section 303(r))*; U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) powers).

[37] *See supra* at note 23.

[38] Given this shared responsibility, it is appropriate for the Commission to take note of the DOJ's merger investigation. For example, issuing a Commission decision denying a transfer of licenses or authorizations may prove unnecessary if the DOJ investigation ultimately leads to a divestiture, consent decree, or other changes in material facts. In such a circumstance, DOJ's actions may cause the Commission to reach a different outcome.

[39] *See, e.g., Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20005, para. 33; *BT/MCI Order*, 12 FCC Rcd at 15364, para. 28; *see also United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (*en banc*).

[40] That the standard for reviewing mergers under the Communications Act differs somewhat from the standard under the antitrust laws is not a new development. Since the 1930s, the Commission has had the authority and responsibility to review such mergers under both the Communications Act and the antitrust laws. Until passage of the 1996 Act, however, the Commission's public interest determination under the Communications Act with respect to mergers between common carriers took precedence over any determination by DOJ pursuant to the antitrust laws. *See* 47 U.S.C. § 221(a) (1995 ed.). Section 601 of the 1996 Act, by

we are required to make an independent determination whether a proposed merger will serve the public interest. Moreover, our public interest evaluation is distinct from, and broader than, the competitive analyses conducted by antitrust authorities. First, although the Communications Act requires us to consider public interest benefits or harms other than the merger's competitive effects, to make an overall assessment, the Commission itself must consider the effect of the transfer on competition -- "there can be no doubt that competition is a relevant factor in weighing the public interest."[41]

13. Second, while the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence,[42] it is not governed by them. Therefore, it is possible for the Commission to arrive at a different assessment of the size or nature of the likely competitive benefits or harms of a proposed merger when assessing competitive effects under its public interest standard than the antitrust agencies arrive at based on antitrust law. As the Supreme Court stated in *FCC v. RCA Communications Inc.*:

> To restrict the Commission's action 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

amending the Communications Act to remove the Commission's ability to prevent DOJ from challenging mergers between common carriers under the antitrust laws, contemplated that both agencies would be reviewing such mergers and, potentially, be reaching disparate results. *See* 47 U.S.C. § 152nt. Indeed, Congress did not eliminate the Commission's Clayton Act authority, or in any way diminish our authority -- and responsibility -- under sections 214 and 310 to determine whether a transfer of licenses and authorizations serves the public interest.

41 *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953) (*RCA Communications*); *US v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (quoting *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968)); *see Nat'l Citizens*, 436 U.S. at 795.

42 *RCA Communications*, 346 U.S. at 94; *United States v. FCC*, 652 F.2d at 81-82, 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."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.*, 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger, even though the DOJ had also reviewed the merger and found the proposed transaction would not violate the antitrust laws); *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 1197, 1201 (D.C. Cir. 1987). *Cf. Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply.").

> by more flexible procedure. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast . . . .[43]

As we explain in greater detail in section II.B below, the need for the Commission to make expert predictions of future market conditions and the likelihood of success of individual competitors is particularly acute in the period of great change following the passage of the Telecommunications Act of 1996 (1996 Act).[44]

14. A third and related reason that the Commission's merger analysis is distinct from and broader than antitrust analysis is that the Commission must implement and enforce the 1996 Act, in which Congress established a clear national policy that competition leading to deregulation, rather than continued regulation of dominant firms, shall be the preferred means for protecting consumers.[45] The antitrust agencies, on the other hand, are required to approve mergers unless they substantially lessen competition. Depending upon how one interprets the antitrust agencies' mandate, it is possible that the antitrust agencies might well approve a merger that does not decrease the current level of competition but that does impede the development of future competition, leading the Commission to conclude that the merger does not serve the public interest. Finally, because of its regulatory and enforcement institutions and experience, the Commission in some cases may well have a comparative advantage in imposing and enforcing certain types of conditions that result in the merger yielding over-all positive public interest benefits.[46]

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[43] *RCA Communications*, 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) (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)).

[44] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* The 1996 Act amended the Communications Act of 1934.

[45] Joint Statement of Managers, S. Conf. Rep. No. 104-230, at 1 (1996).

[46] We note that there are other differences between the Commission's and the DOJ's merger review activities. For example, the Commission issues a final appealable decision, while any decision the DOJ may make to challenge a merger must then be prosecuted before a federal court. In addition, the Commission is held judicially accountable for its decision to grant or deny a transaction, while a DOJ decision to not challenge a transaction is not judicially reviewable. As a result, the Commission is required in all events to explain its reasoning in an order on the merits, while a DOJ decision not to challenge a transaction is ordinarily accompanied by no publicly available explanation of its analysis. Moreover, the Commission must apply the "public interest"

B. Analytical Framework for Assessing Competitive Effects

15. In conducting our public interest analysis of the competitive effects of the proposed merger, we generally follow the analytical framework adopted by the Commission in the *Bell Atlantic/NYNEX Order* and the *BT/MCI Order*.[47] As the Commission noted in the *BT/MCI Order*, this analytical framework is based not only on prior Commission analyses of market power,[48] but "is also embodied in the antitrust laws, including the DOJ and Federal Trade Commission *1992 Horizontal Merger Guidelines* and the April 8, 1997 revisions of those guidelines."[49]

16. Consistent with the *1992 Horizontal Merger Guidelines*, the *Bell Atlantic/NYNEX* competitive effects analysis seeks to define the relevant markets and those firms participating in those markets.[50] It then attempts to determine whether the proposed merger will allow firms participating in those markets to exercise increased market power through either unilateral or coordinated anticompetitive behavior.[51] Finally, if it appears that the merger will result in

standard spelled out in sections 214 and 310 of the Communications Act (assuming it does not exercise its Clayton Act authority), while the DOJ may ground a decision not to challenge a transaction on resource constraints or other issues of prosecutorial discretion.

47 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20008, para. 37; *BT/MCI Order*, 12 FCC Rcd at 15367, para. 33.

48 *See, e.g.*, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Dockets No. 96-149 & 96-61, Second Report and Order & Third Report and Order, 12 FCC Rcd 15756 (1997) (*LEC Regulatory Treatment Order*); *Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, Memorandum Opinion and Order*, Report No. LB-96-32, Memorandum Opinion and Order, 12 FCC Rcd 2624 (1997); *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, Order, 12 FCC Rcd 17963 (1996) (*AT&T International Non-Dominance Order*) *recon. pending*; *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*); *Craig O. McCaw, Transferor and AT&T Co., Transferee,* File No. ENF-93-44, Memorandum Opinion and Order, 9 FCC Rcd 5836 (1994) (*AT&T/McCaw Order)*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11786 (1995), *aff'd sub nom. SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

49 *BT/MCI Order*, 12 FCC Rcd at 15368, para. 34. In that order, the Commission noted that the analytical framework we apply is closely related to the "actual potential competition" doctrine applied by lower courts in evaluating certain non-horizontal mergers. *Id.* at nn.57-58. *See* United States Dept. of Justice Antitrust Div., and Federal Trade Comm'n, *1992 Horizontal Merger Guidelines,* 57 Fed. Reg. 41552 (1992); United States Dept. of Justice and the Federal Trade Comm'n, *Revision to the Horizontal Merger Guidelines* (Apr. 8, 1997) (*1992 Horizontal Merger Guidelines*).

50 *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20008-09, para. 37.

51 *Id.*

increased market power (through either unilateral or coordinated activity), it attempts to determine if entry of new firms or construction of new capacity by existing firms in response to price increases will constrain any attempted exercise of market power.[52]

17. In assessing whether a merger involving firms currently competing in a market will result in anticompetitive effects, the *1992 Horizontal Merger Guidelines* suggest that market shares should be assigned to each firm currently participating in the market and then the pre-merger and post-merger levels of concentration should be calculated, using the Herfindahl-Hirschman Index (HHI). The merger guidelines also explicitly recognize, however, that "recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance."[53]

18. The *1992 Horizontal Merger Guidelines* focus on static markets perhaps because the most typical case is that of a market that has not undergone a recent major change which will substantially affect its subsequent structure. As a result, the *1992 Horizontal Merger Guidelines* do not detail any specific methodology for assessing the effect of mergers in markets that have experienced significant recent, or ongoing, changes. The passage of the 1996 Act, however, has resulted in precisely such a major change in a number of telecommunications markets. Specifically, many markets, such as those for local exchange telephony services, that historically have been regulated as monopolies, are now in transition to becoming competitive as envisioned by the 1996 Act. In such markets, where competition is still in its infancy, analysis of post-merger increases in concentration based on current market shares may well provide an insufficient predictor of the likelihood of the merger's potential effects on competition. In the *Bell Atlantic/NYNEX Order*, the Commission created an explicit analytic framework to assess the potential competitive effects of mergers involving carriers that had been prevented or deterred from entering the relevant market because of the legal, regulatory, economic and operational barriers that the 1996 Act seeks to lower.[54] It used the term "transitional markets" to refer to such markets and set forth an analytical framework that should be used to analyze the potential competitive effects of mergers in such markets. We believe that this framework is an appropriate analytical tool for assessing potential competitive effects where the relevant market is a transitional market *and* at least one of the merging firms is a precluded competitor in the relevant market.[55]

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52 *Id*. at 20049, para. 128.

53 *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41558, § 1.521.

54 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20020, para. 60.

55 "Precluded competitors" are those firms "that are most likely to enter but have until recently been prevented or deterred from market participation by barriers to entry the 1996 Act seeks to lower." *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20020, para. 60.

19. Under the analysis laid out in the *Bell Atlantic/NYNEX Order,* the Commission seeks to determine whether either or both of the merging parties are among a small number of "most significant market participants" that could most quickly foster competition in the relevant market.[56] If a firm, whether presently active in the market or currently precluded, is among a small number of "most significant market participants," then its absorption by the merger will, in most cases, create a competitive harm. Of course, almost any antitrust analysis of mergers could be generally characterized as attempting to identify the most significant participants in a market and then determine if one or both of the merging parties are among them. The important distinction in transitional markets is that firms that have been precluded from entering the market by recently removed barriers to entry may potentially be considered significant participants. Furthermore, depending upon the circumstances, firms may be included as significant competitors even though they may have yet to manifest a firm intention to enter or to invest substantially in preparation for entry.[57]

20. The analytical framework set forth in the *Bell Atlantic/NYNEX Order* reflects the values of, and builds upon, the "actual potential competition" doctrine established in antitrust case law. Under the actual potential competition doctrine, a merger between an existing market participant and a firm that is not currently a market participant, but would have entered the market but for the merger, violates antitrust laws if the market is concentrated and entry by the nonparticipant would have resulted in deconcentration of the market or other pro-competitive effects.[58] As the case law indicates, one obstacle facing parties bringing an actual potential competition case is to demonstrate that the acquired firm would have entered the relevant market absent the merger. In particular, the fact that the firm has not entered up until the current period may be considered by some to create a presumption that it would not have entered in the near future either. The *Bell Atlantic/NYNEX* framework differs from the actual potential competition doctrine in that it is only meant to apply to situations where this presumption is inappropriate

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[56] As we stated in the *AT&T/TCG Order*, when analyzing a merger in a market that is rapidly changing, the best way to assess the likely effect of the merger is to isolate the effect of the merger from all other factors affecting the development of the relevant market over time. This is achieved by framing the analysis in a way that holds constant the effects of all changes in the market conditions other than those directly caused by the merger. To do this, we also identify as market participants those firms that have been effectively precluded from the market -- that is, those firms that are most likely to enter (or are just beginning to enter) the market but have until recently been prevented or deterred from participating in the market by the barriers that the 1996 Act seeks to eradicate. We then identify the most significant participants based on an assessment of capabilities and incentives to compete effectively in the relevant market. *AT&T/TCG Order* at para. 17.

[57] Of course, the case for including a firm as a significant potential competitor will generally be stronger to the extent that it can be established that the firm has made plans to enter or has already made investments in preparation for entry.

[58] *See United States v. Marine Bancorporation*, 418 U.S. 602 (1974). *See also* ABA Section of Antitrust Law, *Antitrust Law Developments* (4th ed. 1997) at 346-50 (*Antitrust Law Developments*).

because there is a clear and strong reason to explain why a firm that has yet to enter a market may nonetheless be likely to enter in the near future. The reason is simply that the passage of the 1996 Act resulted in a lowering of entry barriers that will make entry attractive that was previously impossible.

21. Rightly understood, then, the analytical framework set forth in the *Bell Atlantic/NYNEX Order* is a natural extension of the principles, contained in the merger guidelines and existing antitrust case law, to transitional markets.[59] That framework, which is well-tailored to the Commission's unique role as an expert agency with regulatory authority over these transitional markets, explains how and why the Commission will treat as "most significant market participants" not only firms that already dominate transitional markets, but also those that are most likely to enter soon, effectively, and on a large scale once a more competitive environment is established.

22. In this Order, we examine the potential competitive effects of WorldCom's acquisition of MCI on the provision of domestic long distance, international long distance, Internet backbone, and local exchange and exchange access services.[60] Because neither WorldCom nor MCI are precluded competitors in the provision of domestic long distance, international long distance, or Internet backbone services -- and indeed are major current participants in the provision of these types of services -- we need not evaluate the potential competitive effects of the merger in those areas using the "transitional markets" analytical framework of the *Bell Atlantic/NYNEX Order*. Instead, we evaluate the merger's potential competitive effects on those services under traditional horizontal merger analysis. We conclude that it is appropriate, however, to utilize the "transitional markets" analytical framework of the *Bell Atlantic/NYNEX Order* to analyze the potential competitive effects of this merger on local exchange markets because those markets are transitional markets, and WorldCom and MCI, until recently, have been, and to an extent still are, effectively precluded from competing in those markets.

IV. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS

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59 As explained above, however, it may be that the Commission is better able to enforce this forward-looking standard that requires expert judgment about future events than are the antitrust agencies.

60 Although we have determined that these four services are the only services relevant to the instant proceeding, we expect that bundled service may, in the future, become a distinct and relevant product market. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20015-16, para. 52 (noting that to the extent consumer demand for bundled service packages force carriers to offer such bundles, the bundling of local exchange and exchange access services with long distance services may well become a relevant product market even if, today, it is still nascent in most markets and nonexistent in many others); GTE Jan. 5 Petition at 47 (acknowledging the existence of a "nascent" market for bundled services). We note that, many carriers, including the Applicants, presently offer, to a limited extent, local exchange and exchange access service bundled with long distance service.

A. Domestic Long Distance Services

23. This section considers the competitive effects of the proposed merger on domestic long distance services. Although this merger, which combines the second and fourth largest long distance carriers, will increase market concentration significantly in the near term, we conclude that the merger will not likely have anticompetitive effects on domestic long distance services, because of recent and expected, significant increases in the essential input of transmission capacity. As discussed in greater detail below, we find particularly significant the fact that four firms are currently constructing new national fiber networks. We conclude that these firms and others will be able to utilize this new transmission capacity to compete with incumbent long distance carriers in retail markets, and therefore, that the merger likely will not impair competition in markets for long distance services. We also examine the primary claim of commenters opposing the application -- that the merger will injure competition by eliminating WorldCom as a "maverick" supplier of wholesale long distance services. We conclude that the four new firms, each with a high-capacity national fiber network, should more than replace the potential loss of WorldCom as a "maverick" supplier to resellers of long distance services. Finally, in section IV.E below, we address allegations by commenters that the merged entity will abandon its residential long distance customers.

1. Relevant Markets

24. *Product Markets*. For purposes of analyzing the competitive effects of this merger on domestic, interstate, interexchange services[61] we identify two distinct product markets, reflecting customers groups with different patterns of demand: (1) residential customers and small business (mass market); and (2) medium-sized and large business customers (larger business market).[62]

25. We note that in previous orders, such as the *Bell Atlantic/NYNEX Order*, the Commission described mass market long distance and larger business long distance as separate market segments within the long distance relevant product market. We previously used the phrase "market segment" to distinguish between customer groups (specifically "mass market" and "larger business" customers), because the Commission used the term "markets" to distinguish broadly among long distance services, local exchange and exchange access services,

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[61] Consistent with the Commission's analysis in the *Bell Atlantic/NYNEX Order*, we will examine domestic interstate, interexchange, long distance services separately from local exchange and exchange access services, because consumers wishing to make a long distance call cannot substitute local telephone service. *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20015, para. 51.

[62] *See AT&T/TCG Order* at para. 20; WorldCom/MCI Mar. 20 Reply Comments at 25. *See also Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53. We find nothing in the record that suggests a need to analyze medium-sized businesses as a separate product market. *See AT&T/TCG Order* at para. 20.

and international services. We recognize that our choice of terminology may have caused some confusion. We take this opportunity, therefore, to clarify our approach. What we have termed "the long distance product market" is, in fact, comprised of a number of different relevant product markets, as discussed below. Thus the "market segments" identified in the *Bell Atlantic/NYNEX Order* actually constitute, for the purposes of this Order, separate relevant product markets. We emphasize, however, that we are applying the same analytical principles here that we adopted in the *LEC Regulatory Treatment Order*, and applied in the *Bell Atlantic/NYNEX Order*, the *BT/MCI Order*, and the *AT&T/TCG Order*. We note, moreover, that changing our description of mass market long distance and larger business long distance from market segments to separate relevant product markets does not alter any of our findings concerning competitive effects either in our previous orders or here.

26. We distinguish mass market consumers from larger business consumers because the record indicates that larger business users often demand advanced long distance features (advanced features), such as frame relay, virtual private networks (VPN), and enhanced 800 services (E800 services), that differ from the services generally demanded by mass market consumers.[63] Additionally, larger business customers generally demand greater volumes of minutes than mass market customers, and thus qualify for volume discounts that are unavailable, as a practical matter, to mass market customers.

27. We recognize that, under the *1992 Horizontal Merger Guidelines*, it may be possible to identify additional and narrower relevant product markets within these two broader end user markets.[64] The record, however, contains insufficient information on cross-elasticities of demand for us to make such a determination. More importantly, we find that, with the possible exception of a few "high-end" advanced business services discussed below,[65] we do not need to make such a determination because owners of transmission capacity provide all the same services, and production substitution among these services is "nearly universal."[66] Accordingly, we conclude that we can analyze adequately the competitive effects of the merger by considering only the mass and larger business markets.

28. In analyzing the competitive effects of the instant merger on domestic long distance services, we will focus on the input of transmission capacity -- a distinct and essential

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63 WorldCom/MCI Mar. 20 Reply Comments at 25.

64 *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41554-55, § 1.11.

65 *See infra* paras. 72-76.

66 *Cf. 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41557, § 1.32 n.14 ("If production substitution among a group of products is nearly universal among the firms selling one or more of those products, . . . the Agency may use an aggregate description of those markets as a matter of convenience.").

ingredient for providing long distance services to either product market.[67] GTE, on the other hand, argues that, in order to assess adequately the potential competitive effects of this merger, we should define a separate wholesale (input) market.[68] By suggesting that we analyze a wholesale market, GTE proposes that we examine inputs beyond the mere provision of transmission capacity. As explained below, however, we find that once a firm has overcome the barrier of deploying a national fiber network, all the other capabilities necessary to provide wholesale services are readily attainable.[69] We need not, therefore, for purposes of this proceeding, analyze wholesale services as a separate and distinct input market. At the same time, we note that the results of our competitive analysis would be logically equivalent were we to do so.

29. We find it appropriate to analyze transmission capacity in our examination of the effects on the merger on the two relevant retail markets because transmission capacity is generally fungible between both the mass and larger business markets. As we discuss below, we find that the increase in transmission capacity provided by the four new facilities-based firms should mitigate any increase in concentration resulting from the merger between WorldCom and MCI. In addition, we conclude that these new firms, as well as traditional resellers and those carriers purchasing fiber from these firms, will be able to use this transmission capacity to mitigate any competitive effects of the merger on either retail market.

30. *Geographic Markets.* Continuing the method of analysis we followed in the *LEC Regulatory Treatment Order* and the *Bell Atlantic/NYNEX Order*, we treat the relevant geographic market as a single national market.[70] The geographic market is more accurately defined as a series of point-to-point markets. A telephone call in one point-to-point market usually is a poor substitute for another. For example, if one wants to call a relative or business associate in Denver, it is generally inconsequential if rates to San Francisco are lower.

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[67] In order to transport a long distance call, it is necessary to have not only fiber, but certain other facilities and equipment including, but not limited to, electronics and switching equipment.

[68] *See* GTE Jan. 5 Petition at 25-28; GTE Mar. 13 Comments at 12; GTE Jan. 5 Petition at 25 (arguing that the Commission "recognized in the *Bell Atlantic/NYNEX Order* [that] the competitive effects of a proposed merger must be assessed in both wholesale (input) and retail markets") (citing *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20044-46, paras. 115-20). As an initial matter, we disagree with GTE's contention that such a distinction was made in the *Bell Atlantic/NYNEX Order.* We note that the Commission did not define a separate product market for inputs in the paragraphs cited by GTE, but rather simply noted that Bell Atlantic and NYNEX control inputs that are essential for interexchange providers and that should be accounted for in analyzing the effect of the merger on the bundled service market.

[69] *See infra* paras. 51-63.

[70] *See LEC Regulatory Treatment Order*, 12 FCC Rcd 15756, 15792-95, paras. 64-69 (1997); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20017, para. 54. *See also AT&T/TCG Order* at paras. 21-22.

Nevertheless, for purposes of our competitive analysis of this merger, we analyze a single national market for long distance services -- both mass market and advanced business services -- because we believe that geographic rate averaging and rate integration, price regulation of exchange access services, and the availability of interstate transport capacity cause carriers to behave similarly in each domestic point-to-point market. Equally important, most substantial competitors in the long distance services market are national in scope, advertise nationally, and exert the same competitive effect in all regions. There is no credible evidence suggesting that there is, or could be, different competitive conditions in a particular point-to-point market, or groups of point-to-point markets.[71]

31. We are not persuaded by GTE's various arguments for defining more narrow geographic markets.[72] GTE first argues that there are capacity shortages on individual routes that create different market conditions among different city pairs. GTE does not, however, identify specific routes that suffer from shortages or quantify the effect of any such shortages.[73] GTE next maintains that the geographic rate averaging requirement has no impact on the market definition for retail services, because carriers offer location-specific discounts by lowering intrastate rates in certain states, and by spending significantly more on advertising and marketing of discount plans in larger urban areas than in smaller markets.[74] We reject this argument. The Communications Act's proscription on interexchange carriers charging higher rates to rural customers than to urban customers applies to intrastate calls as well as to interstate calls, and there is no evidence in the record from which we could conclude that carriers' intrastate rates violate geographic rate averaging requirements.[75] Moreover, we have no basis to conclude from the record that market-specific advertising of discount plans available to all customers precludes the geographic rate averaging requirement from mitigating the potential exercise of market power in any particular point-to-point market.[76] In sum, we are not persuaded that there are, or

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[71] *See LEC Regulatory Treatment Order,* 12 FCC Rcd at 15749, para. 67.

[72] GTE June 11 Renewed Motion at 15.

[73] *Id.*

[74] *Id.* at 16-17.

[75] The Commission has previously concluded that the geographic rate averaging requirement applies to intrastate, interexchange calls, and that Congress intended the states to ensure that rates for intrastate, interexchange calls offered to rural and high-cost customers are no higher than those paid by urban customers. *See Implementation of Section 254(g) of the Communications Act of 1934*, Order, 11 FCC Rcd 9564, 9585, para. 46 (1996) (*Geographic Rate Averaging and Rate Integration Order*).

[76] We note that the only "geographically-specific" discounts that carriers may offer under Commission rules are temporary promotions lasting no more than 90 days. *Geographic Rate Averaging and Rate Integration Order,* 11 FCC Rcd at 9576-8, paras. 24, 29.

could be, materially different competitive conditions in a particular point-to-point market, or group of point-to-point markets, and therefore, treat the geographic market as a single, national market.[77]

2. Market Participants

32. The next step in our competitive analysis is to identify the participants in each relevant market.[78] For over a decade, the number of companies providing long distance service has risen every year,[79] reaching more than 600 companies by the end of 1996.[80] Most of this increase in long distance competition has come at the expense of AT&T, whose market share, while still the largest, has fallen below 50 percent of total toll operating revenues.[81]

33. *Mass Market.* WorldCom is not a significant competitor in the provision of long distance services to residential and small business customers, as demonstrated by its small retail market share and its lack of substantial brand recognition, as conceded by both Applicants and

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[77] GTE also argues that the appropriate geographic market for retail long distance service should not be larger than a local access and transport area (LATA), "because all customers within a LATA generally face the same retail long-distance market conditions." GTE June 11 Renewed Motion at 15, Harris Reply Aff. at 7. We find no reason to depart from the Commission's previous conclusion that geographic rate averaging and rate integration requirements cause carriers to behave similarly in all domestic LATAs. Under the 1996 Act, a "local access and transport area" (LATA) is "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission." 47 U.S.C. § 153(25). LATAs were created as part of the Modification of Final Judgment's (MFJ) "plan of reorganization" under which the BOCs were divested from AT&T. *United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983) (Plan of Reorganization), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983); *see also United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Apr. 11, 1996) (vacating the MFJ). Pursuant to the MFJ, "all BOC territory in the continental United States [was] divided into LATAs, generally centering upon a city or other identifiable community of interest." *United States v. Western Elec. Co.*, 569 F. Supp. 990, 993 (D.D.C. 1983).

[78] *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20019, para. 58.

[79] *See 1998 Trends in Telephone Service Report* at 46-48.

[80] *Id.* at 46.

[81] FCC, *Long Distance Market Shares First Quarter* (Com. Car. Bur. June 1998) at 16 (*1998 Long Distance Market Shares Report*).

commenters.[82] WorldCom states that it has chosen not to market directly to residential end users and, instead, serves these customers indirectly through its wholesale of long distance services.[83] Indeed, as explained below, it is in connection with WorldCom's role as a wholesale supplier to resellers that market to these consumers that allegations of competitive harm are raised.[84] All parties agree that AT&T, MCI, and Sprint are the three largest retail providers of long distance services to the mass market.[85] Non-BOC[86] incumbent local exchange carriers (LECs), such as GTE and Southern New England Telecommunications Corp. (SNET), also are providing retail mass market long distance services, and have been successful in rapidly gaining market share.[87] The success of these incumbent LECs suggests that, upon obtaining approval pursuant to section 271, BOCs are also likely to be successful in the mass market within their own regions. Finally, there are a number of companies reselling long distance services to this product market, and several have gained significant market shares.[88]

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[82] GTE Jan. 5 Petition at 25-26; WorldCom/MCI Mar. 20 Reply Comments at 26.

[83] Letter from Jean L. Kiddoo, Counsel for WorldCom, Swidler & Berlin, to Magalie Roman Salas, Secretary, FCC, Grillo Aff. at 4 (filed July 8, 1998) (WorldCom July 8 *Ex Parte)*.

[84] *See infra* paras. 67-76.

[85] AT&T, MCI, and Sprint have a combined 82.7 percent market share of residential direct dial toll minutes. *1998 Long Distance Market Shares Report* at Table 4.3. GTE provides the following estimates of market shares based on retail long distance revenues of "residence and low-volume business facilities-based carriers": AT&T (66.8 percent); Sprint (12.7 percent); MCI (12.3 percent); Frontier (2.3 percent); LCI (2.1 percent); WorldCom (1.9 percent); Qwest (0.1 percent). GTE Mar. 13 Comments, Schmalensee and Taylor Aff. at Ex. 12, citing Frost & Sullivan. Frost & Sullivan define "low-volume business customers" as those that spend less than $4,170 per month for long distance service. The Applicants state that they cannot comment in detail on the findings or methodologies of the Frost & Sullivan estimates, because they have been advised by Frost and Sullivan that any research conducted for GTE has been done as custom research on a proprietary basis. WorldCom July 8 *Ex Parte* at 1-2.

[86] We define the term "BOC" as that term is defined in 47 U.S.C. § 153(4).

[87] GTE has added 2.2 million customers for its long distance service after just over two years of operation, representing approximately 11 percent of its domestic customer base. *See GTE Profits Flatten With New Data Investment, Competition,* Communications Daily (July 21, 1998)(July 21 Comm. Daily); *FCC Preliminary Statistics of Communications Common Carriers, 1997.* GTE's long distance revenue expanded 83 percent between the second quarter 1997 and second quarter 1998. July 21 Comm. Daily. SNET has also been successful in acquiring long distance customers in its service area and is presently providing long distance service on 41 percent of its access lines. *See FCC Preliminary Statistics of Communications Common Carriers, 1997*; *SNET First Quarter Normalized Net Income of $56.4 Million Up 12.1 percent Before One-Time Items,* SNET News Release (Apr. 24, 1998).

[88] *See 1998 Long Distance Market Shares Report* at 11, Table 3.1.

34. *Larger Business Market.* AT&T, MCI, and Sprint are also among the largest providers of domestic interstate long distance services to larger business consumers. WorldCom is also a substantial provider of long distance services in this market, at least for some of the services these customers purchase.[89] WorldCom is both a retail provider of these services and a provider of wholesale services to resellers. The Applicants acknowledge that WorldCom has served a limited number of larger customers with "plain-vanilla" telecommunications services.[90] They further state that MCI's product line is targeted across all customer ranges, with an emphasis on high-end, large business customers.[91] We believe that many other carriers, including Qwest Communications International, Inc. (Qwest),[92] IXC Communications, Inc. (IXC), C&W, and the Frontier Companies (Frontier), have the capabilities to have a significant impact on competition for larger business customers. Each of these carriers owns their own facilities and markets its ability to provide at least one advanced feature such as VPN and E800 features.[93] We also believe that the BOCs will participate in this product market upon obtaining section 271 approval. The record indicates that, as businesses demand ever more sophisticated service offerings, the number of providers diminishes, and that only AT&T, MCI, and Sprint provide high-end services on a retail basis.[94]

89 GTE provides the following estimates of market shares based on retail long distance revenues of "large-volume business facilities-based carriers": MCI (41.9 percent); AT&T (35.5 percent); WorldCom (13.2 percent); Sprint (6.4 percent); LCI (1.2 percent); Frontier (0.4 percent); Qwest (0.04 percent); others (1.5 percent). GTE Mar. 13 Comments, Schmalansee and Taylor Aff. at Ex. 4 (citing Frost & Sullivan). Frost & Sullivan define "high volume business customers" as those that spend more than $4,170 per month for long distance service. *But see* n. 85, *infra*. (Applicants' complaints about Frost & Sullivan data). The Yankee Group, in a report submitted by Bell Atlantic, estimates the following business long distance market shares for 1996: AT&T (51.4 percent), MCI (23.2 percent), Sprint (11.4 percent), WorldCom (10.2 percent), others (3.9 percent). Letter from Robert H. Griffen, Antitrust Litigation Counsel, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, Attach., The Yankee Group, *Telecommunications White Paper*, Vol. 12, No. 13 (Dec. 1997), "U.S. Long Distance Market: Calm Before the Storm" at 3 (filed Apr. 28, 1998) (Bell Atlantic Apr. 28 *Ex Parte*).

90 WorldCom July 8 *Ex Parte*, Grillo Aff. at 3. By "plain-vanilla," we understand Applicants to mean transmission capacity for basic voice long distance service.

91 *Id.* at 4-5. The Applicants state that MCI provides sophisticated service offerings designed to satisfy the needs of these consumers.

92 We note that LCI merged with Qwest on June 5, 1998. *See* Qwest Press Release, *Qwest and LCI Consummate Merger* (June 5, 1998) <http://www.qwest.net/press/060598.html> (Qwest June 5 Press Release).

93 Letter from Jean L. Kiddoo, Counsel for WorldCom, Swidler & Berlin, to Magalie Roman Salas, Secretary, FCC, at 4 (filed June 1, 1998)(WorldCom June 1 *Ex Parte*).

94 *See* WorldCom/MCI Mar. 20 Reply Comments at 25; WorldCom July 8 *Ex Parte*, Grillo Aff. at 4.

35. Four market participants, Qwest, IXC, Williams Communications (Williams), and Level 3 Communications, Inc. (Level 3), are each building a national fiber network. Moreover, several firms, including GTE and Frontier, are purchasing fiber from these firms to use in their own national networks. We consider the operators of these new networks to be market participants, rather than potential entrants, because they committed to enter the market prior to the merger. Their entry, therefore, does not represent a reaction to any anticompetitive effects of the merger.[95] As discussed below, each company plans to complete a national fiber network comparable in size and capacity to WorldCom's present network.[96] Because GTE and other commenters have focused much of their opposition to the merger on concerns that WorldCom would no longer provide, at favorable terms and conditions, wholesale services to resellers that compete in retail markets, the ability of these new networks to use their transmission capacity to provide wholesale services is central to our analysis of competitive effects of the merger.

3. Analysis of Competitive Effects

a. Effect of Merger's Increase in Market Concentration

36. In our analysis of the competitive effects of the merger, we consider whether the merger will increase the likelihood of unilateral anticompetitive conduct by the merged entity or coordinated anticompetitive conduct of multiple market participants. We do not believe, and no commenter has alleged, that the merger will likely result in the merged entity's exercising unilateral market power.[97] Several commenters have argued, however, that the merger will further increase concentration in this market, and will therefore increase the likelihood of anticompetitive coordinated interaction among market participants.[98] Although there can be no

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[95] According to the *1992 Horizontal Merger Guidelines*, "[f]irms which have committed to entering the market prior to the merger generally will be included in the measurement of the market. Only committed entry or adjustments to pre-existing entry plans that are induced by the merger will be considered as possibly deterring or counteracting the competitive effects of concern." *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. 41552, 41562, § 3.2 n.27.

[96] *See* WorldCom/MCI Jan. 26 Reply Comments at 35 (citing FCC, *Fiber Deployment Update End of Year 1996* (Com. Car. Bur. Aug. 1997) at Table 1); WorldCom/MCI Jan. 26 Reply Comments, Carlton and Sider Decl. at 17-18.

[97] GTE has alleged that "residential and small business customers will suffer because resellers will pay higher prices for wholesale capacity (an anticompetitive unilateral effect of the merger), which they will be forced to pass on through higher end user rates." GTE Jan. 5 Petition at 28. We discuss this claim at paras. 68-71 *infra.*

[98] BellSouth and GTE also suggest that the stock prices of AT&T, MCI, Sprint, and WorldCom relative to the S&P 500 in the period following the announcement of the merger support their theory that the proposed acquisition will result in higher prices and earnings in long distance. BellSouth Jan. 5 Petition at 18; GTE Mar. 13 Comments, Harris Long Distance Aff. at 45-46; *see* GTE June 11 Renewed Motion, Harris Long Distance Reply

dispute that the merger will increase concentration in the short run, we disagree that anticompetitive effects are likely to result. Recent market trends indicate that the long distance market has become progressively less concentrated over the past decade. Moreover, the record indicates that there will be significant increases in the amount of long distance transmission capacity over the next two years.[99] We further conclude that, once a carrier has access to this fiber capacity, any remaining barriers to deploying this capacity in the retail long distance market are low. As discussed below, we conclude that the merger will not make coordinated action more likely in the market for long distance services.

b. HHI Indices

37. We begin our analysis of the competitive effects of the merger by assessing both the current market concentration and the likely increase in market concentration resulting from the merger, as measured by the Herfindahl-Hirschman Index (HHI).[100] As the *1992 Horizontal Merger Guidelines* make clear, this HHI analysis provides guidance regarding the potential

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Aff. at 45-46. WorldCom and MCI dispute this argument noting that a stock market analysis should focus on a short period of time, at most a few days, in order to isolate the announcement effect, and that, over a several month period, many factors can affect a stock's price, so that it would be difficult to attribute the changes to one factor. WorldCom/MCI Mar. 20 Reply Comments, Carlton and Sider Decl. at 36-37. We find that the information on relative changes in the value of stocks in the telecommunications industry submitted by BellSouth and GTE is speculative, does not control for numerous extraneous events, and, therefore, does not provide probative evidence of anticompetitive effects.

[99] *See infra* paras. 43-50.

[100] *See 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41558, § 1.51 (a)-(c). A market's HHI is calculated by summing the squares of the individual market shares of all the participants. Market concentration and the increase in market concentration resulting from a merger can be an indicator of the likely competitive effects of a merger. Under the *1992 Horizontal Merger Guidelines*, if the post-merger HHI is below 1000, the market is considered unconcentrated and the merger requires no further analysis; if the post-merger HHI is between 1000 and 1800, the market is considered moderately concentrated and an increase in HHI of more than 100 signals potential significant competitive concerns; and if the post-merger HHI is above 1800, the market is considered highly concentrated and an increase in HHI of more than 50 signals potential significant competitive concerns. We have used HHI analysis in numerous contexts as an initial means of measuring the significance of changes in market concentration. *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* CS Docket No. 96-133, Third Annual Report, 12 FCC Rcd 4358, 4419-20, paras. 120-21 (1997); *Amendment of Parts 20 & 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap,* WB Docket No. 96-59, Report & Order, 11 FCC Rcd 7824, 7869-73, 7899-904 (1996). The HHI has also been used by antitrust courts as a basic tool and has been called "a standard measure of market concentration," *Western Resources, Inc. v. Surface Trans. Board,* 109 F.3d 782, 785 (D.C. Cir. 1997), and "[t]he most prominent method of measuring market concentration." *FTC v. University Health, Inc.*, 938 F.2d 1206, 1211, n.12.

anticompetitive effects of a merger, but is not meant to be conclusive.[101] We also note that, given the unique economic, legal, and technical circumstances that color the telecommunications industry, we will not rigidly adhere to the results of this analysis where our independent expert analysis suggests a different outcome.[102]

38. With respect to the concentration in the retail market, GTE maintains that, based on interexchange carrier operating revenues, the pre-merger HHI is 2,823, and the post-merger HHI is 3,038.[103] Commenters further assert that, under the *1992 Horizontal Merger Guidelines*, such an increase in the HHI as a result of the merger indicates that the merger would be presumed to create or facilitate the exercise of market power.[104] These arguments overstate both the importance of the HHI calculations in this case and the assurance with which HHIs can be calculated for these products. A more complete measure of market concentration accounts for changing market conditions brought about by, among other things, new market participants that committed to enter the market before the merger.[105] Commenters' estimates of the increase in

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[101] The *1992 Horizontal Merger Guidelines* state that, "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger. Before determining whether to challenge a merger, . . . other market factors" must be considered. *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41558, § 2.0. *See also id.* §1.521.

[102] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20053, para. 136.

[103] GTE Jan. 5 Petition at 16. GTE bases its calculations on the Commission's *Long Distance Market Shares* report using 1996 revenues. *See id*. at n.34 (citing FCC, *Long Distance Market Shares Second Quarter* 1997 (Com. Car. Bur. Oct. 1997) at Table 6). The Commission has subsequently released its report for 1997 revenues. *See 1998 Long Distance Market Shares Report* at 13, Table 3.1. Using data from this report, the pre-merger HHI of 2,508 would rise to 2,766 after the merger. BellSouth and Rainbow/PUSH calculate similar estimates for the pre-merger HHI and the HHI increase for the long distance market including both business and residential service. BellSouth Jan. 5 Petition at 9; Rainbow/PUSH Jan. 5 Petition at 16-17. GTE also estimated pre-merger HHI levels and HHI increases using presubscribed lines and points of presence. *See* GTE Mar. 13 Comments, Harris Long Distance Aff., Ex. 13. Because the post-merger HHI appears to be greater than the pre-merger HHI in the short term no matter what measure is used, we do not discuss these other measures. By choosing not to discuss these measures, however, we do not find them irrelevant. Indeed, the *1992 Horizontal Merger Guidelines* suggest that adequate measures of market concentration include dollar sales, unit sales, or physical capacity. *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41557, § 1.41. Nevertheless, we note that these HHIs are not specific to either of the product markets that we define, and therefore represent at best rough approximations. Several of these measures, including the use of interexchange carrier revenues, combine revenues from both the mass and larger business markets. Because we base our analysis of competitive effects on the case of most concern, namely a post-merger HHI greater than 1800, but not over 3500, accompanied by a change in HHI greater than 100, and nevertheless find that the entry of new firms will mitigate any potential anticompetitive effects of the merger, we find it unnecessary to calculate more precise HHIs.

[104] *See 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41558, § 1.51.

[105] *See supra* para. 35.

HHI, which neglect these competitors, therefore, likely overstate the actual increase in concentration. Indeed, calculating an HHI based on revenue should account for the projected future sales of the firms described below who have committed to enter the market, as well as the adjusted projected revenues of the existing competitors.[106]

39. Although Applicants do not challenge commenters' HHI calculations, they note that neither the DOJ nor the Commission has suggested that mergers falling outside of the *1992 Horizontal Merger Guidelines*' safe harbor are necessarily anticompetitive.[107] We agree that an HHI analysis alone is not determinative and does not substitute for our more detailed examination of competitive concerns.[108] In particular, in this case, we must examine probable future expansion by committed entrants, as well as future conditions of entry generally.

c. Industry Market Trends

40. Recent market trends indicate that, overall, the markets for long distance service have become increasingly more competitive since the breakup of AT&T in 1984. In 1995, the Commission reclassified AT&T as a nondominant interexchange carrier, based on its finding that AT&T lacked unilateral market power in the long distance market.[109] Since that time, AT&T's market share has continued to decline as the number of carriers offering long distance services has risen and as new fiber networks have been constructed.[110] As previously noted, over 600 carriers provide long distance services. At least 20 of these carriers had annual revenues exceeding $100 million in 1997, and eight carriers had annual revenues exceeding $1 billion.[111] Moreover, as a group, carriers other than the four largest long distance carriers have demonstrated annual growth rates exceeding 40 percent.[112] The HHI for the long distance

[106] *Cf. 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41557, § 1.41. ("Market shares will be calculated using the best indicator of firms' future competitive significance.").

[107] WorldCom/MCI Jan. 26 Reply Comments at 31-33.

[108] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20057, para. 143.

[109] *AT&T Domestic Non-Dominance Order*.

[110] *AT&T/TCG Order* at para. 40.

[111] Specifically, these eight carriers were: AT&T, MCI, Sprint, WorldCom, Excel, Frontier, LCI, and C&W. *1998 Long Distance Market Shares Report* at 13.

[112] WorldCom/MCI Jan. 26 Reply Comments at 30 (citing FCC, *Long Distance Market Shares Third Quarter 1997* (Com. Car. Bur. Jan. 1997) at Table 2.3).

market has decreased since 1984 -- from 8,155 to 2,508 at the end of 1997 -- when calculated based on long distance carrier revenues.[113]

41. In the *AT&T Domestic Non-Dominance Order*, the Commission considered several market trends as evidence supporting its conclusion that AT&T lacked market power in long distance services. These trends continue today. For example, the Commission concluded that competitors in long distance services had enough readily available excess capacity to constrain other competitors' pricing behavior.[114] The Commission also found that both residential and business customers are highly price sensitive and will switch long distance carriers to obtain price reductions and desired features.[115] Moreover, the Commission found that the behavior of the market between 1984 and 1994 suggested intense rivalry among AT&T, MCI, and Sprint.[116]

42. We find no evidence in the record that these market trends will be reversed by this merger. GTE largely attributes the deconcentration of the long distance services market to the emergence of WorldCom and WorldCom's aggressive sales of wholesale services that have enabled resellers to gain market share.[117] We agree that a major reason for the increased competition in the long distance services market has been the increase in the availability of transmission capacity, from WorldCom as well as other facilities-based providers.[118] Although we believe that the time and expense needed to construct a fiber network represents a barrier to entry, the existence of the four firms that are already building national networks shows that these barriers are far from insurmountable; in addition, we find that existing and new carriers face relatively few barriers to using this transmission capacity to constrain any market power possessed by incumbents.[119]

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[113] *1998 Long Distance Market Shares Report* at 16. This HHI is based on revenues derived from mass market and larger business market long distance service revenues combined.

[114] *AT&T Domestic Non-Dominance Order*, 11 FCC Rcd at 3303, para. 58.

[115] *AT&T Domestic Non-Dominance Order*, 11 FCC Rcd at 3305-06, paras. 63-65. The Commission found that business customers were more sophisticated and knowledgeable about the products they buy and routinely request proposals from a number of carriers and accord full consideration to these proposals. *Id*. (quoting *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880, 5887 (1991)).

[116] *Id.* at 3308, para. 72.

[117] GTE Jan. 5 Petition at 19-22. We address GTE's "maverick" theory below at paras. 67-76.

[118] *See AT&T Domestic Non-Dominance Order*, 11 FCC Rcd at 3303-05, paras. 57-62.

[119] GTE argues that another barrier or deterrent to entry arises from the excess capacity possessed by AT&T, MCI, Sprint, and WorldCom. According to GTE, excess capacity can deter entry or price-cutting by signalling

i. Transmission Capacity of New Networks

43. We conclude, based on the evidence in the record, that the supply of transmission capacity is expanding significantly with the construction of four new national fiber-optic networks by Qwest, IXC, Williams, and Level 3. This capacity will likely enable these firms, those that buy fiber capacity, and resellers to constrain any exercise of market power by any market participant or group of market participants.

44. There are two network architectures that are used to provide both wholesale and retail long distance services. The first architecture is the traditional circuit-switched voice network. This is the predominant architecture used by incumbent interexchange carriers and is also being used by some of the new entrants. The second architecture, used by some new entrants including Qwest and Level 3, is the packet-switched Internet Protocol (IP) network. The IP architecture was designed and has traditionally been used for data transmission. Recent developments are likely to allow the IP architecture to support voice services better and to interface more easily with the legacy circuit-switched network, most notably with Signaling System 7 (SS7) capabilities.[120] As a result of these developments, we find that networks built with the IP architecture will compete increasingly with the traditional networks for long distance voice services. We review below the four new networks that are being built by Qwest, IXC, Williams, and Level 3, as well as other firms that are buying or leasing capacity from these networks.

45. *Qwest.* The record indicates that Qwest is providing wholesale and retail long distance services on its network. Qwest began construction of its network in 1996[121] and plans

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that retaliation will be a low-cost, rational, and credible strategy. GTE Jan. 5 Petition at 22-23. We find this argument without merit. First, the construction of four national facilities-based networks described below belies the argument that excess capacity has deterred entry. Second, GTE's concern that carriers will have sufficient excess capacities to retaliate against cost-cutting firms is undermined by GTE's contrary assertion that there may be capacity constraints on many routes. *See* GTE Jan. 5 Petition at 23 n.50; GTE Mar. 13 Comments at 15; GTE Mar. 13 Comments, Harris Long Distance Aff. at 24-25.

[120] *See* The COOK Report, *summary of article, Level 3 - TAC [Technical Advisory Council] IP Device Control Specification Completed -- Result of Multiple Efforts will Permit Packet Networks to Envelop PSTN and Empower End User Driven Applications* (Sept. 1998 (7.06)) <http://www.cookreport.com/07.06.shtml>.

[121] *See* Qwest SEC Form 10-Q/A First Quarter 1998 Report (filed May 7, 1998) (Qwest May 7, 1998 10-Q/A). *See also* WorldCom/MCI Jan. 26 Reply Comments at 35-36.

to complete its 18,500 route mile high-capacity fiber network by the second quarter of 1999.[122] Qwest's completed network will include nearly as many route miles[123] as

[122] Qwest Press Release, *Qwest Lights Network from New York to Washington, DC* (July 6, 1998) <http://www.qwest.com/press/070698.html> (Qwest July 6 Press Release).

[123] A "route mile" is a measure of the total number of miles of fiber routes on a network. Each route may contain one or more fiber cable sheaths.

WorldCom's network included last year.[124] Moreover, Qwest's network will include more fibers per cable than the current average national network, and will employ high capacity transmission technologies such as dense wave division multiplexing (DWDM).[125] According to the Applicants, the completed Qwest network will have points of presence (POPs)[126] in local access and transport areas (LATAs) that cover 78 percent of the U.S. population.[127] Qwest is already carrying traffic on a wholesale basis on 8,800 miles of its network.[128] In addition, through its recent acquisition of LCI, Qwest has become competitive in the retail market, and currently serves over 2 million business and residential customers.[129]

46. We find unpersuasive GTE's claim that construction delays will keep Qwest from completing its network on schedule.[130] Based on allegations that Qwest has experienced delays in completing nine of its fiber routes, GTE estimates that Qwest will not complete its network until August 2000.[131] Evidence indicates, however, that Qwest has revised its original construction schedule, and currently plans to complete its network by the second quarter of 1999.[132] We find no reason to believe that Qwest's most recent estimates are inaccurate or fail to consider previous delays.

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124 As of 1997, WorldCom's network consisted of 19,619 route miles. *1997 Fiber Deployment Report* at Table 1.

125 WorldCom/MCI Jan. 26 Reply Comments, Carlton and Sider Decl. at 18. For a discussion of network technology, *see* Qwest SEC Form 10K-405, Annual Report (filed Mar. 19, 1998) (Qwest Mar. 9, 1998 10K-405 Annual Report). DWDM increases network capacity by allowing each fiber to carry signals on more than one wavelength of light. We discuss new network technology below. *See infra* para. 64.

126 A POP is the location of physical interconnection between the long distance network and the network of the LEC.

127 WorldCom/MCI Mar. 20 Reply Comments, Carlton and Sider Decl. at 11. By comparison, WorldCom's network covers 82 percent of the U.S. population. WorldCom/MCI Mar. 20 Reply Comments, Carlton and Sider Decl. at 11; *see also* GTE Mar. 13 Comments, Harris Long Distance Aff. at 13.

128 *See* Qwest SEC Form 8-K Current Report (filed July 8, 1998) (Qwest July 8, 1998 8-K Current Report).

129 Qwest June 5 Press Release.

130 GTE June 11 Renewed Motion at 21, Harris Long Distance Reply Aff. at 28-29.

131 *Id.*, Harris Long Distance Reply Aff. at 26-29.

132 Qwest July 8, 1998 8-K Current Report.

47. *IXC.* The record indicates that IXC provides wholesale and retail long distance services including certain advanced features on its national network.[133] IXC, which began the national expansion of its network in 1995,[134] currently has 10,500 route miles of fiber and expects to have 20,000 route miles operational by the end of next year.[135] IXC will employ high-capacity transmission technologies such as DWDM,[136] and according to Applicants, will deploy, on average, twice as many fibers per cable as existing networks.[137] According to Applicants, IXC has, or will have, POPs in LATAs that include 61 percent of the U.S. population.[138] The evidence in the record also indicates that, by 1999, IXC's fiber will serve 95 of the top 100 metropolitan statistical areas (MSAs) and serve a total of 120 MSAs.[139]

48. *Williams.* Company documents and evidence in the record indicate that Williams will offer wholesale long distance services on its network.[140] According to Applicants, Williams plans to have 20,000 route miles of its 32,000 mile network activated by the end of 1999.[141]

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[133] Letter from James E. Magee, Counsel to IXC, Reboul, MacMurray, Hewitt, Maynard & Kristol, to Magalie Roman Salas, Secretary, FCC, Mann Aff. at 2, 3-4 (filed July 13, 1998) (IXC July 13 *Ex Parte*). IXC sells wholesale service to over 120 switchless resellers. *Id.* at 1-2. A "switchless reseller" buys long distance service in bulk from a long distance company and resells that service to smaller users; it owns no communications facilities. *See* Newton's Telecom Dictionary, 14th Ed. (1998) at 689 (Newton's).

[134] IXC Press Release, *IXC Breaks Ground On First Phase Of Fiber Optic Network Expansion* (Nov. 29, 1995) <http://www.ixc-investor.com/11-29-95.html>.

[135] IXC July 13 *Ex Parte* at 2-3.

[136] *See infra* para. 64.

[137] WorldCom/MCI Jan. 26 Reply Comments, Carlton and Sider Decl. at 17-18.

[138] WorldCom/MCI Mar. 20 Reply Comments, Carlton and Sider Decl. at 11.

[139] IXC July 13 *Ex Parte* at 2.

[140] Williams SEC Form 10K-405 Annual Report (filed Mar. 30, 1998) (Williams Mar. 30, 1998 10K-405 Annual Report); WorldCom/MCI Mar. 20 Reply Comments, Carlton and Sider Decl. at 16.

[141] WorldCom/MCI Mar. 20 Reply Comments, Carlton and Sider Decl. at 8. GTE maintains that 11,000 miles of this network is owned by Vyvx, a Williams subsidiary, and should not be considered when assessing the capacity of the Williams network, because a non-compete agreement Williams signed with WorldCom bars Williams from using the fiber for voice or fax until July 2001. GTE June 11 Renewed Motion at 21. We find that the Williams network presently under construction will be capable of providing substantial wholesale transmission capacity even if we do not consider the fiber owned by Vyvx.

Applicants claim that the Williams network will have POPs in LATAs covering 72 percent of the U.S. population when the network is complete at the end of 2001.[142]

49. *Level 3.* In January 1998, Level 3 announced plans to complete a 15,000 route mile fiber IP network.[143] Level 3, having received all necessary rights of way, began construction of its network in the second quarter of 1998.[144] It expects to have fiber in place connecting 25 U. S. cities by the first quarter of 2001.[145] Currently, Level 3 leases capacity on Frontier's 13,000 mile network;[146] this leased capacity will enable Level 3 to build up a customer base for its IP voice and data services as it completes and shifts traffic to its own network. Level 3 plans to provide a full range of services - including local, long distance, international and Internet services.[147] Significantly, using the capacity it has leased from Frontier, Level 3 plans to begin offering advanced IP-based services at the end of the third quarter.[148] Although, as GTE points out, Level 3's national fiber network will not be completed as quickly as those of the other three new facilities-based market participants,[149] it is clear that it will soon begin offering various long distance services in competition with the incumbent long distance carriers.

50. *Miscellaneous Carriers.* A number of firms are buying transmission capacity from these facilities-based companies. For example, Qwest has contracts to provide dark fiber to other carriers, such as GTE and Frontier, that compete in the retail long distance market and to provide capacity and services on a wholesale basis to other interexchange carriers.[150] GTE plans to use the fiber it purchased from Qwest to create a "Global Network Infrastructure (GNI),"

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[142] WorldCom/MCI Mar. 20 Reply Comments, Carlton and Sider Decl. at 8, 10-11.

[143] Letter from Terrence J. Ferguson, Senior Vice President and General Counsel, Level 3, to Magalie Roman Salas, Secretary, FCC, *Ex Parte* Presentation at 6 (filed May 29, 1998) (Level 3 May 29 *Ex Parte*).

[144] *See* Level 3 Press Release, *Level 3 Communications Reports Second Quarter 1998 Results* (Aug. 12, 1998) <http://www.L3.com/press_releases/12Aug98.html> (Level 3 Aug. 12 Press Release).

[145] *Id.*

[146] Level 3 Press Release, *Frontier and Level 3 Sign Landmark $165 Million Data Network Agreement* (Mar. 24, 1998) <http://www.L3.com/press_releases/24Mar98.html>.

[147] *See* Level 3 Aug. 12 Press Release.

[148] *Id.*

[149] GTE June 11 Renewed Motion at 22.

[150] Qwest Mar. 19, 1998 10K-405 Annual Report.

eventually spanning 17,000 miles.[151] Frontier, using fiber purchased from Qwest and Williams, plans to complete a 13,000 route mile, 24-strand national fiber network in early 1999, and states that it will expand this network to 18,000 miles connecting 120 cities in an 11-ring design by the end of 1999.[152] IXC has contracts to sell capacity to other carriers, including Frontier, C&W, and Excel Communications, Inc. (Excel).[153] Excel itself is becoming a facilities-based carrier and has stated that it intends to become "an aggressive and prominent switchless resale provider."[154] Williams claims to have over $1 billion in long-term revenue commitments from wholesale customers for the network it is constructing.[155] Level 3 has recently signed a $700 million agreement to provide dark fiber on its network to Internext, LLC.[156]

ii. Barriers to Entry and Expansion

51. In light of the significant new transmission capacity that we believe will become available by the end of 1999, we conclude that existing market participants as well as potential market entrants will likely be capable of using the newly available capacity to constrain any attempted exercise of market power. An attempted exercise of market power can be constrained if rivals and new entrants have the capabilities and incentives to expand output in response to any anticompetitive practices of all or a group of incumbents.[157]

52. We reject arguments by GTE and BellSouth that development of these new national networks will not be timely, likely, or sufficient to ameliorate the alleged competitive concerns raised by the merger.[158] GTE identifies the following barriers to entry that it maintains will prevent any carrier from using this new transmission capacity to provide long distance

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151 *See* WorldCom July 8 *Ex Parte*, Kolb Aff. at 12-13 (quoting *GTE Internetworking: 'One Big New Mother of a Network'*, ISP Business News, June 29, 1998).

152 Frontier Press Release, *Frontier Extends Network Into Southeast Through Agreement With Williams* (July 22, 1998) <http://www.frontiercorp.com/about/news/1998722-901106029.html>.

153 IXC July 13 *Ex Parte*, Mann Aff. at 1-2.

154 Excel Press Release, *Excel Communications Announces Addition of Ottinger as Senior Vice President of Switchless Resale* <http://www.excel.com/hotnews/ottinger0498-content.htm>.

155 Williams Jan. 5 Press Release. *See* WorldCom/MCI Jan. 26 Reply Comments at 36-37.

156 Level 3 Press Release, *Level 3 to Provide National Fiber Network to McCaw Controlled Telecommunications Company* (July 20, 1998) <http://www.L3.com/press_releases/20Jul98.html>.

157 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20049, para. 128, n.244 (citations omitted).

158 BellSouth Mar. 13 Comments at 8-9; GTE June 11 Renewed Motion at 18.

services directly to end users: geographic coverage; economies of scale; deployment of switches and other equipment; implementation of SS7 capabilities; development of operations support systems (OSS), network management and back office (provisioning, inventory management, facility management and design, etc.) systems and software to support new services; reliability; and the availability of a qualified work force.[159] GTE also argues that a provider cannot offer attractive wholesale long distance services by assembling certain functions provided by independent vendors.[160] We are unpersuaded by this argument because empirical evidence demonstrates that other firms are, in fact, providing wholesale long distance using third party vendors. We address each of these alleged barriers to entry in turn.

53. *Geographic Coverage.* GTE asserts that a new firm hoping to provide wholesale services to nationwide resellers must develop a network that reaches the vast majority of the country.[161] GTE argues that, in order to provide ubiquitous service to long distance customers, the new firms will have to supplement their networks by leasing capacity and POPs from other companies, which will increase their costs and decrease the quality of their respective networks.[162] GTE also argues that comparing WorldCom's 82 percent population coverage with the population coverage of new competitors is misleading, because WorldCom has built a "thicker" network containing more direct end office trunks and more high-capacity transport

159 GTE Mar. 13 Comments at 22-23. In its Renewed Motion, GTE also asserts that the companies deploying fiber to form new national networks lack the following inputs that are required to provide competitive long distance services: rights of way and conduit; electronic and photonic equipment to light the fiber; multiplexers and cross-connects to parse the raw capacity into usable pieces for various services and customers; switches to route calls to the proper locations; signaling systems to set up the calls along the network; network control centers to monitor and manage the network; developing or leasing of POPs; purchasing or leasing transport from the backbone to at least one POP in each of the LATAs; customized software so that the network functions as a whole; order taking systems; billing systems; access agreements and facilities to connect POPs to the LEC network; and operator services. GTE June 11 Renewed Motion at 19-20. *See* GTE Mar. 13 Comments, Schmalensee and Taylor Aff. at 28; GTE Mar. 13 Comments at 22 & Harris Long Distance Aff. at 7-8; GTE June 11 Renewed Motion, Schmalensee and Taylor Reply Aff. at 9, 11-12. All of these inputs are included in the seven alleged barriers to entry that we address here, and therefore, we do not address these inputs separately.

160 Letter from R. Michael Senkowski, Counsel for GTE, Wiley, Rein & Fielding, to Magalie Roman Salas, Secretary, FCC at 5-7, Harris Long Distance Rebuttal Aff. at 5-6, Covey Aff. at 4-5, 7-11. (filed Aug. 3, 1998) (GTE Aug. 3 *Ex Parte*).

161 GTE Mar. 13 Comments at 22-23. *See* GTE Jan. 5 Petition at 27.

162 GTE Mar. 13 Comments at 23-26, Harris Long Distance Aff. at 12; *see* GTE Aug. 3 *Ex Parte*, Harris Long Distance Rebuttal Aff. at 10. Professor Harris states that transport costs range from .6 cents per minute to connect two self-owned POPs that are both on a carrier's own network, and 2.2 cents per minute to connect two leased POPs using leased transport. GTE Mar. 13 Comments at 23-26, Harris Long Distance Aff. at 12, Exh. 10. *See also* GTE Mar. 13 Comments at 25, Schmalensee and Taylor Aff. at 30 & Exh. 15.

than the new networks, which gives it a cost advantage over the new competitors.[163] Finally, GTE contends that it is not practical to combine the facilities of more than one carrier in order to provide national long distance service.[164]

54. We agree with the Applicants that having a network with ubiquitous geographical coverage and POPs in virtually every LATA is not necessary for a carrier to become an effective competitor in the long distance market.[165] GTE's own statements demonstrate that ubiquity is not necessary for a network to be competitive. Although GTE claims that only a truly national carrier, like WorldCom, can be an effective supplier of wholesale services,[166] it concedes that WorldCom's network only covers approximately 82 percent of the national population, and does not have a POP in roughly 90 of the nearly 200 LATAs.[167] Moreover, despite the fact that WorldCom's own network does not offer ubiquitous coverage, GTE itself is using WorldCom as a single supplier of wholesale 1+ services.[168] Furthermore, GTE plans to migrate substantial traffic to the fiber it has purchased on the Qwest network.[169] GTE's plans for its Qwest fiber are an indication that the coverage of the new networks is sufficient to provide competitive national long distance service.

55. *Economies of Scale*. GTE maintains that the firms building new networks will be unable to capitalize on economies of scale enjoyed by AT&T, MCI, Sprint, and WorldCom,[170]

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[163] GTE Aug. 3 *Ex Parte*, Covey Aff. at 6.

[164] GTE June 11 Renewed Motion at 27-28, Harris Long Distance Reply Aff. at 32-33; GTE Aug. 3 *Ex Parte* at 9.

[165] WorldCom/MCI Mar. 20 Reply Comments at 39.

[166] GTE June 11 Renewed Motion at 27-28 (asserting that resellers cannot practically combine the facilities of several new entrants in order to provide national service).

[167] GTE Mar. 13 Comments at 24.

[168] GTE June 11 Renewed Motion, Harris Long Distance Reply Aff. at 34. Similarly, Ameritech and SBC have entered into contracts with WorldCom for the provision of wholesale long distance service. *Id*. at 31.

[169] *See* WorldCom July 8 *Ex Parte*, Kolb Aff. at 15 (citing presentation slide of Butch Bercher, President of GTE Communications Corporation, dated June 2, 1998.) GTE's attempt to refute the significance of Mr. Bercher's comment at a GTE Analyst Conference is unclear. *See* GTE Aug. 3 *Ex Parte*, Covey Aff. at 12-13. Although GTE states that it will need to make an additional investment ranging from $500 million to $1.5 billion to make use of the fiber acquired from Qwest, and that its schedule for using the fiber will depend on the cost involved and traffic predictions, it does not maintain that it is incapable of activating this fiber for its own use. *See* GTE Aug. 3 *Ex Parte* at 10-11.

[170] GTE Mar. 13 Comments at 26-27.

and therefore will operate at substantial operational cost disadvantages against the large incumbents.[171] GTE argues that the Applicants' claimed cost advantages from the combination of their operations support GTE's argument that there are economies of scale that render smaller competitors less efficient than MCI WorldCom.[172]

56. We are not persuaded by GTE's argument that the carriers building new networks will face substantial operational cost disadvantages compared with large incumbents.[173] The Commission rejected similar arguments in the *AT&T Domestic Non-Dominance Order* where it found that "it is not surprising that an incumbent would enjoy certain advantages, including resource advantages, scale economies, long-term relationships with suppliers (including collocation agreements), and ready access to capital,"[174] but that the "competitive process itself is largely about trying to develop one's own advantages, and all firms need not be equal in all respects for this process to work."[175]

57. We conclude that any advantages enjoyed by the long distance incumbents are not "so great to preclude the effective functioning of a competitive market."[176] For example, the firms building these new networks have lowered their construction outlays by leasing or selling portions of the network in advance of construction.[177] This not only lowers the cost of building a network, but enables the purchasers of the capacity to become facilities-based carriers in their own right without having to build a separate network. Furthermore, to spread the initial capital costs of building a national network, a new firm can sell transmission capacity to resellers. This will also obviate the need for the firm to develop a strong brand name in the retail market in order to recoup costs of building its network.[178]

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[171] *Id.* at 27; GTE Aug. 3 *Ex Parte*, Covey Aff. at 7.

[172] GTE Mar. 13 Comments, Harris Long Distance Aff. at 20. GTE June 11 Renewed Motion at 25, Harris Long Distance Reply Aff. at 51.

[173] GTE Mar. 13 Comments at 26-27.

[174] *AT&T Domestic Non-Dominance Order*, 11 FCC Rcd at 3309, para. 73.

[175] *Id.* (quoting *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5892 (1991) (*First Interexchange Competition Order*)).

[176] *AT&T Domestic Non-Dominance Order*, 11 FCC Rcd at 3309, para. 73 (quoting *First Interexchange Competition Order*, 6 FCC Rcd at 5891-92).

[177] *See supra* para. 50.

[178] *See* WorldCom/MCI Mar. 20 Reply Comments at 37-38.

58. Moreover, we agree with the Applicants that GTE overlooks the cost advantages that newer technologies give to recently-constructed fiber networks.[179] GTE's own economic expert notes that the most economically rational strategy for long distance incumbents might be to use their old technology for some period of time before upgrading to new technology.[180] The reason for this is that, unlike new firms that invest in equipment by weighing the full benefits of new equipment versus the cost of the equipment, the incumbent owns operational, if not leading edge, equipment, and therefore weighs only the marginal benefit the new equipment brings over the old equipment against the cost of the new equipment. Thus, the incumbent is less likely than the new firm to install this new equipment. This rationale is confirmed by GTE's expert, Dr. Harris, who, according to the Applicants, has stated that "[n]ew entrants can deploy the best available technologies without the constraints of embedded technologies."[181] Therefore, we find that the new national networks have cost advantages that may outweigh any cost disadvantages alleged by GTE. Moreover, GTE's admission that incumbents can quickly deploy new technologies appears to undermine its claim that new firms cannot quickly enter the market.[182]

59. *Switching and Other Equipment.* We find unpersuasive GTE's argument that deployment of the new networks will not be timely because the new firms will deploy switching equipment only as growth warrants, over the course of many years, in order to cover the massive expense of doing so.[183] Applicants submit that, as demand for capacity grows, carriers can deploy the electronics necessary to light a dark fiber network within months.[184] We also agree with the Applicants that a company that has invested capital necessary to build a national fiber network can be expected to spend the additional amount of money needed to offer service,

[179] *Id.* at 38. GTE claims that new entrants that are facilities-based "do not possess any real advantages over existing carriers," because "incumbents can quickly deploy the same technology as new entrants." GTE June 11 Renewed Motion at 30, Harris Long Distance Reply Aff. at 18-19. *See infra* para. 64 discussing new network technologies.

[180] GTE June 11 Renewed Motion, Harris Long Distance Reply Aff. at 18.

[181] WorldCom July 8 *Ex Parte*, Kolb Aff. at 16-17 (quoting Harris, "The Dynamics of Competition in Telecommunications" presentation to Minnesota Public Utilities Commission, dated Oct. 8, 1997 at 49).

[182] Harris, for instance, argues that with respect to deploying transmission and switching equipment, as well as establishing POPs to obtain national coverage, although "it is feasible, experience shows that it could take up to a decade to establish such a presence." GTE Mar. 13 Comments, Harris Long Distance Aff. at 18.

[183] GTE Mar. 13 Comments at 27-28.

[184] WorldCom July 8 *Ex Parte*, Kolb Aff. at 9-10. Applicants state that the typical switch can be ordered, manufactured, installed, and made operational within 18 months. *Id.* at 10.

generate revenue, and realize a return on its investment, or sell that capacity to some other firm that will.[185]

60. *SS7*. We disagree with GTE's claim that the new firms will be unable to deploy signaling equipment for years.[186] Applicants identify several companies, including Transaction Network Services, Inc., GTE Intelligent Network Services, and SNET, that provide wholesale SS7 signaling services.[187]

61. *OSS and Other Software*. We reject GTE's claims that the firms operating these new networks will be unable to satisfy resellers and end users for several years because it will take time to develop satisfactory OSS and back office systems.[188] Instead, we find persuasive the results of the Atlantic*ACM survey showing that these new networks satisfy resellers at least as well as AT&T, MCI, Sprint, and WorldCom. In this survey, resellers ranked AT&T, MCI, Sprint, and WorldCom below "smaller carriers" in billing, provisioning, and service.[189] This report also states that facilities-based carriers reselling long distance gave their best rankings to

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185 *Id.* at 9.

186 GTE Mar. 13 Comments at 28.

187 WorldCom June 1 *Ex Parte*, Attach. 1, Phone+ Magazine, Apr. 15, 1998, at 80-85. *See also* Illuminet, *Advantages from Illuminet, SS7 Connectivity and Billing Support to Win and Keep Customer,* <http://www.illuminetss7.com/interexc/interexc.htm>. We note that GTE's statements about WorldCom's capabilities undercut its own argument. Although GTE maintains that SS7 deployment is critical for building an efficient network, and that new firms' lower deployment of SS7 compromises the attractiveness of their networks for both retail and wholesale customers, GTE concedes that WorldCom has only recently made its SS7 network operational. GTE Mar. 13 Comments at 28.

188 GTE Mar. 13 Comments at 29.

189 *See* WorldCom July 8 *Ex Parte,* Kolb Aff., Attach. 6, William West and Judy Reed Smith, *Wholesale Report Card: Resellers Give Underlying Carriers a C+,* Phone+ Magazine (May 1998) <http://www.phoneplusmag.com/articles/851feat3.html> (Phone+ May 1998 Article). The authors note that "larger carriers were ranked below the mean score [for billing services], earning criticism primarily for their systems' inflexibility." In the category of provisioning, Sprint scored above the mean and competitively with smaller carriers. In the service category, the authors state that, "'Other' providers received the highest scores among switchless resellers, indicating that small wholesalers have found a niche in providing strong service." *Id.* We find GTE's challenges to the reliability of the Atlantic*ACM study unconvincing given GTE's willingness to rely on the previous year's results of the very same study. *Compare* GTE Mar. 13 Comments, Harris Long Distance Aff. at 40; GTE Aug. 3 *Ex Parte* at 7, Harris Long Distance Rebuttal Aff. at 7-8, & GTE Aug. 3 *Ex Parte,* Covey Aff. at 5.

Qwest.[190] Moreover, the Applicants have submitted information indicating that many companies offer billing systems to the wholesale market.[191]

62. *Reliability.* We reject GTE's contention that the new networks are vulnerable to outages because they will initially deploy "spurs"[192] to extend the coverage of their networks. Because of this alleged vulnerability, GTE contends resellers would be "justifiably concerned about taking capacity from a network that is not fully diverse."[193] We disagree. We note, for example, that Qwest has stated that its completed network is designed to allow instantaneous rerouting in the event of a fiber cut.[194] IXC similarly claims that it has fully redundant routing between switches.[195] GTE also maintains that reliability is compromised by lack of ubiquitous geographic coverage because a carrier must lease POPs from third parties who will be responsible for maintenance, and that reliability is impaired by having to develop and optimize network management tools.[196] We find these arguments undermined by the willingness of many carriers, GTE included, to purchase transmission capacity from non-ubiquitous networks, such as those operated by WorldCom and Qwest.[197]

63. *Availability of Qualified Work Force*. We are unpersuaded by GTE's claim that a shortage of qualified employees will act as a barrier to entry by new firms. GTE asserts that it will be expensive and time consuming, particularly in light of the shortage of qualified network engineers and telecommunications software developers, to write the software needed to provide the advanced long distance features that represent a key source of competitive advantage in the

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[190] *See* WorldCom July 8 *Ex Parte*, Kolb Aff., Attach. 6, Phone+ May 1998 Article.

[191] *Id.*

[192] GTE defines "spurs" as routes without diversity, and argues that these routes could be susceptible to outages in case of a fiber break. GTE Mar. 13 Comments at 29-30, Harris Long Distance Aff. at 16-17.

[193] GTE Mar. 13 Comments at 30.

[194] Qwest uses bi-directional, line switching OC-192 SONET (synchronous optical network) ring architecture and will offer a self-healing system that provides security and reliability. *See* Qwest July 6 Press Release. The SONET signaling protocol links fiber into large transmission rings and allows rapid restoration of the signal when there is a break in the network. *See* J.P. Morgan Securities, Inc., Equity Research, "Telecoms in the Age of the Internet," Apr. 24, 1998 at 15-16 (J.P. Morgan Telecom Report).

[195] IXC, *The Network*, <http://www.ixc-comm.com/prodnetwork.html>.

[196] GTE Mar. 13 Comments at 30.

[197] *See supra* note 168 (citing presentation slide of Butch Bercher, President of GTE Communications Corporation, dated June 2, 1998).

industry.[198] Likewise, GTE maintains that it will take substantial time to develop key elements including ordering platforms, POPs, switches, and OSS to provide a wholesale offering.[199] We agree with the Applicants that any increased compensation of new technical employees resulting from increased bidding by the new networks (and attracting employees from the incumbents in the process) raises the cost of technical help for all market participants, including the incumbents.[200] Thus, the firms' costs for qualified network engineers and telecommunications software developers should be no higher than for incumbents.

iii. Impact of New Technology on Transmission Capacity

64. New technologies, such as DWDM and dispersion shifted fiber,[201] will vastly increase the transmission capacity of existing and new fiber networks.[202] The four major long distance carriers have indicated plans to deploy DWDM in their networks.[203] In addition, the new national networks of Qwest, IXC, Williams, and Level 3 will employ DWDM and dispersion shifted fiber universally.[204] Analysts estimate that these new network technologies will allow a 100-fold increase in U.S. fiber backbone capacity between 1997 and 2000.[205] As a result, existing carriers can expand capacity to constrain a unilateral exercise of market power by any other carrier, and new carriers likely will be able to constrain any coordinated exercise of market power by the incumbents.

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198 *See* GTE Mar. 13 Comments at 28, 30 & Harris Long Distance Aff. at 18.

199 GTE Mar. 13 Comments, Harris Long Distance Aff. at 18.

200 WorldCom/MCI Mar. 20 Reply Comments at 40.

201 Dispersion shifted fiber is made out of a refined glass that reduces dispersion of the optical signal and allows the signal to be amplified optically. Optical amplification achieves greater transmission speed by bypassing the light-electric conversion necessary for the electric amplification used in older networks. J.P. Morgan Telecom Report at 15.

202 WorldCom/MCI Jan. 26 Reply Comments at 37, Hall Aff. at 4; WorldCom/MCI Mar. 20 Reply Comments, Carlton and Sider Decl. at 8. DWDM, for example, allows a 40-fold increase in the capacity of each fiber by using individual wavelengths of light as separate transmission channels. Ciena Corporation, a manufacturer of DWDM equipment, claims that this technology has the potential to yield up to a 96-fold increase over the capacity of existing optical signaling equipment. *See* Ciena Corporation Press Release, *Ciena Introduces Multiwave® 4000 System, Scaleable DWDM from 40 to 96 Channels* (Mar. 16, 1998) <http://www.ciena.com/news/archive/31698apr.html>.

203 J.P. Morgan Telecom Report at 11.

204 *Id* at 11, 15.

205 *Id.* at 3 & Table 2.

d. Analysis of Certain Direct Effects on the Retail Market

65. We here discuss two specific concerns raised by GTE resulting from the increased concentration due to the merger. GTE contends that WorldCom, along with AT&T, MCI, and Sprint, are the only providers of long distance services to high volume business customers (*i.e.*, larger business customers). According to GTE, the merger will, therefore, make it easier for these carriers to coordinate prices for provision of long distance services to larger business customers.[206] We are not persuaded by this claim, however, because we find that larger business customers are knowledgeable consumers that will have competitive alternatives to the largest three incumbents. Business customers generally are sophisticated and knowledgeable consumers of long distance services and often obtain competitive prices through requests for proposals from carriers.[207] Moreover, for the reasons discussed above, we find that other firms, such as Qwest, IXC, and Frontier, with their large available transmission capacity, will have the incentive to participate aggressively for high volume business customers.

66. GTE also maintains that, as market shares in an oligopoly become more nearly equal, cooperative rather than competitive pricing is more likely to prevail, and therefore the merger would deter competitive pricing by reducing the market share gap between AT&T and MCI WorldCom.[208] As evidence for this theory, GTE quotes an economic text that argues that market share variations are likely to prevent firms from collectively maximizing profits.[209] We note that GTE fails to present the chosen quotation in the proper context. According to the same economic text, market share variations only prevent firms from collectively maximizing profits when the firms have different marginal costs.[210] GTE presents no evidence regarding any marginal cost differences among the largest firms in the industry, and therefore we are unable to determine whether the merger would exacerbate cooperative pricing in the fashion described by GTE. More importantly, assuming the truth of GTE's argument, the presence of four new facilities-based carriers should increase not only the number of competitors but also the variance in market share which should make tacit coordination more difficult.

[206] GTE Mar. 13 Comments, Schmalansee and Taylor Aff. at 15-16.

[207] *See AT&T Domestic Non-Dominance Order*, 11 FCC Rcd at 3305, para. 65 (quoting *First Interexchange Competition Order*, 6 FCC Rcd at 5887).

[208] GTE Jan. 5 Petition at 24.

[209] *Id.* at n.52 (citing F. Scherer, *Industrial Market Structure and Economic Performance* (Houghton Mifflin, 2d ed. 1980) at 160 (*Scherer*)).

[210] Scherer notes that "when marginal costs are constant over the relevant range of outputs, differences in market shares do not lead to different price preferences, *ceteris paribus*." *Scherer* at 158.

e. Alleged Loss of WorldCom as a Maverick Supplier of Wholesale Long Distance Services

67. We next consider the related concern raised by GTE, BellSouth, and Bell Atlantic that the merger will eliminate WorldCom as a "maverick" supplier of wholesale long distance services -- that is, a supplier that is willing to offer wholesale services to resellers at prices that undercut the pricing structure of the three biggest interexchange carriers.[211] As previously indicated, our concern here is whether any alleged loss of wholesale services is likely to affect retail consumers adversely. We agree that resellers of long distance services have increased competition in the long distance market. We would thus be concerned if prices to consumers increased because, as a result of the merger, resellers could not continue to obtain wholesale services at prices that permitted them to compete against the largest facilities-based interexchange carriers. As explained above, in our analysis we distinguish mass market consumers from larger business customers based on their different demand patterns.[212]

68. *Mass Market*. We conclude that the merger of WorldCom and MCI will not adversely affect retail mass market consumers by thwarting the competition currently provided by resellers. As explained below, we are unpersuaded by opponents' claims that the merged entity will no longer have the incentive to offer long distance services on a wholesale basis to resellers. More importantly, even if MCI WorldCom becomes less aggressive in serving resellers after the merger, we do not believe that retail consumers will be harmed because: (1) resellers will be able to obtain wholesale long distance services from other suppliers; and (2) MCI WorldCom is likely to become less aggressive in serving resellers only if it chooses to focus directly on retail customers, and to do so, it will have to offer retail consumers more attractive service and rates to compete with resellers.

[211] Maverick firms are "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 41559-60, § 2.12.

[212] As noted above, mass market consumers tend to purchase relatively small volumes of basic switched minutes based on mass marketing advertising by carriers. Larger business customers, on the other hand, tend to require higher volumes of long distance services and combinations of advanced features. *See supra* para. 26.

69. BellSouth and GTE maintain that WorldCom has been a maverick firm[213] that has undermined attempts by the three largest long distance carriers to coordinate prices charged to residential and small business consumers.[214] More specifically, these commenters argue that resellers provide the only check on retail prices that would otherwise be subject to tacit price coordination by the largest long distance carriers,[215] and that competition for the provision of wholesale long distance services to resellers exists only because of the presence of WorldCom.[216] GTE further contends that, after the merger, MCI WorldCom will have a reduced incentive to provide wholesale long distance services to resellers, because it will be concerned about cannibalizing its newly acquired retail customer base from whom it allegedly earns higher profit margins.[217] GTE claims that, without a maverick supplier of wholesale services, the remaining large long distance carriers will pursue a less vigorous strategy towards providing wholesale services to resellers, and therefore, will promote coordinated pricing to retail customers.[218]

70. We reject the assertion that WorldCom is solely responsible for competition in the provision of wholesale long distance services. As stated above, many other firms, including Qwest, IXC, and Williams, are currently providing wholesale services to resellers, and several

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[213] The Applicants dispute that WorldCom was, in fact, a maverick firm. WorldCom/MCI Jan. 26 Reply Comments at 42. They maintain that MCI has taken the initiative on cutting retail prices to mass market customers, and that MCI provides service to resellers on a scale comparable to WorldCom. *Id.* Commenters' estimates of capacity provided by long distance carriers support the Applicants' claim that WorldCom and MCI are comparable suppliers of wholesale capacity. We need not decide whether WorldCom is, or has been, a maverick supplier of wholesale capacity, however, because we are not persuaded that its incentive to provide wholesale capacity to resellers will change as a result of the merger.

[214] BellSouth Jan. 5 Petition at 16-17; GTE Jan. 5 Petition at 20; GTE Mar. 13 Comments at 32. Commenters' argument regarding the availability of wholesale capacity for providing long distance services to residential and small business customers also applies to larger business customers to the extent that these customers demand only high volumes of transmission capacity for basic voice long distance service, and not the advanced features discussed below.

[215] BellSouth Jan. 5 Petition at 16-17; GTE Jan. 5 Petition at 22.

[216] GTE Jan. 5 Petition at 26.

[217] *Id*. at 28. *See* GTE Aug. 3 *Ex Parte*, Harris Long Distance Rebuttal Aff. at 3. The Applicants dispute the size of the disparity between wholesale and retail profit margins. *See* WorldCom July 8 *Ex Parte*, Kolb Aff. at 2. We need not reach this issue because we find the difference in profit margins irrelevant where, as we find here, other carriers with no retail base are capable of providing wholesale capacity to resellers.

[218] GTE Jan. 5 Petition at 28. As evidence that WorldCom will be a less vigorous provider of wholesale services, GTE cites WorldCom's alleged failure to affirm to GTE's Vice President of Market Solutions that its new relationship with MCI will not harm the working relationship GTE has with WorldCom. GTE Aug. 3 *Ex Parte* at 5, Covey Aff. at 2. We do not find this assertion probative of WorldCom's incentives after the merger.

other firms, including Excel, will soon have this capability.[219] In fact, a recent survey of switched and switchless resellers ranked Qwest, not WorldCom, best in the pricing category.[220] To the extent that WorldCom had an incentive to market aggressively its wholesale services to resellers because it had no retail brand name recognition,[221] Qwest, IXC, and others similarly have an incentive to participate in the retail market through resellers. We also find unpersuasive commenters' claims that the merged MCI WorldCom will have reduced incentive to sell wholesale services to resellers. Because other firms appear equally capable of providing the wholesale long distance services presently provided to resellers by WorldCom and MCI, the combined firm's rational approach would be to continue supplying resellers rather than to cede these revenues to other carriers.[222] AT&T and Sprint, moreover, are likely to make the same choice.[223] For example, Sprint has stated that it agreed to provide wholesale services to the BOCs, because it would rather have some wholesale business than lose out on this revenue completely.[224] We, therefore, agree with the Applicants that even a long distance carrier with a large retail customer base will have an incentive to provide wholesale services to resellers if the reseller can obtain these services on favorable terms from other providers.[225]

71. We further find that, even if the merged entity alters its business strategy to focus more on retail than wholesale, mass market retail customers likely will not be harmed because the merged entity will have to become more effective at marketing to retail customers. As stated above, we conclude that other carriers are equally capable of providing wholesale services to resellers if the merged entity decides not to pursue this business strategy. Thus, if the merged

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[219] *See supra* paras. 43-50 .

[220] WorldCom June 1 *Ex Parte*, Attach. 6 at 3.

[221] GTE Mar. 13 Comments at 32.

[222] *See* Letter from Larry Blosser, Senior Counsel, MCI, to Magalie Roman Salas, Secretary, FCC, Hall Aff. at 11 (filed July 8, 1998) (MCI July 8 *Ex Parte*).

[223] Notwithstanding GTE's contention that wholesale profit margins are relatively small, provision of wholesale capacity provides a significant source of revenue for long distance carriers. According to The Yankee Group, the provision of wholesale services has been one of the fastest growing revenue sources for long distance carriers over the last four years. Bell Atlantic Apr. 28 *Ex Parte*, The Yankee Group, *Telecommunications White Paper*, Vol. 12, No. 13 (Dec. 1997) at 8.

[224] Sprint Vice President and General Manager for BOC Services Leo Welsh, Jr. has stated that, "[t]he retail minute is best, but the wholesale minute is better than none. Instead of losing on residential totally, we would pick up the wholesale business." Gail Lawyer, tele.com, *Bells Contemplate Long-Distance Options* (August 1997) <http://www.teledotcom.com/0897/headend/tdc0897headend_inregion.html.>.

[225] WorldCom/MCI Jan. 26 Reply Comments at 52-53.

entity made fewer wholesale services available to resellers, it would, in order to generate revenues, instead seek to provide long distance services to retail customers directly. It can only accomplish this if it is able to offer better quality or lower prices to end users and thereby increase its retail market share.[226]

72. *Larger Business Market.* GTE and Bell Atlantic also contend that the proposed merger will affect WorldCom's incentives to provide advanced services to resellers serving the larger business market, and thus hinder retail competition. For the reasons stated below, we disagree.

73. GTE advances vague and unsubstantiated allegations that WorldCom has committed to provide resellers certain advanced features, and has been "willing" to develop others, that AT&T, MCI, and Sprint have either offered at less attractive rates, or have been reluctant to provide to resellers at all.[227] GTE maintains that WorldCom is willing to provide advanced features such as VPN, frame relay, and "various" enhanced 800 services to resellers, and that it has been willing to commit to schedules to develop platforms for advance features.[228] Despite its voluminous filings in this proceeding, GTE has not specified which advanced features WorldCom has been willing to provide that other carriers are not capable of providing, or cannot develop the capability to provide.[229] Simply identifying VPN, frame relay, or enhanced 800 services is not sufficient because the record reveals that there are varying degrees

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[226] MCI July 8 *Ex Parte*, Hall Aff. at 11-12.

[227] GTE Jan. 5 Petition at 26-28, Covey Aff. at 2-3. It is unclear whether GTE is arguing that AT&T, MCI, and Sprint are violating statutory requirements to make available to resellers any telecommunications service they provide on a retail basis.

[228] *Id.*, Covey Aff. at 2-3; GTE Mar. 13 Comments at 34.

[229] The closest GTE comes to identifying a particular feature offered by WorldCom and not by any other carrier is in an affidavit by Debra Covey responding to an affidavit filed by WorldCom. *See* GTE Aug. 3 *Ex Parte*, Covey Aff. at 3-4 (maintaining that WorldCom's attachment demonstrates that only AT&T, MCI, Sprint, and WorldCom offer the E800 service called "Network Control"). Even here, GTE does not state that other carriers are incapable of developing this service.

of sophistication of such services, some of which other carriers appear capable of providing,[230] and others of which only AT&T, MCI, and Sprint allegedly provide.[231]

74. Bell Atlantic similarly raises unsupported claims that WorldCom "apparently was in the process of beginning to develop . . . high-end business features in competition with the [three largest long distance] incumbents."[232] Steven AuBuchon, Director of Business Product Marketing for Bell Atlantic, states that "WorldCom also was beginning to develop these high-end features, or so I gathered from headhunter calls for WorldCom concerning opportunities to develop and manage VPN and E800 projects."[233] According to Bell Atlantic, the sophisticated features that are necessary to serve the Fortune 500 market require years to develop and presently only AT&T, MCI, and Sprint are able to provide them.[234] We find that Bell Atlantic's evidence, consisting of "headhunter calls" to a Bell Atlantic employee, is not probative of WorldCom's actual plans.

75. Moreover, even if we were convinced that WorldCom was currently providing advanced features on favorable terms to resellers or developing these features for use by resellers, and that the merger would alter WorldCom's plans in this regard, there is no evidence in the record that this "loss" would diminish competition for larger business customers.

[230] WorldCom June 1 *Ex Parte* at 4. For example, BTI, e.spire, Excel, Frontier, Intermedia, IXC, LCI, and Williams appear to be offering frame relay to resellers. *Id.* Likewise, Frontier, Intermedia, Qwest, and Sprint are providing VPN to resellers. *Id.* Finally, C&W, Excel, Frontier, GTE Intelligent Network Services, IXC, LCI, Sprint, and TeleHub indicate that they offer some type of advanced 800 services to resellers. *Id.* *See* WorldCom July 8 *Ex Parte*, Kolb Aff. at 4 & Attach. 3, 4. Moreover, carriers can develop certain advanced features themselves using third-party vendors. For example, third-party firms, such as GeoTel, supply software for advanced features, such as intelligent call-routing, and thereby aid entrants who use their own, or wholesale, capacity to enter the retail business market. GeoTel, *Product Overview* <http://www.geotel.com/geotel/products.htm>; GeoTel, *About GeoTel* <http://www.geotel.com/geotel/company.htm>.

[231] *See* WorldCom July 8 *Ex Parte*, Grillo Aff. at 4 (stating that WorldCom does not possess the network capabilities to address the needs of large businesses demanding certain sophisticated, advanced features); *See also* Bell Atlantic Jan. 5 Petition, AuBuchon Aff. at 1-2 ("Only AT&T, Sprint and MCI have the full range of [advanced] features necessary to compete [in the business market].").

[232] Bell Atlantic Jan. 5 Petition at 14.

[233] *Id.*, AuBuchon Aff. at 2.

[234] *Id.* at 14.

Significantly, none of the commenters provides evidence that the retail larger business market is not competitive today[235] or that the merger will reduce competition in this retail market.[236]

76. We note further that the merger will not change the statutory obligation on all carriers to make available for resale any advanced features provided on a retail basis.[237] Accordingly, as WorldCom and MCI note, the advanced features they currently provide are available to resellers under tariff and will remain so after the merger.[238] We find, therefore, that the merger will not have an anticompetitive effect on the retail market for any advanced features.

f. Conclusion

77. Based on the above analysis, we find that the merger likely will not impair competition in the domestic, interstate, interexchange market. We therefore decline to impose any of the various conditions proposed by commenters.[239]

B. U.S. International Services

78. We consider in this section the competitive effects of the proposed merger in the markets for U.S. international services.[240] We find that the merger will increase concentration in certain relevant product and geographic markets. As a general matter, however, we conclude that significant increases in international transport capacity, an essential input in the provision of

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[235] Bell Atlantic's AuBuchon alleges that, because only AT&T, Sprint, and MCI have the full range of features necessary to compete in the larger business market, competition for these customers is "not robust." *Id.*, AuBuchon Aff. at 1-2. The number of firms competing in an industry does not, by itself, provide evidence of the degree to which these firms compete with one another.

[236] As discussed above, we reject GTE's claim that the merger will harm large volume business customers. *See supra* para. 65.

[237] WorldCom/MCI Jan. 26 Reply Comments at 53-54.

[238] *Id.* at 53.

[239] *See* BellSouth Jan. 5 Petition at 25 (proposing conditioning approval of the merger on broad-scale BOC entry into long distance); Bell Atlantic Jan. 5 Petition at 18 (proposing a condition requiring WorldCom to resell all of its long distance network management features and services to Bell Atlantic on a timely and reasonable basis).

[240] "U.S. international services" consist of all U.S.-billed telecommunications services, including calls that originate in the United States and terminate at a foreign point and calls that originate at a foreign point but are billed by a U.S. carrier, such as international calling card calls.

international telecommunications services, should mitigate the increase in concentration and prevent any anticompetitive effects. We find that this additional capacity will be provided by a growing number of suppliers. We further find that entities that currently control a large amount of transport capacity will not have advantages in the provision of this new capacity. As a result, we find that the higher concentration ratios resulting from the merger are not likely to have anticompetitive effects in the provision of international services.

79. As in our analysis of domestic long distance services, we examine here two separate end user product markets defined by the class of customers served: mass market customers and larger business customers. For the reasons discussed below, we find that it is also appropriate to examine separately the international transport capacity market, which provides the physical transmission path carriers use to deliver services in both the mass market and larger business markets.

80. The Commission has long recognized certain important differences between the markets for domestic and international long distance services. As the Commission explained in the *BT/MCI Order*, input markets are a significant component of the international services market,[241] and there is more likely to be market power with respect to particular inputs on international routes than there is on domestic long distance routes. In contrast to the domestic long distance market, for example, international transport capacity historically has been concentrated in a limited number of facilities owned by small consortia of carriers. U.S. carriers, moreover, have been further limited by the fact that they could only use their transport capacity as part of a correspondent relationship with foreign carriers that frequently have sought to limit competition on the U.S. international route. Another important difference is that different countries have different regulatory regimes which may affect the prices charged to end users on U.S. international routes. We note that prices for U.S. international calls tend to vary among countries.

81. Because of these differences, the Commission appropriately has tended to focus its analysis on particular inputs in considering competitive effects on international routes. For example, in the *BT/MCI Order*, the Commission examined six relevant input markets and three relevant end user markets.[242] Our analysis here first examines relevant input markets, in

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[241] *See BT/MCI Order*, 12 FCC Rcd at 15378-79, paras. 58-60.

[242] The Commission identified six relevant input markets: (1) international transport between the United States and the 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. The Commission also identified three relevant end user markets: (1) U.S. local exchange and exchange access service; (2) U.S.-U.K. outbound international service; and (3) global seamless services. *See BT/MCI Order*, 12 FCC Rcd at 15376, para. 52.

particular, international transport capacity. We then examine the possible competitive effects of the merger on the relevant end user markets for international services.

1. Input Markets

a. International Transport Market

82. *Product Market*. We conclude that international transport is a relevant international input market for purposes of this merger analysis. Transport provides users with the international physical transmission path over which they may offer any service, such as switched voice telephony or data traffic. In particular, we find that, for purposes of this merger, submarine cable capacity is the transport medium that warrants review.

83. We note that more U.S. international traffic is transmitted via submarine cable facilities than any other transport medium.[243] Although the Commission has identified cable and satellite capacity as fungible technologies capable of providing international transport,[244] we have also recognized that the delay and echo inherent in satellite transmission, as well as the cost per circuit, appear to make submarine cable capacity the more attractive medium for international transport of voice and data.[245] Parties to this proceeding support this finding.[246] Moreover, WorldCom states that it does not hold any ownership interest in satellite systems or

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[243] *See* FCC, *1996 Section 43.82 Circuit Status Data Report* (Int'l Bur., Dec. 1997) at 2-3 (*1996 Circuit Status Report*).

[244] *See Comsat Corporation Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, File No. 60-SAT-ISP-97, Order and Notice of Proposed Rulemaking, FCC 98-78, at para. 32 (rel. Apr. 28, 1998) (*Comsat Non-Dominance Order*).

[245] *See id.*; *BT/MCI Order*, 12 FCC Rcd at 15390, para. 97. GTE asserts that, in addition to our examination of voice and data, we should require the Applicants to specify whether either offers full-time or occasional use video services. *See* GTE June 11 Renewed Motion at 44 n.16. According to traffic and revenue data reported by the carriers, MCI has recently reported miscellaneous services, which include video services, but WorldCom has not. *See* FCC, *1996 Section 43.61 International Telecommunications Data* (Com. Car. Bur., Jan. 1998) at Table C9 (*1996 Section 43.61 Report*). Without further substantiation that either WorldCom or MCI could be a significant provider of these services, we conclude that it is not necessary to examine the effect of the merger on the provision of these services.

[246] GTE directs its comments to submarine cable capacity. *See* GTE Jan. 5 Petition at 36 & n.69 (identifying submarine cable capacity as the relevant transport medium, noting that "due to its relatively high cost and quality constraints, satellite service is typically not a provider's first choice for point-to-point transport"); WorldCom/MCI Jan. 26 Reply Comments at 62-65 (examining submarine cable capacity in its review of the international transport market).

satellite transponder capacity.[247] As a result, we find that, for purposes of this proceeding, it is appropriate to focus our transport market analysis on submarine cable capacity.

84. *Geographic Market.* Although we recognize that the geographic market is more accurately described as a series of point-to-point markets and that it may be necessary to examine specific country routes when considering the effects of a proposed merger on relevant input markets,[248] we conclude that it is appropriate here to adopt a regional approach to analyzing the international transport market. With regard to U.S. international submarine cables, we find that, although they terminate in a select number of countries, they tend to serve entire regions. For example, the TAT-12/13 cable system terminates in the United Kingdom and France, but carriers use this cable system to carry traffic destined for points throughout Europe. We find here that it is appropriate to aggregate international transport where point-to-point markets have competitive characteristics that are sufficiently similar to other point-to-point markets.[249] Generally, U.S. submarine cables serve three regions: Atlantic, Pacific, and Caribbean/Latin America.[250] We find, moreover, that several cable systems may provide transport capacity to the same geographic region. If, for some reason, one cable route to a particular destination is foreclosed, carriers generally can route their traffic to that destination using other cables serving the same region. We therefore seek to determine whether the proposed merger would have anticompetitive effects on the transport capacity market in any of those three regions.

85. We note here that 63 countries are not linked to the United States by cable and are served only by satellites. These countries are sometimes referred to as "thin routes."[251] As noted above, WorldCom states that it does not hold ownership interests in satellite systems, which would include those that serve the thin route market countries.[252] As a result, we find that the merger would not increase concentration in the provision of transport capacity on these routes. We also note that, in contrast to other U.S. international routes, traffic on the U.S.-Mexico and U.S.-Canada routes is carried primarily via terrestrial facilities. No party has argued that the

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[247] *See* Letter from Robert S. Koppel and Kerry E. Murray, WorldCom, to Magalie Roman Salas, Secretary, FCC, at 2 (filed Aug. 28, 1998) (WorldCom Aug. 28 *Ex Parte*).

[248] *See, e.g., BT/MCI Order*, 12 FCC Rcd at 15402-408, paras. 133-151.

[249] *See LEC Regulatory Treatment Order*, 12 FCC Rcd at 15801, para. 80. *See also BT/MCI Order*, 12 FCC Rcd at 15375, para. 51; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-20017, para. 54.

[250] *See* GTE Jan. 5 Petition at 36.

[251] *See Comsat Non-Dominance Order* at para. 28.

[252] *See supra* para. 83.

proposed merger would result in anticompetitive effects on either of these routes. Nor are we aware of any shortage of, or difficulty in obtaining capacity in, facilities for the provision of service on these routes. We therefore find that it is not necessary to review either the thin route markets or the U.S.-Mexico and U.S.-Canada routes as part of our transport capacity analysis in this proceeding.

b. Market Participants

86. Traditionally, most submarine cable capacity has been jointly owned by consortia of U.S. and foreign telecommunications carriers. These carriers generally are vertically integrated (*i.e.*, they use a large amount of the cable capacity they own to provide services to end users). Recently, non-carriers have built and own submarine cable systems to operate as carriers' carriers. Our determination of market participants examines ownership of transport capacity. Non-owners of cable systems may acquire capacity by either a short-term lease or as an indefeasible right of user (IRU), which essentially is a perpetual leasehold in a circuit of capacity.[253] We recognize that taking into account IRU leaseholds would more fully reflect control of existing capacity, but this information is generally not available on a cable-specific basis. We believe that it is reasonable, as an initial matter, to examine ownership of transport capacity, although to some extent such a review may overstate cable owners' market presence by failing to account for IRU leaseholders' control of existing capacity.

87. For purposes of this proceeding, we will examine ownership of U.S. half-circuits (including the U.S. half of whole-circuits).[254] We do so because WorldCom and MCI each predominantly own capacity on the U.S. end of cable systems. It is therefore appropriate to analyze any potential anticompetitive effect on the U.S. end of the circuit.[255] We also note that

[253] "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." *See 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*, CC Docket No. 87-45, Report and Order, 7 FCC Rcd 4561, 4561 n.1 (1992), *recon.* 8 FCC Rcd 4173 (1993).

[254] Traditionally, a U.S. carrier and a foreign carrier have jointly provided service on an international circuit in a correspondent relationship. Each circuit was divided into U.S. and foreign "half-circuits." Increasingly, entities own international transport capacity on a whole-circuit basis. We recognize and encourage this trend because it facilitates the provision of end-to-end international services (provided appropriate authorizations have been obtained on both ends).

[255] *See* GTE Jan. 5 Petition at 37 n.74 ("the market for U.S.-side half-circuit capacity remains the most critical input for new carrier entry . . . [and] existing whole circuits likely would be covered by half-circuit data.").

many carriers still own capacity on a half-circuit basis. Our concern is whether the proposed merger could increase ownership concentration of U.S. half-circuits to such an extent that the combined entity would have the ability to exercise market power through unilateral or coordinated action. We examine cable ownership on an E-1 circuit basis, commonly referred to in cable transactions as a Minimum Investment Unit (MIU), although capacity may be purchased or provisioned in varying bandwidths.[256]

88. We take into account future capacity in our identification of market participants and in our measurement of market concentration if plans for capacity existed prior to the merger.[257] To establish a reasonable level of certainty with regard to new cable systems, we take into account future cable systems for which a U.S. cable landing license has been granted and a construction contract has been signed.[258] These cables are scheduled to become operational by the end of 1999. We recognize that other cable systems have been announced but currently lack a Commission license or signed construction contract. We will not use these cable systems in our calculations of market concentration because cable plans may be modified, delayed, or abandoned. We nonetheless consider these cables relevant to our examination of barriers to entry in the transport market.

89. *Atlantic Region*. The transatlantic route currently is served by a number of submarine cables (Columbus-II, TAT-8, -9, -10, -11, -12/13, PTAT, CANTAT-3, Gemini, and Atlantic Crossing (AC-1)). The TAT-12/13 submarine cable system, placed into service in

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By contrast, in the *BT/MCI Order*, the Commission examined the whole-circuit market because MCI primarily owned half-circuits on the U.S. end and BT primarily owned half-circuits on the U.K. end. Our concern in that proceeding was the applicants' merged market power to the extent that the merger would have increased control over whole-circuits on the TAT-12/13 cable system. *See BT/MCI Order*, 12 FCC Rcd at 15403, para. 135 & n.185. We note here that, as part of a privatization auction on July 29, 1998, MCI won the bid for Embratel, the monopoly provider of long distance and international services in Brazil. *See* Letter from Kenneth A. Schagrin, Associate Counsel, MCI to Troy Tanner, Chief, Policy and Facilities Branch, Telecommunications Division, International Bureau, FCC in File No. FCN-98-020 (filed Aug. 11, 1998) (MCI File No. FCN-98-020 Aug. 11 Letter). WorldCom's U.S. half-circuit market presence in the Caribbean/Latin American region is minimal. *See infra* paras. 111-114. We discuss below the impact of MCI's recent purchase of Embratel. *See infra* note 359.

[256] An E-1 circuit is a 2.048 Mbps circuit that is the equivalent of 30 64-Kbps voice-grade channels. As demand for greater bandwidth capacity increases, some carriers are obtaining international transport on an STM-1 basis, which is the equivalent of 63 E-1 circuits or 1,890 voice-grade channels. Sixty-four STM-1s, or 4,032 E-1 circuits, represent 10 Gbps of capacity.

[257] *See 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41562, § 3.2 n.27.

[258] GTE asserts that in reviewing the international transport market, the Commission should "at a minimum" only consider those projects that have obtained a Commission license. *See* GTE June 11 Renewed Motion at 49. We find that entering into a supply contract usually requires a significant financial downpayment and, therefore, provides reasonable certainty that the cable system will be built.

1995, was the first of the "state-of-the-art" systems using a self-healing ring configuration that permits instantaneous self-restoration.[259] TAT-12/13 provides 4,032 E-1 circuits of capacity, which, at the time it was introduced, nearly doubled the previously existing transatlantic cable capacity.[260] More recently, two new submarine cable systems with the self-healing ring configuration have initiated service on the transatlantic route. Both the AC-1 and Gemini cable systems were introduced into service in the first half of 1998.[261] AC-1 presently provides capacity equivalent to 8,064 E-1 circuits,[262] and Gemini offers the equivalent of 4,032 E-1 circuits on the transatlantic route.[263] Together, these three cables presently account for approximately 75 percent of the capacity in the transatlantic region.[264]

90. We do not agree with GTE that for purposes of this merger we should only take into account capacity on TAT-12/13, as the Commission did in the *BT/MCI Order*.[265] At that time, TAT-12/13 represented the only advanced transatlantic cable system, offering the most cost-effective, reliable means of transporting calls between the United States and the United Kingdom.[266] As noted above, however, Gemini and AC-1 have been placed into service since that time. Given that all three cables are designed to offer state-of-the-art technology and account for the bulk of transatlantic transport capacity, we consider them a reasonable measure of the total capacity in the Atlantic region.

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259 *See In the Matter of AT&T et. al 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*, File No. SCL-93-004, Cable Landing License, 8 FCC Rcd 4808 (1993).

260 *See 1996 Circuit Status Report* at Table 7.

261 *See First Segment of Atlantic Crossing Ready for Service*, Communications Today, June 19, 1998; *Gemini Turns Up Trans-Atlantic System*, Communications Today, Mar. 13, 1998.

262 *See* Atlantic Crossing, *The Project: System Technology* <http://www.atlantic-crossing.com/project/technical.htm>.

263 The Applicants indicate that 2,016 E-1 circuits went into service on Gemini as of March 31, 1998 and an additional 2,016 E-1 circuits will be in service by September 30, 1998. *See* WorldCom/MCI Jan. 26 Reply Comments at 63 n.99. For purposes of our analysis, we consider 4,032 E-1 circuits of capacity to be currently in service on Gemini.

264 *See 1996 Circuit Status Report* at Table 7. We rely on the cable capacity numbers in the *1996 Circuit Status Report* for capacity on all the cables except for AC-1 and Gemini. For AC-1 and Gemini we rely on sources identified in this paragraph.

265 *See* GTE Jan. 5 Petition at 36-37.

266 *See BT/MCI Order*, 12 FCC Rcd at 15390, para. 98 & 15402, paras. 134-135 (examining TAT-12/13 for purposes of determining market concentration).

91. At least 59 entities currently own U.S. half-circuits on the TAT-12/13, Gemini, and AC-1 cables.[267] Today, Global Crossing, the non-carrier owner of AC-1, owns 50 percent of the current capacity on the U.S. end of the transatlantic route, by far the largest amount held by any entity; WorldCom is the next largest owner with 14.0 percent, followed by C&W with 12.9 percent, AT&T with 8.1 percent, MCI with 6.9 percent, Sprint with 1.7 percent, and BT with 1.6 percent.[268]

92. We note here that the amount of capacity on these three cables is expected to increase 150 percent by the end of 1999. Both Gemini and AC-1 will complete construction of their ring configurations, with each system offering 8,064 E-1 circuits of capacity in addition to their capacity already in service.[269] The capacity on TAT-12/13 is scheduled to triple to 12,092 E-1 circuits by the end of 1999 as a result of wave division multiplexing (WDM) upgrades.[270] This additional capacity results in a shift in ownership shares. By the end of 1999, Global Crossing's share of transatlantic capacity will be 40 percent, followed by WorldCom with 17.2 percent, C&W with 15.9 percent, AT&T with 7.8 percent, MCI with 6.1 percent, BT with 3.7 percent, Deutsche Telekom with 1.8 percent, and Sprint with 1.6 percent.

93. *Pacific Region*. The transpacific route currently is served by a number of submarine cable systems (HAW-4/TPC-3, NPC, TPC-4, PacRimEast, and TPC-5). The TPC-5 cable system is the only facility that uses the "state-of-the-art" self-healing ring configuration. TPC-5 offers 4,032 E-1 circuits, which is nearly 72 percent of current transpacific capacity.[271]

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267 *See* TAT-12/13 Construction and Maintenance Agreement Revised Schedules at Schedule C-5 (effective Dec. 9, 1997) (Dec. 1997 TAT-12/13 Schedules).

268 *See id.*; Letter from Robert S. Koppel and Kerry E. Murray, WorldCom to Magalie Roman Salas, Secretary, FCC, Attach. at 1 & 3 (filed July 2, 1998) (WorldCom July 2 *Ex Parte* I); Atlantic Crossing, *About Global Crossing Ltd*. <http://www.atlantic-crossing.com/contact/telesystems.htm>. WorldCom and C&W each hold an indirect 50 percent interest in Gemini Submarine Cable System Limited, which owns and operates the Gemini cable system. *See* WorldCom July 2 *Ex Parte* I Attach. at 1. For purposes of this proceeding, we assign ownership of 50 percent of Gemini's circuits to WorldCom and C&W each.

269 Gemini will offer a total of 30 Gbps of customer capacity, equivalent to 12,096 E-1 circuits, upon completion in 1999. *See* Letter from Robert S. Koppel and Kerry E. Murray, WorldCom, to Magalie Roman Salas, Secretary, FCC, at 1 (filed Aug. 21, 1998) (WorldCom Aug. 21 *Ex Parte*); Gemini, *Solutions: Operational Benefits* <http://www.gemini.bm/solutions/index.html>. AC-1 will offer a total of 40 Gbps of service capacity, equivalent to 16,128 E-1 circuits, upon completion, which is scheduled for 1999. *See* Prospectus of Global Crossing Ltd. at 46 (Aug. 10, 1998). Global Crossing notes that AC-1 is upgradeable to 80 Gbps. *See id.*

270 *See* TAT-12/13 WDM Upgrade Program Schedules at Schedule C-10 (1997 TAT-12/13 WDM Upgrade Schedules); TAT-12/13 WDM-3 Upgrade Program Schedules at Schedule C-15 (Feb. 3, 1998) (1998 TAT-12/13 WDM-3 Upgrade Schedule).

271 *See 1996 Circuit Status Report* at Table 7.

Given that the TPC-5 cable is the only self-healing ring system on the transpacific route and that it represents the bulk of transport capacity, we consider it a reasonable measure for current capacity on the transpacific route. At least 78 entities own U.S. half-circuits on TPC-5.[272] AT&T owns 38.8 percent of the capacity, followed by MCI with 21.6 percent, Sprint with 8.8 percent, Kokusai Denshin Denwa Co., Ltd (KDD) with 6.5 percent, and WorldCom with 4.1 percent.[273]

94. We note that the amount of capacity in the transpacific region is expected to increase nearly ten-fold by the end of 1999. Construction on the China-U.S. cable system, which will provide the equivalent of 32,256 E-1 circuits on the transpacific route, is scheduled to begin in 1998 and service is set to be offered in December 1999.[274] In addition, WDM upgrades will double capacity on the TPC-5 cable.[275] This additional capacity results in a shift in ownership shares. AT&T's share of transpacific capacity will likely be 12.1 percent, followed by MCI with 8.5 percent, KDD with 7.4 percent, Sprint with 6.7 percent, and ten carriers with approximately 5.5 percent each; WorldCom will have approximately 1.1 percent of the U.S. half-circuits on the transpacific route.[276]

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272 *See* TPC-5 Construction and Maintenance Revised Schedules (effective Nov. 1, 1997) (Nov. 1997 TPC-5 Revised Schedules).

273 In examining ownership of TPC-5, we note that the northern segment consists of a single path between Japan and the mainland United States, and the southern route consists of five separate ownership segments: mainland United States-Hawaii; mainland United States-Guam; Hawaii-Guam; Hawaii-Japan; and Guam-Japan. *See id.* For purposes of this merger, we consider as relevant ownership of U.S. half-circuits on the following routes: the northern route (Schedule G4); the mainland United States-Guam route (Schedule G5); and the Hawaii-Japan route (Schedule G6). We did not include in our calculation the United States mainland-Hawaii route (Schedule G1), because we consider this route a U.S. domestic route. We did not include the Hawaii-Guam and Guam-Japan routes, which account for under 5 percent of TPC-5 capacity (Schedule F) and which are physically accounted for on the U.S. mainland-Guam and Hawaii-Japan routes.

274 *AT&T Corp. et al.*, File No. SCL-98-002, Cable Landing License, DA 98-1711 (Tel. Div. Int'l Bur. rel. Aug. 28, 1998); Alcatel, *Share of U.S. $950 Million Trans-Pacific Contract for Alcatel* <http://www.alcatel.com/press/current/1997/french/12_12c.htm>.

275 *See* TPC-5 Revised Schedules B Through G to the Construction and Maintenance Agreement (effective June 1, 1998).

276 *See id.*; China-U.S. Cable Network Construction and Maintenance Agreement, Schedule G (effective Dec. 11, 1997) (China-U.S. C&MA). Forty-seven entities hold ownership interests in the China-U.S. cable, which will provide transpacific and intra-Asia transport capacity. The China-U.S. C&MA assigned each owner a certain number of capacity "points" which may be used to obtain transpacific or intra-Asia capacity. *See* China-U.S. C&MA at Schedule G & Annex 4. For purposes of identifying transpacific capacity ownership, we apply each owner's percentage of capacity points to the total capacity on the cable, and then assign the carrier that percentage of the transpacific capacity. For example, AT&T has 5,292 points, which account for 6.7 percent of the 78,757

95. *Caribbean/Latin American Region.*[277] For purposes of reaching the Caribbean/Latin American region, the primary cable routes are from the U.S. mainland to the U.S. Virgin Islands and, to a lesser extent, Puerto Rico. The U.S. Virgin Islands and Puerto Rico serve as hubs for U.S. international traffic destined for other Caribbean islands and Latin America. Americas-I and Columbus-II, which extend from the U.S. mainland to the U.S. Virgin Islands and beyond, provide the bulk of transport capacity to the Caribbean/Latin American region. Each of these cables has a capacity of 2,016 E-1 circuits between the U.S. mainland and the U.S. Virgin Islands.[278] In addition, the TCS-1 cable, which offers 252 E-1 circuits of capacity, provides service from the U.S. mainland to Puerto Rico.[279]

96. We note here that, on July 29, 1998, MCI acquired Embratel, the Brazilian long distance and international services monopoly provider.[280] The acquisition was subsequently consummated with MCI's first payment made in early August. For purposes of our analysis in this proceeding, we consider Embratel to be part of MCI. We therefore examine the impact of WorldCom merging with MCI and Embratel. MCI's share of the U.S. half-circuit market thus includes capacity owned by Embratel.

97. There are at least 45 owners of U.S. half-circuits on the U.S. mainland - U.S. Virgin Islands/Puerto Rico route. AT&T is currently the largest owner of capacity on this route with a market share of 45.1 percent, followed by MCI with 17.4 percent, Sprint with 8.5 percent, Teleglobe with 3.9 percent, WorldCom with 3.7 percent, and Telefonica Large Distancia de Puerto Rico, Inc. (TLDI) with 3.7 percent.[281]

98. As noted above, U.S. international traffic to this region extends from the U.S. Virgin Islands/Puerto Rico to Latin American countries and Caribbean islands via several

total points on the cable. Thus, we assign AT&T 6.7 percent of the transpacific capacity on the China-U.S. cable.

[277] We note here that no party raised concerns regarding the Caribbean/Latin American international transport market. We nonetheless examine this market to ensure that we undertake a comprehensive analysis in this proceeding.

[278] *See* Americas-I Construction and Maintenance Agreement Revised Schedules at Schedule D-1 (effective Sept. 19, 1997) (Americas-I C&MA); Columbus-II Construction and Maintenance Agreement Revised Schedules at Schedule D-2 (effective Sept. 19, 1997) (Columbus-II C&MA).

[279] *See* TCS-I Construction and Maintenance Agreement Revised Schedules at Schedule D at 1 (effective Aug. 1, 1997) (TCS-I C&MA).

[280] *See* MCI File No. FCN-98-020 Aug. 11 Letter.

[281] *See* Americas-I C&MA at Schedule D-1; Columbus-II C&MA at Schedule D-2; TCS-I C&MA at Schedule D at 1.

undersea cables. Americas-I currently provides 758 E-1 circuits of transport capacity along the northeast coast of South America, and TCS-1 provides 126 E-1 circuits from Puerto Rico to Colombia.[282] The Pan American Cable System is under construction and is scheduled to begin service from the U.S. Virgin Islands to the west coast of South America in the fall of 1998, initially providing an additional 2,016 E-1 circuits in the region.[283] Taking into account these cables, ownership shares along the U.S. Virgin Islands/Puerto Rico - Latin America route will be as follows by the end of 1999: MCI with 24.5 percent; AT&T with 21.5 percent; Sprint with 10.9 percent; Telecom Italia with 8.6 percent; Telefonica de Espana, S.A. with 5.9 percent; WorldCom with 5.2 percent; Empresa Nacional de Telecomunicaciones de Colombia with 3.1 percent; and Compania Anonima Nacional Telefones de Venezuela (CANTV) with 3.0 percent.[284]

99. Other cables, including Antillas I, TCS-1, and TAINO-CARIB, provide transport capacity for U.S. international traffic from the U.S. Virgin Islands and Puerto Rico to other Caribbean islands.[285] Combined ownership shares for these cables are: AT&T with 36.9 percent; the Bahamas Telecommunications Corp. (Batelco) with 24.2 percent; MCI with 9.7 percent; TLDI with 6.1 percent; Sprint with 5.2 percent; Compania Dominicana de Telefonos (Codetel) with 2.6 percent; and WorldCom with 2.4 percent.[286] On any single cable, MCI will hold no more than 17.6 percent and WorldCom will hold no more than 4.9 percent.[287]

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[282] Americas-I C&MA at Schedules D-2; TCS-I C&MA at Schedule D at 3.

[283] *See* Pan American Cable System Construction and Maintenance Agreement at 6 (effective Dec. 5, 1996) (Pan American C&MA); *Americatel Corp. et al.*, File No. 97-001, Cable Landing License, 13 FCC Rcd 850 (Tel. Div. Int'l Bur. 1998); Alcatel, *Submarine Network References -- South Atlantic* <http://www.alcatel.com/telecom/snd/refs/southatl>.

[284] *See* Americas-I C&MA at Schedule D-1; Pan American C&MA at Schedule D1; TCS-I C&MA at Schedule D at 3.

[285] For purposes of our analysis, we include in this group of cables the Bahamas-II cable from Florida to the Bahamas and the Columbus-II segment from Florida to Mexico because, like capacity from the U.S. Virgin Islands and Puerto Rico, these cables serve the Caribbean Basin.

[286] *See* Columbus-II C&MA at Schedule D-1; TCS-1 C&MA at Schedule D at 2 and 5; AT&T Corp. *et al.*, Memorandum Opinion, Order and Authorization, DA 96-1234 (rel. Aug. 6, 1996); Ursus Telecom Corp., Modification of Cable Landing License, DA 98-1674 (rel. Aug. 21, 1998) (modifying the Bahamas II cable landing license); TAINO-CARIB Construction and Maintenance Agreement at Schedule D at 3-4 (Nov. 1, 1997) (TAINO-CARIB C&MA); Antillas I Construction and Maintenance Agreement at Schedule D-1 (May 21, 1996). For Bahamas II, we use voting interests in making our calculation rather than information available on segment allocation, because the voting interests are more complete.

[287] *See* TAINO-CARIB C&MA at Schedule D at 3 (ownership on the U.S. Virgin Islands - Puerto Rico route).

c. Analysis of Competitive Effects

100. We find that the merger will increase concentration in each of the three international transport market regions. It likely will not result in anticompetitive effects, however, given the low barriers to entry and the substantial amount of non-MCI WorldCom transport capacity that will become operational by the end of 1999 in the Atlantic and Pacific regions. In the Caribbean/Latin American region, we find that low barriers to entry, coupled with the limited presence of WorldCom as a provider of transport capacity, makes it likely that the merger will not result in anticompetitive effects.[288]

101. As dynamic change occurs in the transport market in all three regions, we consider the competitive effects of the proposed merger by the end of 1999, when committed capacity will be operational,[289] and in the future. With regard to future capacity, we note that WDM upgrades, which can substantially increase transport capacity on existing cables, can be implemented in less than a year. Moreover, planning and construction of a new cable system can be implemented within two years.

102. *Atlantic Region*. We find that, despite the rise in concentration in the cable capacity market resulting from the merger, the combined entity likely will not have the ability to exercise market power, either unilaterally or in a coordinated manner, because low entry barriers exist and a substantial amount of non-MCI WorldCom capacity is becoming operational on the transatlantic route.

103. As an initial matter, the amount of capacity on this route is increasing substantially. In 1995, TAT-12/13 nearly doubled the transport capacity on the transatlantic route by adding 4,032 E-1 circuits of capacity. Thus far in 1998, Gemini and AC-1 have added an additional 12,096 E-1 circuits, a three-fold increase over the TAT-12/13 capacity. The record indicates that by the end of 1999, current capacity will more than double for a total capacity equivalent to 40,320 E-1 circuits. All told, the self-healing ring capacity on the transatlantic route is expected to increase ten-fold between the beginning of 1998 and the end of 1999. This growth in capacity has been driven by demand for additional bandwidth, in large part due to Internet and data traffic. Capacity growth, no doubt, has also been driven by anticipated demand

[288] We note here that submarine cable development involves substantial financing and planning. Nevertheless, in light of significant reductions in construction costs, rapid deployment rates, increases and expected increases in demand for capacity, as well as empirical evidence that new submarine cables are being planned and constructed across the globe, we find below that barriers to entry are sufficiently low to allow new entry into submarine cable capacity markets.

[289] *See supra* para. 88.

in the future. Despite GTE's assertion,[290] the record does not provide evidence that, taking into consideration the new 1998 capacity, a shortage of capacity exists presently or will develop in the near future for new entrants on the transatlantic route. Even if AC-1 has sold 70 percent of its capacity,[291] the remaining capacity available on that system is the equivalent of nearly 2,500 E-1 circuits. This amount of capacity represents 60 percent of today's capacity on TAT-12/13.

104. WorldCom and MCI together would currently own 20.9 percent of the U.S. half-circuits on TAT-12/13, Gemini, and AC-1.[292] As noted above, additional capacity will soon come into service. By the end of 1999, the MCI WorldCom combined ownership would increase to 23.3 percent.[293] Using ownership shares for the end of 1999, the proposed merger would increase the HHI concentration by approximately 200 points, from 2,265 to 2,480.[294] As we discussed above, however, we believe that ownership shares may overstate the market presence of cable owners, because they do not consider the control of existing capacity held by IRU leaseholders.[295] As a result, using only ownership shares is likely to increase the level of concentration in the transport market compared to the level if IRUs were taken into account. For example, taking into account even a limited amount of information regarding IRU leaseholds in capacity on the Gemini and AC-1 cable systems, we find that a reasonably conservative estimate

290 *See* GTE Jan. 5 Petition at 40; GTE Mar. 13 Comments at 59-60.

291 *See* GTE Jan. 5 Petition at 39-40.

292 MCI owns 6.9 percent of the U.S. half-circuits and WorldCom owns 14.0 percent, for a combined ownership share of 20.9 percent of the U.S. end of transatlantic cable capacity. *See supra* para. 91.

293 WorldCom will own 17.2 percent of the U.S. half-circuits and MCI will own 6.1 percent, for a combined ownership share of 23.3 percent of the U.S. end of transatlantic cable capacity. *See supra* para. 92. The facts do not support GTE's claim that the combined entity will, "in large measure," control the new capacity on the transatlantic route. *See* GTE Jan. 5 Petition at 40. MCI WorldCom would own less than 25 percent of the new capacity scheduled to be in service by the end of 1999.

294 The nine largest owners of capacity account for 95.2 percent of the capacity on the transatlantic route. *See* Dec. 1997 TAT-12/13 Schedules; 1997 TAT-12/13 WDM Upgrade Schedules; 1998 TAT-12/13 WDM-3 Upgrade Schedules; Gemini, *Solutions: Operational Benefits* <http://www.gemini.bm/solutions/index.html>; Prospectus of Global Crossing at 46; *see also supra* note 268. The remaining owners, who number at least 50, account for 4.8 percent of the capacity; none of these remaining owners holds one percent or more of the unassigned capacity. For purposes of calculating the HHI, we use the market shares of the nine largest capacity owners and do not assign a value to the remaining owners' market shares, given their minimal market presence. We note that because the remaining owners have market shares less than or equal to one percent, the HHI would be increased by, at most, an amount equal to the combined market shares of these small fringe firms. We further note the change in the HHI calculation resulting from the merger would be unaffected by the inclusion of these firms in our calculation.

295 *See supra* para. 86.

of the pre-merger HHI at the end of 1999 could be 1,503 points, and that the merger could result in a HHI of 1,882 points.[296] Unfortunately, full IRU leasehold information is not publicly available on a cable specific basis. Nonetheless, we recognize that according to the *1992 Horizontal Merger Guidelines*, the post-merger market based on available data would still be considered moderately to highly concentrated and that the merger would be presumed to raise significant concerns that it might create or facilitate the exercise of market power.[297] We note again, however, that an HHI analysis alone is not determinative and does not substitute for our more detailed examination of competitive considerations.[298] In the context of a market as

[296] We take into account the following information and assumptions in order to derive this reasonably conservative HHI calculation. With regard to Gemini, WorldCom submits that as of August 21, 1998, 17 entities have purchased IRUs totaling a combined 82 STM-1s, or 5,166 E-1 circuits. WorldCom asserts that it has purchased capacity equivalent to 2,268 E-1 circuits on Gemini, that C&W and one other carrier have each purchased 1,008 E-1 circuits, and that the remaining 14 IRU holders have purchased a total of 14 STM-1s, or 882 E-1 circuits. *See* WorldCom Aug. 21 *Ex Parte* at 1-2. WorldCom states that MCI does not own any capacity in Gemini. *See* WorldCom July 2 *Ex Parte* I Attach. at 1 n.2. For purposes of this calculation, we assign the 1,008 E-1 circuits purchased by the unknown carrier to AT&T, the carrier that owns the largest amount of capacity on the transatlantic route other than WorldCom and C&W. This will provide the most conservative calculation of market concentration. Because Gemini sells IRU leaseholds in the amount of 1 STM-1 or greater, *see id.* Attach. at 1 n.1, we assign 1 STM-1, or 63 E-1 circuits, to each of the 14 next largest owners of transatlantic capacity, other than WorldCom, C&W, AT&T, and MCI. One hundred and ten STM-1s, or 6,930 E-1 circuits, of Gemini's total capacity remain unsold. Because WorldCom and C&W each indirectly own 50 percent of Gemini, we also assign these carriers 50 percent of the remaining unsold capacity, or 3,465 E-1 circuits, each. With regard to AC-1, a total of 256 STM-1s, or 16,128 E-1 circuits, of capacity will be available by the end of 1999. AC-1 owner Global Crossing Ltd. indicates that at least 22 entities have thus far purchased 97 STM-1s, or 6,111 E-1 circuits (stating that at least 22 entities have purchased 19 percent of a possible 512 circuits, which is equivalent to 97 STM-1s of capacity). *See* Prospectus of Global Crossing at 47. WorldCom states that it may purchase up to ten percent of capacity available on AC-1. *See* WorldCom July 2 *Ex Parte* I Attach. at 3. We therefore assign WorldCom ten percent of capacity on AC-1, regardless of its current share of 16 STM-1s, or 1,008 E-1 circuits. *See* WorldCom Aug. 21 *Ex Parte* at 2. The largest single customer has acquired 20 STM-1s, or 1,260 E-1 circuits. Telephone conversation with Ian McLean, Vice President of Global Crossing Ltd. (Aug. 20, 1998) (*memorialized in* Memorandum from Cathy Hsu, International Bureau, FCC to CC Docket No. 97-211 (Aug. 20, 1998)). To provide for the most conservative calculation, we assign this capacity to MCI. We distribute the remaining 61 STM-1s of capacity among 20 customers. We note here that the record indicates that Global Crossing sells IRU leaseholds in the amount of 1 STM-1 or greater, *see* Atlantic Crossing, *The Project: Service Overview* <http://www.atlantic-crossing.com/project/service_overview.htm>; WorldCom July 2 *Ex Parte* I Attach. at 1 n.1. Again, to provide for the most conservative calculation, we assign 42 STM-1s, or 2,646 E-1 circuits, to AT&T, and 1 STM-1, or 63 E-1 circuits, to the 19 other customers, including incumbent carriers Sprint, BT, C&W, Deutsche Telekom, and France Telecom. We assign the balance of unsold capacity on AC-1, 149 STM-1 or 9,387 E-1 circuits, to Global Crossing. With regard to TAT-12/13, we use ownership shares available in the TAT-12/13 Schedules. *See* Dec. 1997 TAT-12/13 Schedules; 1997 TAT-12/13 WDM Upgrade Schedules; 1998 TAT-12/13 WDM-3 Upgrade Schedules.

[297] *See 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41558, § 1.51.

[298] *See supra* para. 37.

dynamic as the transatlantic transport market, we find that the increase in concentration resulting from the merger is not likely to have anticompetitive effects.

105. Contrary to GTE's contention, we conclude that the proposed merger would not make entry more difficult for competitive U.S. carriers, nor would it result in higher costs of services for retail U.S. international markets.[299] Rather, the record suggests that entry by new carriers or investor groups in this market would be timely, likely, and sufficient to deter or counteract any competitive concerns.[300] As the Applicants indicate, commercial and regulatory barriers to constructing and operating new cable systems are decreasing significantly.[301] A firm or group of firms can decide to construct and begin operating a new cable system in response to an exercise of market power within two years. The recent examples of Gemini and AC-1 demonstrate that cable systems can begin service within two years of planning and initial construction.[302] In addition, the per-unit cost of constructing new capacity continues to decrease dramatically. The Applicants note that the construction costs of capacity on AC-1 were just one-third of the costs of capacity on TAT-12/13.[303] Existing capacity owners, moreover, do not control assets required for entry, thereby allowing new entrants to respond fully to demand for additional capacity. In addition, entry has been further facilitated by World Trade Organization (WTO) Member implementation of commitments made as part of the WTO Agreement on Basic Telecommunications Services (Basic Telecom Agreement), resulting in the removal of foreign investment restrictions and licensing hurdles that previously hampered the rapid deployment of new cable systems.

106. We note that additional transatlantic cables are already in the planning stages and are scheduled to be in service between late 1999 and late 2001. We do not include these cables in our analysis of transport capacity because they do not meet our standard of reasonable certainty in examining planned capacity: grant of a U.S. cable landing license and a construction

[299] GTE Jan. 5 Petition at 36, 41.

[300] *See 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41561, § 3.

[301] *See* WorldCom/MCI Mar. 20 Reply Comments at 54.

[302] *See Gemini Turns Up Trans-Atlantic System*, Communications Today, Mar. 13, 1998 (noting that Gemini went from conception to carrying live traffic in 18 months); Atlantic Crossing, *The Project: Implementation Timetable & Schedule of Upcoming Events* <http://www.atlantic-crossing.com/Project/timetable.htm>.

[303] *See* Letter from Andrew D. Lipman, Swidler & Berlin, Counsel for WorldCom, to Magalie Roman Salas, Secretary, FCC at Attach. 1 at 12 (filed May 1, 1998) (stating that a 64 Kbps half-circuit on TAT-12/13 costs $3,000, whereas the same capacity on AC-1 costs $1,000). Indeed, the Commission recently reported that the annual investment cost per usable circuit continues to fall as the cost of AC-1 is less than 30 percent of TAT-12/13. *See* FCC, *Trends in the U.S. International Telecommunications Industry* (Com. Car. Bur., Aug. 1998) at Table 12.

contract.[304] We nonetheless find that these cables, even at their current stage, suggest the existence of low entry barriers. Columbus-III would add 4,032 E-1 circuits on the transatlantic route with capability for a four-fold capacity upgrade.[305] In addition, a group of 50 carriers have entered into an agreement to construct TAT-14, a transatlantic cable scheduled to provide 640 Gbps, or capacity equivalent to approximately 250,000 additional E-1 circuits.[306] A further system, Project OXYGEN™, has announced intentions to offer an additional 640 Gbps of capacity in regions all over the globe.[307] CTR Group, Ltd. has managed the project but carriers may purchase ownership interests.[308] These cable system plans further indicate that entry barriers are low and suggest that there will be ample opportunity for new entrants to obtain capacity on the transatlantic route. Thus, any temporary increase in concentration due to the merger is unlikely to have a continuing significance in the transatlantic transport market.

107. Moreover, recent history indicates that, as the amount of transport capacity increases, the transatlantic route is becoming less and less concentrated. Indeed, the level of concentration is decreasing even after the impact of the merger is taken into account. Using

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304 *See supra* para. 88.

305 We note here that the International Bureau has granted a special temporary authorization (STA) for the Columbus-III cable. Special Temporary Authority for AT&T Corp. *et al.*, File No. TAO-2627 (Mar. 6, 1998, Sept. 2, 1998) (Columbus-III STA). An STA does not constitute a section 214 authorization or a cable landing license, and thus we do not include this cable in our analysis of concentration of cable capacity in the Atlantic region. An application is pending before the Commission. *See* AT&T Corp. *et al.*, ITC-98-437, at 12 (filed May 27, 1998). Pursuant to section 1.767(b) of our rules, 47 C.F.R. § 1.767(b), the Cable Landing License Act, 47 U.S.C. §§ 34-39 (1994), and Executive Order No. 10530, *reprinted as amended in* 3 U.S.C. § 301 app. at 459-60 (1994), we have informed the Department of State of the pending application. *See* Letter from Diane J. Cornell, Chief, Telecommunications Division, International Bureau, FCC, to Steven W. Lett, Deputy U.S. Coordinator, Office of International Communications and Information Policy, U.S. Department of State (June 17, 1998). The Commission acts on cable landing license applications only after we receive notification whether the Department of State, on behalf of the Executive Branch, has any objection to the issuance of the cable landing license. If we consider Columbus-III in our calculations, we find that it would provide approximately 9 percent of transatlantic capacity but would have virtually no effect on the level of concentration on the transatlantic route. The combined entity's ownership share, for example, would increase .7 percent to 24 percent. *See supra* para. 92; Columbus-III Construction and Maintenance Revised Schedule H-5 (effective Apr. 17. 1998) (for transatlantic capacity ownership on Columbus-III, we use data from subsegment S5, the relevant segment for outgoing U.S. traffic, to derive fully allocated ownership shares).

306 *See A Trans-Atlantic Cable Network Deal*, N.Y. Times, Sept. 3, 1998 at C2.

307 *See* CTR Group Ltd., *CTR Accelerates OXYGEN™ Rollout* <http://www.oxygen.org/news_0408_accel.html>.

308 *See* CTR Group Ltd., *Project OXYGEN™ Network Gathers US$1.4 Billion Support from Carriers* <http://www.oxygen.org/news_1216_v.html>.

post-merger ownership shares, a HHI calculation reveals a concentration level in today's market of approximately 3,200 points. As noted above, the post-merger HHI for the market at the end of 1999 is approximately 2,500 points, a decrease of 700 points. But for the mitigating factors we have identified, a HHI of 2,500 points ordinarily would be considered to be a troublesome level. This reduction in concentration demonstrates that the potential for the exercise of market power is rapidly declining as more entities gain ownership of transatlantic capacity. Given that transport capacity is growing substantially, barriers to entry are low, and more companies have opportunities to gain access to cable ownership and capacity, it appears unlikely that the combined entity, either unilaterally or in a coordinated manner, would have the ability to exercise market power on the transatlantic transport route.

108. Finally, we are not persuaded by GTE that, with regard to the wholesale market for international transport capacity, the combined entity would have changed incentives "when faced with a request for capacity from a carrier" seeking to compete with AT&T, Sprint, and MCI WorldCom, because the combined entity would now be a significant competitor in the end user market.[309] As we concluded above in relation to domestic long distance services, new providers of capacity have every incentive to provide transport to the wholesale market.[310] In fact, AC-1 owner Global Crossing, which holds a significant share of transatlantic cable capacity, identifies itself as a "carrier's carrier" that does not compete with its customers in the retail market.[311] MCI WorldCom's rational response would be to continue supplying wholesale capacity rather than to cede those revenues to another transport provider.

109. *Pacific Region.* We find that the combined entity will have no ability to exercise market power either unilaterally or in a coordinated manner because of its modest percentage of ownership in TPC-5 as well as the capacity becoming available on the transpacific route. Taken together, WorldCom and MCI currently own 25.7 percent of the U.S. end of transpacific capacity.[312] A HHI review of the current transpacific capacity indicates that the merger would increase concentration from 2,121 points to 2,295 points.[313] As noted above, the China-U.S.

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[309] GTE Mar. 13 Comments at 60.

[310] *See supra* para. 70.

[311] Atlantic Crossing, *About Global Crossing Ltd.* <http://www.atlantic-crossing.com/Contact/telesystems.htm>.

[312] MCI owns 21.6 percent of the U.S. end and WorldCom owns 4.1 percent of the U.S. end. *See supra* para. 93.

[313] The nine largest owners of capacity account for 86.8 percent of the capacity on the transpacific route. *See* Nov. 1997 TPC-5 Revised Schedules. The remaining owners, who number at least 70, account for 13.2 percent of the capacity; none of these remaining owners holds one percent or more of the unassigned capacity.

cable system and the WDM upgrade on TPC-5 are scheduled to increase transpacific capacity substantially by the end of 1999. As a result, the combined entity's market share of U.S. half-circuits will drop to 9.6 percent, a substantial decrease from the combined current market share.[314] Using ownership shares for the end of 1999, a HHI review indicates that concentration on the transpacific route would increase from approximately 632 points to 650 points as a result of the merger.[315] According to the *1992 Horizontal Merger Guidelines*, a HHI figure below 1,000 is considered an unconcentrated market which requires no further review.[316] Given the combined entity's low market share and minimal increase in the HHI, we conclude that the combined entity would not have the ability to exercise market power in the transpacific transport market.

110. Furthermore, we note here that other transpacific cables, such as Pacific Crossing (PC-1), Southern Cross, the U.S.-Japan cable system, and Project OXYGEN™, are presently being planned. Again, we do not include these cables in our analysis of transport capacity because they do not meet our standard of reasonable certainty in examining planned capacity: grant of a U.S. cable landing license and a construction contract.[317] We nonetheless find that these cables, even at their current stage, suggest the existence of low entry barriers. We find that the combined entity's planned ownership interest in these cables is not sufficient to give us concern that it will have the ability to exercise market power on the transpacific route.[318]

111. *Caribbean/Latin American Region.* Despite the high level of concentration in this region, we find that, given WorldCom's limited presence and low entry barriers, the merger is not likely to give the combined entity increased market power in the Caribbean/Latin American region. As noted above, the primary route for U.S. international traffic to this region is from the

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For purposes of calculating the HHI, we use the market shares of the nine largest capacity owners and do not assign a value to the remaining owners' market shares, given their minimal market presence.

[314] MCI would own 8.5 percent and WorldCom would own 1.1 percent. *See supra* para. 94.

[315] The 16 largest owners of capacity account for 92.6 percent of the capacity on the transpacific route. *See* June 1998 TPC-5 Revised Schedules; China-U.S. C&MA. The remaining owners, who number at least 75, account for 7.4 percent of the capacity; none of these remaining owners holds one percent or more of the unassigned capacity. For purposes of calculating the HHI, we use the market shares of the 16 largest capacity owners and do not assign a value to the remaining owners' market shares, given their minimal market presence.

[316] *See 1992 Horizontal Merger Guidelines,* 57 Fed. Reg. at 41558, § 1.51.

[317] *See supra* para. 88.

[318] WorldCom will own, through an indirect, wholly owned subsidiary, a 10 percent interest in the Southern Cross cable. *See* WorldCom July 2 *Ex Parte* I Attach. at 2 (Optus Communications Pty Ltd. will own 40 percent and Telecom New Zealand Limited will own the remaining 50 percent).

U.S. mainland to the U.S. Virgin Islands/Puerto Rico. MCI holds an ownership interest in 17.4 percent of the capacity on this route. WorldCom's ownership share is 3.7 percent and, combined with its minimal IRU interests in the region,[319] holds 3.8 percent of the capacity on this route. The proposed merger would increase the HHI concentration from 2,470 points to 2,600 points.[320] Although concentration levels are high on this route, we find that, because of low barriers to entry as described below, coupled with WorldCom's limited presence, totaling less than 4 percent, the merger is unlikely to affect competition in the market for transport capacity along the U.S. mainland - U.S. Virgin Islands/Puerto Rico route.

112. On the route from the U.S. Virgin Islands/Puerto Rico to Latin American countries, MCI currently owns 17.4 percent and WorldCom owns 3.7 percent of capacity. The merger would increase the HHI concentration from 1,436 to 1,564 points.[321] We note here that capacity on this route will increase as a result of the Pan American cable system. By the end of 1999, MCI will hold ownership interests in 24.5 percent of the capacity and WorldCom is expected to own or hold IRU interests in 5.6 percent of the overall undersea cable capacity to these countries.[322] Here the post-merger HHI concentration would increase from 1,350 points to approximately 1,600 points.[323]

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[319] *See* WorldCom Aug. 28 *Ex Parte*.

[320] The 10 largest owners of capacity account for 90.8 percent of the capacity on the U.S. mainland - U.S. Virgin Islands/Puerto Rico route. *See* Americas-I C&MA; Columbus-II C&MA; TCS-1 C&MA. The remaining owners, who number at least 35, account for 9.2 percent of the capacity; none of these remaining owners holds one percent or more of the unassigned capacity. For purposes of calculating the HHI, we use the market shares of the 10 largest capacity owners and do not assign a value to the remaining owners' market shares, given their minimal market presence.

[321] The 12 largest owners of capacity account for 91.8 percent of the capacity on the U.S. Virgin Islands/Puerto Rico - Latin American countries route. *See* Americas-I C&MA; TCS-1 C&MA. The remaining owners, who number at least 20, account for 8.2 percent of the capacity; none of these remaining owners holds one percent or more of the unassigned capacity. For purposes of calculating the HHI, we use the market shares of the 12 largest capacity owners and do not assign a value to the remaining owners' market shares, given their minimal market presence.

[322] *See* Americas-I C&MA; TCS-1 C&MA; Pan American Cable System C&MA; WorldCom Aug. 28 *Ex Parte* at 1.

[323] The 11 largest owners of capacity account for 88 percent of the capacity on the U.S. Virgin Islands/Puerto Rico - Latin American countries route. *See* Americas-I C&MA; Pan American C&MA; TCS-1 C&MA. The remaining owners, who number at least 30, account for 12 percent of the capacity; none of these remaining owners holds one percent or more of the unassigned capacity. For purposes of calculating the HHI, we use the market shares of the 11 largest capacity owners and do not assign a value to the remaining owners' market shares, given their minimal market presence.

113. With respect to traffic to other Caribbean destinations, we note that although transport capacity on some routes is concentrated, the proposed merger would have little or no effect on the level of concentration for most routes. On the route from Puerto Rico to the Dominican Republic, for example, the merger would increase the HHI from 1,300 to 1,350 points, an increase that is not likely to have an effect in such a moderately concentrated market.[324] The merger would have its largest effect on the U.S. Virgin Islands - Puerto Rico route, where MCI has 12.9 percent and WorldCom has 4.9 percent of the cable capacity.[325] The merger would increase the HHI concentration from 3,050 to 3,176 points on this route.[326] We note that this HHI calculation overestimates the level of concentration because there are alternative paths available for U.S. Virgin Islands and Puerto Rico traffic. For example, traffic may be sent directly from the U.S. mainland either to the U.S. Virgin Islands or to Puerto Rico without relying on the other as a hub. In addition, traffic between these two hubs may also be routed via the U.S. mainland. As a result, we find that it is unlikely that the merger would affect competition in the market for transport capacity in the Caribbean/Latin American region because of low entry barriers and WorldCom's limited presence on these routes.[327]

114. A substantial amount of new capacity in the Caribbean/Latin American region will become available by the end of 1999. The Americas-II cable is expected to provide

324 The 12 largest owners of capacity account for 89.7 percent of the capacity on the route between Puerto Rico and the Dominican Republic. *See* TCS-1 C&MA; Antillas I C&MA. The remaining owners account for 10.3 percent of the capacity, but none of these remaining owners holds one percent or more of the unassigned capacity. For purposes of calculating the HHI, we use the market shares of the 12 largest capacity owners and do not assign a value to the remaining owners' market shares, given their minimal market presence.

325 *See* TAINO-CARIB C&MA at Schedule D at 3.

326 The eight largest owners of capacity account for 95.8 percent of the capacity on the route between the U.S. Virgin Islands and Puerto Rico. *See id.* The remaining owners account for 4.2 percent of the capacity, but none of these remaining owners holds one percent or more of the unassigned capacity. For purposes of calculating the HHI, we use the market shares of the eight largest capacity owners and do not assign a value to the remaining owners' market shares, given their minimal market presence.

327 Because WorldCom's ownership share of foreign half-circuits on any segment in the Caribbean/Latin American region is so small, the proposed merger with MCI does not in itself raise vertical concerns that could otherwise result from WorldCom ownership of foreign half-circuits. In particular, WorldCom holds foreign half-circuit ownership or IRU interests on the U.S. mainland - U.S. Virgin Islands/Puerto Rico route amounting to 2.1 percent of capacity. *See* Americas-I C&MA at Schedule D-1; Columbus-II C&MA at Schedule D-2; TCS-I C&MA at Schedule D at 1. On routes between U.S. Virgin Islands/Puerto Rico and Latin American countries, WorldCom holds only 4.8 percent of the foreign half-circuits. *See* Americas-I C&MA at Schedule D-1; Pan American C&MA at Schedule D1; TCS-I C&MA at Schedule D at 3. Within the Caribbean region itself, WorldCom holds only 1.4 percent of the foreign half-circuits. Moreover, on the route between the U.S. Virgin Islands and Puerto Rico, WorldCom would hold only 3.5 percent of the foreign half-circuits. *See* TAINO-CARIB C&MA at Schedule D at 3.

capacity equivalent to 20,160 E-1 circuits from the U.S. mainland to the U.S. Virgin Islands and then down the eastern coast of South America.[328] As with the transatlantic route, it appears that barriers to entry are low. Recent history indicates that new cable systems can be conceived and constructed within two years. As discussed above, the costs of construction are decreasing significantly. As a result, we find that further entry of transcaribbean capacity would be timely, likely, and sufficient. Other entities have expressed interest in expanding cable capacity in this region. For example, the Mid-Atlantic Crossing and the Pan-American Crossing are expected to add significant capacity on U.S.-Latin American routes.[329] Project OXYGEN™ has announced its intention to introduce service in this region by the end of 2001.[330] We find that these cables, even at their current stage, further suggest the existence of low entry barriers. Because entry is easy and capacity is growing, we find that the increase in concentration due to the merger is unlikely to have continuing significance in the Caribbean/Latin American transport market.

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[328] We note here that the International Bureau has granted a special temporary authorization (STA) for the Americas-II cable. Special Temporary Authority for AT&T Corp. *et al.*, File No. TAO-2629, at 5 (Mar. 31, 1998, Sept. 2, 1998) (Americas-II STA). As discussed above, *see supra* note 305, an STA does not constitute a section 214 authorization or a cable landing license, and thus we do not include this cable in our analysis of concentration of cable capacity in the Caribbean/Latin American region. An application is pending before the Commission. *See* Joint Application of AT&T Corp. *et al.*, File No. SCL 98-003 (filed Apr. 30, 1998); File No. SCL 98-003(A) (amending the original application) (filed July 30, 1998). Pursuant to our rules, we have informed the Department of State of the pending application. *See* Letters from Diane J. Cornell, Chief, Telecommunications Division, International Bureau, Federal Communications Commission, to Steven W. Lett, Deputy U.S. Coordinator, Office of International Communications and Information Policy, U.S. Department of State (May 12, June 17, and Aug. 20, 1998). If we consider Americas-II in our calculations, ownership shares of capacity in the region shift, but our findings remain the same: because of WorldCom's small market presence in this region, the effect of the merger on concentration is not significant. By the end of 1999, MCI's share of capacity from the U.S. mainland to the U.S. Virgin Islands/Puerto Rico would increase to 41.3 percent (in large part due to its acquisition of Embratel), followed by AT&T with 22 percent, Sprint with 14.7 percent, Telintar with 8.3 percent, and WorldCom with 2.3 percent (including WorldCom ownership and IRU interests). *See* Americas-I C&MA at Schedule D-1; Columbus-II C&MA at Schedule D-2; TCS-1 C&MA at Schedule D at 1; Americas-II Construction and Maintenance Agreement Revised Schedules at Schedule D (Feb. 27, 1998); WorldCom Aug. 28 *Ex Parte*. Despite the shift in ownership shares, the level of concentration on this route would remain nearly the same, with a post-merger HHI calculation of 2,680 points. Again, because of WorldCom's limited presence on this route, which drops from 3.8 percent to 2.3 percent when Americas-II is included, the effect of the merger is not significant despite the high level of concentration on the route. We reach the same conclusion with regard to the other routes in this region. From the U.S. Virgin Islands/Puerto Rico to Latin American countries, WorldCom's ownership and IRU interests amount to 1.9 percent, and to other Caribbean islands WorldCom's presence is 4.1 percent with no more than 5.3 percent on any individual route. *See id.*

[329] *See* Global Crossing, *Mid-Atlantic Crossing* <http://www.globalcrossing.bm>; Global Crossing, *Pan American Crossing* <http://www.globalcrossing.bm>.

[330] *See* Project OXYGEN™, *Construction Schedule* <http://www.oxygen.org/project_oxygen_overview/slds027.htm>.

d. Other Input Markets

115. Many other inputs are essential for the provision of international services, but there is no evidence in the record to demonstrate that the proposed merger would affect competition adversely in any of these markets. For example, we conclude that the combined entity would not have the ability to exercise market power in the provision of U.S. backhaul, which is a high capacity private line used to carry traffic between a submarine cable landing station and a carrier's international switch or point of presence. GTE alleges that "it is conceivable" that the combined entity, either unilaterally or in concert with other carriers, could exercise market power in the provision of backhaul.[331] GTE, however, provides no evidence to support this claim. We find that the appropriate geographic market for backhaul is regional because backhaul is, in effect, the domestic extension of submarine cable systems, which we examine above on a regional basis. We therefore examine the provision of backhaul to three regions: Atlantic, Pacific, and Caribbean/Latin America. The Atlantic region is the only geographic market in which WorldCom and MCI both own backhaul capacity.[332] The record lacks any evidence to demonstrate that the combined entity, either unilaterally or in concert with others, would have the ability to exercise market power in the U.S. backhaul market. Even if the combined entity were to attempt to raise prices, however, it would lack the ability to restrict customers from obtaining new sources of backhaul. WorldCom states that Gemini generally sells IRUs for "city-to-city" (*i.e.,* London-New York) capacity, but that "any customer that chooses to collocate at a cable station would be able to provide its own backhaul."[333] MCI, which provides some backhaul on TAT-12/13 to its own network but not to other entities,[334] does not control the ability of other carriers to provide backhaul on that cable. AT&T, as the TAT-12/13 cable landing station owner, provides U.S. parties with collocation and interconnection.[335] With regard to the AC-1 cable, Global Crossing, like Gemini, states that "the customer may choose to collocate their own equipment at the cable stations and carry the traffic

[331] GTE Jan. 5 Petition at 41.

[332] *See* WorldCom/MCI Jan. 26 Reply Comments at 64-65; WorldCom July *Ex Parte* I Attach. at 2 n.3; Letter from John M. Scorce, Senior Counsel, International Regulatory Affairs Law and Public Policy, MCI, to Magalie Roman Salas, Secretary, FCC at 1 (filed Aug. 31, 1998) (MCI Aug. 31 *Ex Parte*).

[333] *See* WorldCom July 2 *Ex Parte* I Attach. at 2.

[334] *See* MCI Aug. 31 *Ex Parte* at 1.

[335] *See id.* at 1-2.

inland to their own network."[336] We find that the combined entity, therefore, would not have the ability to prohibit or limit other carriers from providing backhaul capacity in this region.

116. In addition, we do not agree with GTE's position that we should examine international private line services as a separate input market.[337] As discussed above, we conclude that the relevant input product market is the broad category of international transport capacity.[338] Capacity is merely a physical link offering the capability to provide any service, whether it is primarily voice or data or classified as International Message Telephone Service (IMTS) or non-IMTS (primarily private line). The cable owner provides the transmission path; the carrier decides the type of service that will be provided over that link.

117. We note that other inputs, such as operating agreements to exchange traffic with foreign carriers, are essential inputs in the provision of international services. Generally, U.S. carriers are able to obtain operating agreements or establish alternative arrangements to provide international services.[339] There is no evidence in the record that operating agreements or other inputs warrant review as relevant markets for purposes of this merger analysis.

118. *Conclusion.* We conclude that the merger likely will not have an anticompetitive effect in any relevant international input market. The combination of WorldCom's and MCI's

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336 *See* Atlantic Crossing, *The Project: Service Overview* <http://www.atlantic-crossing.com/project/service_overview.htm>.

337 *See* GTE Jan. 5 Petition at 35 n.68; GTE Mar. 13 Comments at 49. GTE asserts that international private lines are an input when sophisticated businesses such as banks or airlines obtain them to form their own private network. In fact, this example illustrates private lines as an end user service obtained by customers for their own purposes. *See also* Telstra Jan. 5 Comments at 7 (asserting that the Commission should examine the market for international private lines used to provide Internet access).

338 *See supra* para. 82.

339 *See AT&T International Non-Dominance Order*, 11 FCC Rcd at 17981-82, paras. 50-51 (finding that multiple U.S. carriers have operating agreements to nearly all foreign countries for the provision of IMTS); *International Competitive Carrier Policies*, CC Docket No. 85-107, Report and Order, 102 F.C.C.2d 812, 835, para. 56 (1985) (*International Competitive Carrier*) (finding that foreign carriers are likely to enter operating agreements for the provision of non-IMTS services). Furthermore, as countries implement their market access commitments made as part of the WTO Basic Telecom Agreement, U.S. carriers will be able to obtain operating agreements from new entrants as well as incumbent carriers in these countries. In addition, carriers have been successful in providing international service through alternative arrangements such as switched hubbing through a third country. *See AT&T International Non-Dominance Order*, 11 FCC Rcd at 17982, para. 51. We are not persuaded by GTE's assertion that hubbing and other forms of transit are merely a "theoretical possibility." *See* GTE Jan. 5 Petition at 32 n.65. Such routing, in fact, does occur. A staff review of preliminary 1997 section 43.61 traffic and revenue reports indicates that at least seven carriers have reported the provision of switched telephone service on a switched hubbing basis.

facilities, both current and planned, is unlikely to be sufficient to allow the combined entity to exercise market power given the low barriers to entry and substantial amount of non-MCI WorldCom capacity becoming available.

2. End User Markets

a. Relevant Markets

119. *Product Market*. With the development of innovative communications technologies and the benefits of increasing competition in foreign markets, carriers are finding creative ways to offer the services most desired by international customers. These offerings often transcend the historical classifications of voice-based International Message Telephone Service (IMTS) and data-based non-IMTS.[340] Given the dynamic nature of the telecommunications marketplace, we find that the IMTS/non-IMTS product market distinction is no longer the most appropriate analytical framework for purposes of our merger analysis. Instead, as we discuss below, we identify and review two international service end user product markets: mass market and larger business.

120. We recognize that in the 1985 *International Competitive Carrier* decision, the Commission identified IMTS and non-IMTS as two separate product markets.[341] In that decision, the Commission relied both on demand and supply substitutability in identifying relevant product markets.[342] In 1997, however, the Commission adopted an analytical framework, consistent with the *1992 Horizontal Merger Guidelines*, in which we rely only on demand considerations to identify relevant product markets.[343] Applying this analytical framework, in conjunction with the Applicants' comments regarding product markets, we are persuaded that the mass market and larger business market are the most appropriate end user markets for reviewing the competitive effects of the proposed merger on the U.S. international services market.[344]

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[340] *See International Competitive Carrier*, 102 F.C.C.2d at 824-825, paras. 27-28.

[341] *See id.* at 823, para. 25.

[342] *See id*.

[343] *See LEC Regulatory Treatment Order*, 12 FCC Rcd at 15773-15777, paras. 25-30; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20008-20009, para. 37; *BT/MCI Order*, 12 FCC Rcd at 15367-68, para. 34.

[344] We note here that in our recent *Comsat Non-Dominance Order*, we identified four relevant product markets: switched voice telephony; private lines; full-time video service; and occasional-use video service. *See Comsat Non-Dominance Order* at para. 26. In that proceeding, neither the parties nor the evidence in the record prompted us to review relevant product markets identified in the *International Competitive Carrier* decision. *See*

121. GTE asserts that end user consumers view international private line service as offering flat-rate, dedicated, or secure service to pre-defined points, and IMTS as offering usage-charged, as-needed service to any point.[345] Today, however, the distinction between IMTS and non-IMTS service is blurring. Indeed, there are IMTS-based offerings that provide customers with the functionality traditionally associated with international private line service. As an alternative to private line service, for example, carriers have installed software programs that provide virtual private networks that use the public switched network. Conversely, non-IMTS services are also being used as substitutes for IMTS service. For instance, end users are using packet-switched services to obtain voice services over non-IMTS private line networks rather than international circuit-switched paths. Given the current marketplace, we believe that the IMTS/private line distinction no longer is the most appropriate analytical framework in which to analyze the international services market. As discussed further below, for purposes of this proceeding, we nonetheless respond to GTE's claims regarding IMTS and private line service.

122. As we concluded above in our analysis of domestic long distance services, we view international services as being provided in two product markets defined by the class of customers that are served: (1) the mass market which serves residential customers and small businesses; and (2) the larger business market which serves medium- and large-business customers.[346] Mass market consumers generally demand international services with access to all points, charged at a per-minute rate, and available on an as-needed basis. By contrast, larger business customers use many different types of services, including specialized business services which may be provided via IMTS or international private lines. Larger business customers also

id. at para. 34 ("Neither Comsat nor the parties dispute [the *International Competitive Carrier* product markets] and nothing in the record causes us to revisit this finding."). The identification of separate switched voice and private line product markets in that order had no effect on our ultimate analysis. For both product markets, we reclassified Comsat as a non-dominant common carrier for the "thick route" markets but not for the "thin route" markets. A "thick route" market is served by multiple cable and satellite carriers. As noted above, a "thin route" market is not linked to the United States by cable and is served only by satellite providers. *See id.* at para. 28. Thus, our findings did not depend on whether Comsat was offering a switched voice or private line service but rather on the type of geographic route on which either service was being offered.

345 *See* GTE Mar. 13 Comments at 46-48; GTE June 11 Renewed Motion at 44 n.117.

346 *See supra* section IV.A.2. In the *BT/MCI Order*, we identified mass market and larger business segments of the international services market. *See BT/MCI Order*, 12 FCC Rcd at 15375, para. 50. As noted above, we clarify in this Order that the mass market and larger business market constitute separate relevant product markets. *See supra* para. 25. We recognize here that, under the *1992 Horizontal Merger Guidelines*, it may be possible to identify additional and narrower relevant product markets within these two broader end user markets. *See 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41554-44, § 1.11. We find, however, that we do not need to make such a determination because within each of the product markets identified above, international service providers generally provide all the same services, and production substitution among these services is "nearly universal." *Cf. id.* at 41557, § 1.32 n.14. *See also supra* para. 27.

demand greater volume of any-to-any, on-demand services than mass market customers, and thus qualify for volume discounts that are unavailable, as a practical matter, to mass market customers.

123. *Geographic Market*. As the Commission has concluded previously, we also find that each international route between the United States and a foreign country is a separate geographic market.[347] We conclude, however, that with the exception of the U.S.-Brazil route,[348] we can examine aggregate information that encompasses all international point-to-point markets. No party has submitted credible evidence that the competitive characteristics on any route are sufficiently dissimilar to other routes so as to prevent an aggregate analysis.[349] Using this framework, we therefore seek to determine whether the proposed merger will have any anticompetitive effects on any U.S.-international route.

b. Market Participants

124. There are hundreds of carriers that compete with WorldCom and MCI in the market for U.S. international services, which in 1996 generated revenues of approximately $18 billion.[350] Overall, AT&T is the largest participant with approximately a 59 percent share of revenues. MCI is the next largest participant with approximately a 25 percent share, followed by Sprint with approximately a 10.4 percent share, and WorldCom with approximately a 3 percent share.[351]

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[347] *See LEC Regulatory Treatment Order*, 12 FCC Rcd at 15801, para. 80. *See also AT&T International Non-Dominance Order*, 11 FCC Rcd at 17974-75, paras. 31-33.

[348] *See infra* note 359.

[349] *See LEC Regulatory Treatment Order*, 12 FCC Rcd at 15801, para. 80. *See also BT/MCI Order*, 12 FCC Rcd at 15375, para. 51. Without other information, high market shares and HHI calculations of end user revenues do not necessarily indicate the existence of market power on a particular route. *See infra* paras. 137, 138. In the *LEC Regulatory Treatment Order*, the Commission concluded that myriad factors could affect a decision whether to examine a point-to-point market separately, such as whether a U.S. international carrier was affiliated with an incumbent foreign carrier or whether a U.S. carrier controls a dominant portion of the capacity of the U.S. half of a particular international point-to-point market. *See LEC Regulatory Treatment Order*, 12 FCC Rcd at 15801, para. 80.

[350] *See 1996 Section 43.61 Report* at Figure 7 (examining U.S.-billed revenues for facilities-based and facilities-resale services) & Table D1 (examining IMTS resale service).

[351] *See id.* at Figure 7.

125. *Mass Market*. AT&T, MCI, and Sprint are the largest participants in the provision of international services to mass market customers.[352] WorldCom is also a participant in this market, although 1996 data reflect that it is a smaller market participant.[353] In addition, there are hundreds of other carriers, including some facilities-based and many resale carriers, that offer services used primarily by mass market customers. Additionally, the BOCs represent precluded competitors in the U.S. international services market, at least with respect to the provision of in-region international services.[354]

126. *Larger Business*. AT&T, MCI, Sprint, and WorldCom are the largest participants in the provision of international services to larger business customers.[355] We also find that several other carriers are participants in this market.[356] In addition, we find that the BOCs are also precluded competitors in the larger business market, again with respect to the provision of in-region international services. We also expect that, given our new market entry rules implementing the U.S. commitments in the WTO Basic Telecom Agreement,[357] an increasing

[352] In 1996, AT&T earned 60.1 percent of the total U.S. international telephone service revenues, followed by MCI with 24.9 percent, and Sprint with 10.5 percent. *See id*. at Table E1 (examining IMTS traffic billed in the United States). We recognize that the IMTS data include both mass market and larger business customers, but we believe that the data serve as a reasonable approximation for carriers' market presence in the mass market.

[353] In 1996, WorldCom earned 2.6 percent of the total U.S. international telephone service revenues. *See id.* We recognize that, in the *Comsat Non-Dominance Order*, the Commission observed that WorldCom was "among the most significant market participants in the mass market." *See Comsat Non-Dominance Order* at para. 56. Although WorldCom is the fourth largest carrier in this market, the 1996 data indicate that its market share is significantly below the top three carriers. We note here, moreover, that the Commission's findings in the *Comsat Non-Dominance Order* did not depend on the identification of WorldCom as among the most significant market participants in the mass market.

[354] *See BT/MCI Order,* 12 FCC Rcd at 15383-84, paras. 76-77.

[355] *See 1996 Section 43.61 Report* at Figure 7.

[356] *See id.* We find that several carriers provide private line services, which generally are purchased by larger business customers, and thus are a reasonable approximation of market presence in the larger business market. We note again here, however, that larger business customers demand many different types of services, some of which are classified as IMTS and others as non-IMTS (primarily private line).

[357] *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market and Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997) (*Foreign Participation Order*), *recon. pending*.

number of foreign carriers will also obtain section 214 authorization to provide international services and are likely to offer services to larger business customers.[358]

c. Analysis of Competitive Effects

127. We examine here whether the proposed merger will reduce competition in the relevant markets, compared with the competitive conditions that would exist absent the merger. We reiterate that we are concerned with potential horizontal competitive effects.[359]

128. *Mass Market*. We conclude that the proposed merger likely will not have anticompetitive effects in the mass market. As discussed above, both the Applicants and parties agree that WorldCom is currently not a significant competitor in the provision of long distance services to domestic mass market consumers.[360] Mass market consumers currently presubscribe to a single carrier for the provision of both domestic long distance and international services.[361] Thus, if WorldCom is not a major competitor for domestic long distance service it is unlikely that WorldCom is a major competitor for the provision of international services to the mass market. To the extent that WorldCom provides wholesale capacity used by other carriers to offer mass market services, we find above that new capacity and additional owners will provide

[358] *See* Public Notice, *FCC Grants over 200 International Service Applications in First 90 Days of New Foreign Participation Rules* (rel. May 14, 1998) (noting that in the first 90 days following implementation of the Commission's new market entry rules, 200 carriers including 26 foreign carriers received section 214 authorizations to provide international services).

[359] MCI's recent acquisition of Embratel, the Brazilian long distance and international monopoly carrier, *see supra* para. 96, raises concerns with regard to potentially harmful vertical effects on the U.S.-Brazil route. Given WorldCom's limited transport capacity in the Caribbean region, *see supra* paras. 97 and 98, and its small (7 percent) share of revenues on the U.S.-Brazil route, *see 1996 Section 43.61 Report* at Tables A1, B1, A55, & B36, we find that the merger of WorldCom and MCI will not itself increase the risk of any anticompetitive effects already present. We expect that in the near future MCI will update its notification of affiliation to provide greater detail with regard to its purchase of Embratel, at which time we will determine whether to impose international "dominant carrier" regulation on the combined entity for the U.S.-Brazil route.

[360] *See supra* section IV.A.2. WorldCom, moreover, has indicated that it has not focused on the mass market. *See* WorldCom July 8 *Ex Parte* Grillo Aff. at 4. *See also supra* note 353.

[361] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19417 at para. 45 (1996) *(Local Competition Second Report and Order)* (finding that technical limitations at that time precluded adoption of a nationwide policy requiring a separate presubscription choice for international calling), *vacated in part, People of the State of California v. FCC*, 124 F.3d 934 (8th Cir. Aug. 22, 1997), *cert. granted, AT&T Corp. v. Iowa Util. Bd.,* 118 S.Ct. 879 (Jan. 26, 1998).

this service and will prompt the combined entity to continue its existing practices rather than cede revenue to competing wholesale providers.[362]

129. Moreover, WorldCom does not possess any special retail assets or capabilities that would make it more likely than other carriers to become a major participant in the mass market. Entrants into the mass market are likely to be successful to the degree that they possess, now or in the near future, a strong mass market presence, which may include brand name recognition, reputation, and local customer base. In the U.S. international services market, these attributes are not route specific, except in the case where an entrant is affiliated with an incumbent carrier on the foreign end of a particular route. Non-BOC incumbent LECs such as GTE have capitalized on their brand name recognition, reputation, and local customer base as they provide international services to the mass market. In addition, once granted section 271 authority, the BOCs are likely to become major international services providers within their respective regions, given their local customer base and their marketing and organizational capabilities. As a result, we find that the merger of WorldCom and MCI is not likely to affect adversely competition in this consumer market.

130. *Larger Business*. We find that the combined entity is unlikely to have the ability to act anticompetitively in the provision of services to the larger business market. As we concluded above, MCI WorldCom would not exercise market power over essential inputs, and barriers to entry in the provision of these services are low.

131. The provision of services to larger business customers depends in large part on the ability to obtain critical inputs such as international transport capacity and operating agreements with carriers on the foreign end, as well as the technical ability to provide the services demanded by larger business customers. As discussed above, we find that the combined entity will not have the ability to exercise market power in the international transport market, and the merger, therefore, will not adversely affect the ability of other carriers to obtain capacity.[363] As we noted above, U.S. carriers generally are able to obtain operating agreements or use alternative arrangements to provide international services.[364] Nor do we find it likely that the merger could result in problems in obtaining operating agreements to provide international services.[365]

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[362] *See supra* para. 108.

[363] *See supra* section IV.B.1.

[364] *See supra* para. 117.

[365] We recognize that where a U.S. carrier is affiliated with a foreign carrier that possesses market power on the foreign end of a U.S. international route, concern may arise with regard to preferential treatment related to operating agreements or the provision of service. In such circumstances, our international "dominant carrier"

132. Moreover, we find that many carriers have the technical capability to provide larger business services. The special assets and capabilities (*i.e.*, brand recognition, reputation, and local customer base) that are important attributes in serving the mass market are not as important here. Rather, carriers need only have the ability to offer dedicated services (end-to-end or virtual), bundle specialized services, and provide significant support and maintenance. Many carriers have these capabilities. Moreover, these capabilities are not route-specific, except in the case where an entrant is affiliated with an incumbent carrier on the foreign end of a particular route. For example, foreign carriers are likely market participants, particularly for services to their own countries. Once granted section 271 authority, the BOCs are also likely to be major participants for in-region international larger business services. As a result, we find that entry by new carriers would be timely, likely, and sufficient to deter or counteract any competitive concerns.[366] Accordingly, we find that the merger is unlikely to affect competition adversely in the larger business market.

3. GTE's Argument Regarding IMTS and Private Line Services

133. As explained above, we do not believe that the IMTS/non-IMTS (primarily private line) distinction is the most appropriate framework for analyzing the effects of the proposed merger. Nonetheless, we take this opportunity to evaluate GTE's evidence regarding whether the combined entity would possess market power in IMTS and international private line service.

134. GTE argues that the proposed merger would result in anticompetitive effects on 65 of the routes on which WorldCom and MCI provide IMTS.[367] GTE cites HHI concentration levels to allege that on 41 routes the merger would likely create or enhance market power, and on 24 other routes the merger would raise significant competitive concerns. GTE also asserts that the combined entity would be the largest provider of U.S. international private line services, noting that in 1996 WorldCom and MCI together had a 44.53 percent share of U.S. international private line revenues.[368] GTE argues that based on HHI calculations, the merger "will likely create or enhance market power" on 73 U.S. international private line routes.[369] Furthermore,

safeguards, our "no special concessions" rule, and our International Settlements Policy address such concerns. *See Foreign Participation Order*, 12 FCC Rcd at 23957-23965, 23999-24022, paras. 156-170, 240-292.

[366] *See 1992 Horizontal Merger Guidelines,* 57 Fed. Reg. at 41561-62, § 3.

[367] GTE Mar. 13 Comments at 54-55.

[368] *See id.* at 56; *see also* Telstra Jan. 5 Comments at 2, 7.

[369] GTE Mar. 13 Comments at 54; GTE June 11 Renewed Motion at 46.

GTE asserts that the combined entity would have a 100 percent share of the private line market on nine of these routes.[370]

135. We disagree with GTE that the existence of high HHIs for either IMTS or private line service on particular routes demonstrates that the combined entity would possess market power over each of these services on these routes. As we noted previously, a HHI analysis is intended to provide guidance regarding the potential anticompetitive effects of a merger, but is not meant to be conclusive. Indeed, an HHI analysis alone is not determinative and does not substitute for our more detailed examination of the competitiveness in a given market. Despite the high HHI numbers presented by GTE, we find here that the proposed merger is not likely to have anticompetitive effects in the provision of IMTS or private line service on any U.S. international route.

136. As discussed above, we do not believe that the IMTS/private line distinction is the most useful analytical tool given today's marketplace, but this finding ultimately is not relevant to our conclusion that GTE's claims are unfounded. The only way a carrier can exercise market power for a particular service on a particular route is if it controls essential inputs or has special retail assets and capabilities for the provision of service to end users. As we have shown above, the combined entity would not possess control over transport capacity in any region or on any thin route. Therefore, we must conclude that the combined entity would not be able to exercise market power over transport capacity for any particular route, including the routes for which GTE has calculated high HHIs. Also, as we have explained above, control over final service to end users depends on possession of special retail assets and capabilities with respect to the mass market or larger business markets, and such retail assets and capabilities generally are not route-specific. We have shown that the combined entity would not possess retail assets and capabilities that would allow it to exercise market power in either the mass market or larger business markets. Therefore, we must conclude that the combined entity would not be able to exercise market power for any service on any route through the possession of special retail assets and capabilities. The combined entity's lack of special retail assets and capabilities and its lack of control over inputs indicates that there are no barriers to entry that would enable the combined entity to exercise market power over the provision of any final service to end users, including IMTS or private line service, on any route.

137. We acknowledge that the market shares cited by GTE appear, on their face, to be a cause of concern. A high market share in itself, however, is not conclusive evidence of market power. For example, GTE asserts that the combined entity would have 100 percent of the international private line revenues to Paraguay. The merger, however, would not result in any increase in concentration in the provision of transport capacity to Paraguay, which is served only

[370] The routes cited by GTE are: Albania, Angola, Cameroon, Congo, Hungary, Kazakhstan, Kenya, Paraguay, and Saint Helena. *See* GTE Mar. 13 Comments at 54 n.136.

by satellite.[371] Nor would the combined entity have control over any other assets or capabilities that would enable it to exclude entry by other carriers and allow it to exercise market power on the U.S.-Paraguay route.

138. Moreover, there are many reasons other than the possession of market power that may explain why the combined entity would have such high numbers on particular IMTS or private line routes. For example, in the case of Albania, GTE asserts that the combined entity would have a 100 percent share of private line service revenues. We note, however, that U.S. carrier private line service revenue to Albania totalled only $87,723 (consisting of three 64 Kbps circuits) in 1996.[372] Thus, the combined entity's 100 percent revenue share would likely result not from any market power of the combined entity but from the fact that few U.S. end users require service to Albania. With regard to the IMTS routes for which GTE asserts the merger would create or enhance market power, or otherwise raise significant competitive concerns, we note that the combined entity's 1996 revenues would account for over 50 percent of IMTS revenues on only four routes.[373] Three of these routes are "thin" markets served only by satellites.[374] As discussed above, the proposed merger would not increase concentration in transport capacity on these routes, and the combined entity would not have control over any other assets or capabilities that would enable it to exclude entry or exercise market power on these routes. The fourth route, U.S.-Bhutan, had 31,426 U.S.-billed switched telephone minutes resulting in only $65,638 of revenue in 1996.[375] As in the case of private line service to Albania, discussed above, the combined entity's high market share likely results not from any market power but from the fact that few U.S. end users make calls to Bhutan. In sum, even though the combined entity may have a significant presence in the provision of IMTS or private line service on an individual route, we find no evidence in the record to substantiate that the merger would enable the combined entity to exercise market power on U.S. international routes.

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[371] As noted above, the merger would not increase concentration in ownership of satellite systems or satellite transponder capacity. *See supra* para. 83.

[372] *See 1996 Section 43.61 Report* at Table B1 (examining U.S.-billed private line service on a route by route basis).

[373] As we recently noted in the *Foreign Participation Order*, "'[c]ourts virtually never find monopoly power when market share is less than about 50 percent.'" *Foreign Participation Order* 12 FCC Rcd at 23959-23960, para. 161 (quoting *Antitrust Law Developments* at 235-236).

[374] Somalia, French Polynesia, and Azerbaijan are thin routes. *See Comsat Non-Dominance Order* at Appendix A.

[375] *See 1996 Section 43.61 Report* at Table A1 (examining U.S.-billed IMTS traffic on a route by route basis).

139. As a final matter, we are not persuaded by GTE's assertion that the proposed merger would decrease competition in the provision of IMTS by removing one of the most significant competitors to AT&T and, that as a result of the proposed merger, the provision of IMTS "would be fertile ground for coordinated pricing among the top players."[376] We acknowledge that the proposed merger of WorldCom and MCI will decrease the number of carriers providing IMTS. As we explained above, however, the merger is unlikely to have an anticompetitive effect in the end user market, because WorldCom and MCI do not have market power over inputs and it is likely that new entrants with retail assets and capabilities that are important for the provision of IMTS are poised to enter the market. Thus, we believe that the proposed merger is unlikely to result in any anticompetitive effects in the provision of IMTS.

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

140. The Applicants have requested authority to transfer control of MCI's direct broadcast satellite (DBS) license. The International Bureau, on delegated authority, granted MCI this license following MCI's successful participation in the Commission's DBS auctions.[377] Parties have filed applications for review of the Bureau's grant of this license. In the present proceeding, one party filed requesting the Commission to dismiss or deny the transfer of control of MCI's DBS license.[378]

141. The transfer of control of MCI's DBS license raises issues similar to those raised in the applications for review of the Bureau's order 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, MCI WorldCom will be permitted to acquire control of MCI's DBS license. That license, however, will remain subject to further review, 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.

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[376] GTE Mar. 13 Comments at 57. According to GTE, currently AT&T is the largest provider of IMTS with about 60.13 percent of U.S.-billed revenues. MCI is the second largest with 24.94 percent U.S.-billed revenues, whereas Sprint has 10.49 percent U.S.-billed revenues. WorldCom, according to GTE, has about 2.55 percent of the U.S.-billed revenues.

[377] *See MCI Telecommunications Corporation*, Order, 11 FCC Rcd 16275 (Int'l Bur., 1996) (*MCI DBS Order I*); *Order*, 12 FCC Rcd 12538 (Int'l Bur., 1996) (*MCI DBS Order II*), *app. for review pending*.

[378] United Church of Christ Jan. 5 Petition.

C. Internet Backbone Services

142. We consider in this section the competitive effects of the proposed merger on Internet backbone services. Our primary intent in reviewing the potential effects of this merger on Internet backbone services is to ensure that the dynamism that has characterized the Internet will not be undermined. We seek not to regulate the Internet, but rather to ensure that Internet services, which rely on telecommunications transmission capacity, remain competitive, accessible, and devoid of entry barriers.[379] In response to the Applicants' original application, many commenters argued that, because the merger would have combined two of the largest providers of Internet backbone services, the resulting increase in concentration would impair competition. Since the filing of its original application, MCI agreed to sell its entire Internet business to C&W. Although both the DOJ and the EC have now approved the merger, subject to the condition that MCI sell its Internet business,[380] we must independently determine that this sale addresses the concerns raised regarding the Internet.[381] As discussed below, we find that all MCI Internet assets are being divested to C&W, and therefore the merger will not have anticompetitive effects on any Internet services, as long as the proposed divestiture is in fact carried out.

1. Background

143. The Internet is an interconnected network of packet-switched networks.[382] There are three classes of participants in the Internet: end users, Internet service providers (ISPs), and

[379] We note that no party, including the Applicants, has suggested that the Commission should not consider the competitive effects of the WorldCom and MCI merger on any Internet services.

[380] *See* DOJ Press Release; EC Press Release.

[381] MCI and C&W contend that they do not need Commission approval to consummate their proposed transaction, because Internet services are unregulated and no transfer of any Commission licenses is involved. *See* C&W June 16 Reply Comments at 3-5; MCI July 15 Reply Comments at 9. Although we agree that Commission "approval" of the proposed transaction itself is not required, we nevertheless find it necessary to review this agreement insofar as MCI asserts that the divestiture addresses the anticompetitive concerns raised in the record with respect to the Internet. *See* MCI July 15 Reply Comments at 2 (stating that the "complete divestiture of MCI's entire Internet business removes any issues that the merger will give WorldCom market power in the provision of Internet backbone services or other Internet services at the wholesale or retail level").

[382] Kevin Werbach, "Digital Tornado: the Internet and Telecommunications Policy" (OPP Working Paper Series No. 29, 1997) (Digital Tornado) at 10. A packet-switched network is one that transmits information by breaking it into small packets that are independently routed through the network from source to destination according to a destination address that is included in each packet. Packet switching differs from the circuit switching used in Plain Old Telephone Service (POTS): in a circuit-switched network, a dedicated circuit between the parties is established and reserved for the exclusive use of those parties. *See* Newton's at 527.

Internet backbone providers (IBPs).[383] End users send and receive information; ISPs allow end users to access Internet backbone networks; and IBPs route traffic between ISPs and interconnect with other IBPs.[384] Many IBPs are vertically integrated and thus are also ISPs.[385] Prior to the divestiture of its Internet business, MCI acted both as an IBP and an ISP. WorldCom owns three IBPs - UUNet, ANS, and CNS - and a majority share of a fourth, GridNet;[386] it also owns a number of network access points (NAPs) where IBPs interconnect, most notably MAE-East (Washington DC), MAE-West (San Jose), MAE-Dallas, MAE-Los Angeles, and MAE-Chicago.[387]

144. The essential service provided by IBPs is transmission of information between all users of the Internet. Although IBPs compete with one another for ISP customers, they must also cooperate with one another, by interconnecting, to offer their end users access to the full range of content and to other end users that are connected to the Internet. As a result of this interconnection among IBP networks, the Internet is often described as a "network of networks."

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[383] Digital Tornado at 10. An Internet backbone consists of routers connected together by high-speed data lines. Routers are switching devices that direct packet traffic by examining the address contained in each packet and forwarding it according to directions stored in routing tables. Routers are connected by high-speed data lines that typically consist of fiber optic cables running at DS-3 speeds or higher. (The Digital Service or Digital Signal hierarchy refers to the transmission speed or capacity of a network; DS-3 runs at a speed of 44.736 million bits per second (Mbps), which is the equivalent of 672 standard voice channels. Newton's at 241.) IBPs sell backbone transit services to independent ISPs. The IBP may also provide Internet Protocol (IP) addresses to the ISP. (The Internet Protocol governs addressing of the packets that are transmitted over the Internet. This protocol, together with the Transmission Control Protocol (TCP) that governs the routing and transmission of packets, forms the TCP/IP standard that characterizes the Internet. *See* Digital Tornado at 10, n.11.)

[384] Digital Tornado at 10-12. ISPs provide two different types of Internet access to end users: dial-up access and dedicated access. With dial-up access, an end user places a call with a computer modem over the POTS lines of a LEC to the user's ISP's modem. Dial-up access is generally used by residential end users and small businesses using personal computers, who generally pay their ISP a flat monthly fee for Internet access. With dedicated access, an end-user leases a high-speed line that connects directly to an ISP. Dedicated access is generally used by larger businesses, government organizations, and universities that pay a flat monthly fee that increases with the capacity of the leased line. The ISP aggregates all dial-up and dedicated traffic and routes it to the IBP via a line that is leased from a carrier for a flat monthly fee. The ISP also pays the IBP a flat fee for access to the Internet. Both of these fees increase with the capacity of the leased access line. In order to ensure greater reliability, an ISP may connect with more than one IBP, a practice known as "multi-homing." *See* Digital Tornado at 12.

[385] Digital Tornado at 12.

[386] WorldCom acquired a minority stake in another IBP, Verio, when it purchased Brooks Fiber.

[387] *See generally Boardwatch Magazine's Directory of Internet Service Providers* (Fall 1997). WorldCom acquired these NAPs when it purchased MFS in 1996. MAE stands for Metropolitan Area Exchange.

145. IBPs interconnect with one another through either a peering arrangement or a transiting arrangement. In a peering arrangement, two IBPs agree to exchange traffic that originates from an end user connected to one IBP and terminates with an end user connected to another IBP. A peering arrangement has two main characteristics. First, in general, peering is settlements-free, *i.e.*, the IBPs do not charge each other for terminating traffic.[388] Second, one peer will not allow traffic from another peer to transit its network to a third IBP. For example, if IBP A only has a peering arrangement with IBP B, and IBP B also has a peering arrangement with IBP C, then IBP B will not allow customers of IBP A to send traffic to or receive traffic from customers of IBP C. In order to provide access to the customers of IBP C, IBP A must either peer with IBP C or enter a transit agreement, as described below, with either IBP B or IBP C.

146. The alternative to peering is a paying transit relationship. A transit arrangement differs from peering in two respects. First, in contrast to a peering arrangement in which IBPs generally exchange traffic without charge, in a transit arrangement one IBP pays the other IBP to carry its traffic. The amount of this charge depends upon the capacity of the connection. Second, in contrast to a peering arrangement in which IBPs only terminate each other's traffic, in a transit arrangement an IBP agrees to deliver all Internet traffic that originates or terminates on the paying IBP regardless of the destination or source of that traffic. In the above example, if IBP A becomes a transit customer of IBP B, then as a paying customer of IBP B, IBP A is able to send traffic to and receive traffic from IBP C via IBP B's network.

2. Analysis of Competitive Effects

147. Commenters' allegations of any anticompetitive effects that may have resulted from the merger in its original form focused on the merged entity's provision of Internet backbone services. We first discuss the Internet backbone services that may have been affected by the merger, then describe the asserted harms raised by commenters, and finally show that the divestiture fully alleviates these harms.

148. Because the proposed divestiture of MCI's Internet assets means that the merger of WorldCom and MCI will result in no increased concentration of assets, we need not decide which market is the relevant market for purposes of evaluating the competitive effects of the merger on any Internet services. Nevertheless, based on the record before us, we are inclined to agree with GTE and other commenters that Internet backbone services, which we define to be the transporting and routing of packets between and among ISPs and regional backbone

[388] At least one industry expert, Hal Varian, Dean of the School of Information Management and Systems at the University of California, Berkeley, has called for an end to settlements-free interconnections as the industry norm. Hal Varian, *How to Strengthen the Internet's Backbone*, Wall St. J., June 8, 1998 at A22.

networks, constitutes a separate relevant product market.[389] These Internet backbone services can ensure the delivery of information from any source to any destination on the Internet. The facilities used to provide such Internet backbone services are routers and the high-speed transmission lines that connect these routers. We agree with GTE that there do not appear to be good demand substitutes for ISPs and regional backbone service providers to obtain national Internet access without access to IBPs.[390] We also disagree with Applicants' argument that the fact that transmission facilities are fungible between Internet services and other circuit- and packet-switched services precludes finding an independent and distinct market for Internet backbone services.[391] Finally, because all parties appear to agree that the appropriate geographic market is nationwide, we will assume the market is nationwide for purposes of the analysis below.[392]

149. In response to the Applicants' original application, commenters argued in general that, if WorldCom and MCI's Internet backbones were combined, the size of the resulting backbone network would outweigh any rival's network. As a result, commenters contended that the benefits the Applicants derived from interconnecting with rivals would have been far less than the benefits rivals derived from interconnecting with the Applicants. According to these commenters, therefore, the Applicants, after the merger, would have had less incentive to interconnect on favorable terms with other IBPs and ISPs.[393] Some commenters argued that the merged entity, taking advantage of its increased size, would increase the costs of interconnection, by either charging for peering, or eliminating peering altogether and converting

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[389] GTE Mar. 13 Comments, Harris Internet Aff. at 7. *See* AFL-CIO Jan. 5 Comments at 3; CUIISP Mar. 20 Reply Comments at 2, CWA Jan. 5 Comments at 5-7; CWA Jan. 26 Reply Comments at 4; CWA Mar. 20 Reply Comments at 18-20; GTE Mar. 13 Comments at 66-68; GTE June 11 Comments at 10-11; ICP Jan. 5 Comments at 10; Simply Internet Jan. 5 Petition at 6; Sprint Mar. 13 Comments at 7-9; Letter from Michael B. Fingerhut, General Attorney, Sprint, to Magalie Roman Salas, Secretary, FCC, Attach. Charles River Assocs. Inc. Report at 7-9 (filed June 1, 1998) (Sprint June 1 *Ex Parte*).

[390] GTE Mar. 13 Comments, Harris Internet Aff. at 7. *See* AFL-CIO Jan. 5 Comments at 3; CWA Jan. 5 Comments at 5-7; CWA Jan. 26 Reply Comments at 4; CWA Mar. 20 Reply Comments at 18; GTE Mar. 13 Comments at 67-68; and Simply Internet Jan. 5 Petition at 6.

[391] WorldCom/MCI Jan. 26 Reply Comments at 69-70, 72.

[392] WorldCom/MCI Mar. 20 Reply Comments at 67-68. Because a number of national IBPs offer interconnection in major metropolitan areas, GTE assumes that the geographic market is national; it suggests, however, without specificity, that "there are probably some geographic areas where the separate MCI/WorldCom backbones provide a much higher share of backbone service" such that its assumption of a national market is "conservative." GTE Mar. 13 Comments, Harris Internet Aff. at 8-9; GTE Mar. 13 Comments at 71.

[393] GTE Jan. 26 Reply Comments at 5-7; GTE Mar. 13 Comments at 81, Harris Internet Aff. at 26; Sprint Mar. 13 Comments at 14-16.

peers into transit customers, which would ultimately increase end users' prices.[394] In addition, commenters claimed that the Applicants would degrade the quality of interconnection with rivals in order to induce their rivals' customers to migrate to the Applicants' network.[395] Finally, commenters suggested that the Applicants could have exploited their ISP customers without fear of reprisal because of the difficulty of changing IBPs.[396]

150. Many commenters further contend that difficulties in obtaining settlements-free peering from IBPs constitutes a substantial barrier to entry.[397] IBPs that are unable to secure settlements-free peering agreements must use transiting arrangements, which, commenters contend, increase the costs of providing Internet services to end users and may result in poorer quality transport than that associated with peering.[398] Commenters argue that, for those reasons, IBPs without peering arrangements are unable to attract the large customer base they need to obtain peering. These firms claim that they are caught in a classic Catch 22 situation -- they need more traffic to qualify for peering, but cannot get that traffic without peering. We agree

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394 CWA Mar. 20 Reply Comments at 25-26; Fiber Network Solutions Mar. 20 Reply Comments at 4-5; GTE Jan. 26 Reply Comments at 7; Simply Internet Mar. 13 Comments at 12-13; Sprint Mar. 13 Comments at 13; Reply Comments of NetSet Internet Services, Inc. at 4-5 (filed May 26, 1998) (NetSet May 26 *Ex Parte*).

395 GTE Jan. 26 Reply Comments at 7; GTE Mar. 13 Comments at 83, Harris Internet Aff. at 26-27; GTE June 11 Comments at 22-27, Harris Internet Reply Aff. at 6; Sprint Mar. 13 Comments at 15; Sprint June 1 *Ex Parte*, Charles River Assocs. Report at 13-14. Some commenters also argued that the Applicants could decrease the quality of interconnection between third-party IBPs through WorldCom's control of several of the major NAPs, and thereby induce these IBPs' customers to shift to WorldCom's network. CWA Mar. 20 Reply Comments at 27-28; GTE Mar. 13 Comments at 83-84. Applicants countered that MCI does not own any NAPs, and therefore the merger will not increase the concentration among NAP owners. WorldCom/MCI Mar. 20 Reply Comments at 71.

396 Commenters explain that due to the scarcity of addresses, the American Registry for Internet Numbers (ARIN) assigns addresses only to the largest IBPs, and, as a result, only 10 percent of ISPs "own" their addresses while the vast majority of ISPs must obtain their IP addresses from their IBP. If such an ISP wishes to change its IBP, it must obtain new addresses from its new IBP, and then must renumber its entire network and that of its customers as well. This, according to commenters, can be an expensive and time-consuming process for many ISPs, with attendant risks of network disruptions and customer losses. Bell Atlantic Jan. 5 Comments at 10-11; Bell Atlantic Mar. 13 Comments at 2-3; CUIISP Mar. 20 Comments at 4; CWA Mar. 20 Reply Comments at 29; Simply Internet Mar. 13 Comments at 9-12.

397 BellSouth Mar. 13 Comments at 14-15; CWA Jan. 26 Comments at 9-10; Consumer Project on Technology Jan. 26 Reply Comments at 2-3; GTE Jan. 26 Reply Comments at 8-9; GTE Mar. 13 Comments at 77-78; GTE Mar. 13 Comments, Harris Internet Aff. at 9; GTE June 11 Comments at 18-19; Sprint Mar. 13 Comments at 17-18; Sprint June 1 *Ex Parte*, Charles River Assocs. Report at 21-22. *See* Level 3 May 29 *Ex Parte*.

398 Fiber Network Solutions Mar. 20 Reply Comments at 4-5; GTE Jan. 26 Reply Comments at 7; NetSet May 26 *Ex Parte* at 5; Simply Internet Mar. 13 Comments at 12-13; Sprint Mar. 13 Comments at 16, n.8.

with commenters that peering may be a substantial barrier to entry to those firms that intend to provide Internet services. It was this and related concerns that led to the proposed divestiture of MCI's Internet assets.[399] As explained below, however, we find this divestiture alleviates any competitive effects that may have arisen from the merger in its original form.

3. MCI's Divestiture

151. As a result of discussions with the DOJ and the EC, MCI announced, on July 15, 1998, that it had agreed to sell all of its Internet business to C&W for $1.75 billion.[400] According to MCI, "[a]fter the divestiture, MCI WorldCom will have only those Internet assets, including the backbone network and customer relationships, that WorldCom has at the time of closing. The merger will not produce any increase in WorldCom's Internet market share, capacity, or customer base."[401] The complete divestiture will have the following components:[402]

- *Transfer of Assets and Employees*. MCI will transfer to C&W all of the physical assets that constitute its Internet backbone: 22 nodes (or hubs); over 15,000 interconnection ports; and all the routers, switches, and other equipment dedicated to the backbone.[403]

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[399] *See* DOJ Press Release; EC Press Release.

[400] *See* MCI July 15 Reply Comments. Originally, on June 3, 1998, MCI informed the Commission of the proposed partial divestiture of its Internet assets whereby it agreed to sell its Internet backbone business to C&W, while retaining its Internet retail business. *See* Letter from Mary L. Brown, Senior Policy Counsel, MCI, to Magalie Roman Salas, Secretary, FCC (filed June 3, 1998) (MCI June 3 *Ex Parte).*

[401] MCI July 15 Reply Comments at 9. This divestiture is subject to the condition that MCI is not obliged to proceed if WorldCom and MCI do not merge.

[402] A redacted copy of the term sheet pertaining to the divestiture agreement between MCI and C&W has been placed in the record. *See* Letter from Larry A. Blosser, Senior Counsel, MCI to Magalie Roman Salas, Secretary, FCC (filed Aug. 25, 1998) (MCI Aug. 25 *Ex Parte* I). This confidential document is available for review pursuant to the terms and conditions of the protective order adopted in this proceeding. We are satisfied that MCI has submitted all the relevant portions of its divestiture agreement. We therefore reject claims by commenters that more information concerning the divesture is necessary in order for the Commission to complete its public interest analysis. *See* Telstra June 11 Comments at 3 (arguing that the public interest requires disclosure of the contract and/or tariff terms which would govern MCI's lease of Internet backbone facilities to C&W); Letter from Gregory C. Staple, Koteen & Naftalin, Counsel to Telstra, to Chairman Kennard, FCC, at 5 (filed July 22, 1998) (Telstra July 22 *Ex Parte)*; GTE's Motion for Expedited Consideration of GTE's Motion for Establishment of a Procedural Schedule and Production of Related Materials at 4 (filed July 22, 1998) (requesting the Commission to seek production of the sales contracts and other documents regarding the proposed divestiture) (GTE July 22 Motion). *See also* section IV.C.4 for discussion of Telstra's tariffing claims.

[403] MCI July 15 Reply Comments at 5. We do not agree with those commenters that suggest that a more detailed description of MCI's transferred Internet assets is necessary. *See* CWA July 24 *Ex Parte* at 6; GTE July

MCI will lease to C&W the transmission capacity it needs to operate the network, including projected growth requirements, on "competitive commercial terms" for two years, with an option for C&W to extend the term for an additional three years.[404] MCI will also provide C&W the right to use all associated dedicated software and OSS, will assign to C&W all Internet addresses used in the transferred business, and will allow C&W to collocate equipment in MCI facilities.[405] MCI will transfer all employees necessary to operate the Internet business by allowing C&W to identify those individual employees that it wishes to be transferred from a list of approximately 1,000 MCI employees.[406] In addition, MCI will transfer to C&W all of its more than 40 peering agreements.[407] Finally, MCI WorldCom and C&W are prohibited from terminating their peering agreement for five years.[408]

P *Transfer of ISP Customers*. MCI will transfer to C&W MCI's contracts with ISPs, such that C&W will replace MCI as the IBP to more than 1,300 domestic and international

22 Motion at 2-3; GTE's Reply to MCI's Opposition to GTE's July 22 Motion (filed July 28, 1998) at 4 (GTE July 28 Reply). Rather, we find it sufficient that MCI is transferring *all* of its Internet assets. *See* MCI's Opposition to GTE's July 22 Motion at 2 (filed July 24, 1998) (MCI July 24 Opposition).

[404] C&W is free to use transmission capacity from sources other than MCI. MCI July 15 Reply Comments at 6.

[405] *Id.* at 5-6. C&W has a right to collocate certain routers and modems purchased from MCI for two years, with the right to extend this agreement for an additional three years. C&W will have a nonexclusive, royalty-free, perpetual license to utilize the MCI-owned software necessary to run the transferred Internet business, with the ability to obtain updates for two years. C&W will also be able to use MCI's order entry system for a short period of time to allow a normal transition of the business. MCI Aug. 25 *Ex Parte* II at 2.

[406] MCI July 15 Reply Comments at 6. MCI elaborates that it "will transfer to C&W all engineering, sales, customer service/telemarketing, and managerial, financial, and administrative employees necessary to operate the business, alone or in combination with the personnel in C&W's existing Internet organization" and that it "has identified all of the positions and will shortly provide C&W with a list of approximately 1,000 employees, and C&W will identify those individual employees that it wishes to be transferred." MCI July 15 Reply Comments at 6. Although some commenters ask for a detailed list of employees being transferred, (*see* CWA July 24 *Ex Parte* at 6; GTE July 22 Motion at 4; and GTE July 28 Reply at 5) we find the above description to be sufficient. *See* MCI July 24 Opposition at 3 (stating it is "hard to imagine a role less appropriate for the Commission than to serve as a supervisory human resources department for C&W"). In response to GTE's request for more information regarding the incentives MCI plans to make available to its employees to move to C&W, (*see* GTE July 22 Motion at 4; GTE July 28 Reply at 5) MCI asserts that it will contribute cash to an employee retention fund for C&W. MCI Aug. 25 *Ex Parte* II at 2-3.

[407] MCI July 15 Reply Comments at 6.

[408] MCI Aug. 25 *Ex Parte* II at 3.

ISP customers that now obtain Internet access from MCI.[409] According to the terms of the agreement, MCI WorldCom cannot contract with or solicit any of the transferred ISP customers to provide dedicated Internet access service for two years, unless the ISP customer already purchases Internet services from WorldCom at the closing of the agreement.[410]

P *Transfer of Retail Customers*. MCI will transfer to C&W its contracts with retail customers not only for Internet service, but also for web-hosting, managed firewall, and Real Broadcast Network services.[411] According to the terms of the agreement, MCI WorldCom cannot contract with or solicit transferred retail dedicated access customers to provide dedicated access services for eighteen months, and cannot solicit web-hosting and managed firewall services for six months, unless the customers already purchase these services from WorldCom at closing.[412] MCI will also allow C&W to use the MCI name for one year.[413]

152. We agree with MCI that its current divestiture will adequately address any potentially legitimate objections commenters raised to its original divestiture. Commenters on the original divestiture argued that, because MCI would retain its retail and web-hosting customers, it would retain market power, and C&W would not be as viable a competitor as MCI.[414] The current divestiture, however, includes the transfer of MCI's contracts with retail and web-hosting customers. In addition, commenters contended that, because MCI was transferring only about 50 employees, it would continue to have an undue concentration of Internet expertise and would not provide C&W sufficient technical support to compete successfully.[415] We note that the current divestiture now includes the transfer of as many as

[409] MCI July 15 Reply Comments at 7.

[410] *Id*.

[411] *Id*. at 7-8.

[412] *Id*. at 8.

[413] C&W is authorized, for one year, to identify the transferred Internet business as "formerly the internetMCI backbone network" and/or "formerly the iMCI business." MCI Aug. 25 *Ex Parte* II at 1.

[414] AT&T June 11 Comments at 3-4; BellSouth June 11 Comments at 3; CWA June 11 Comments at 9; GTE June 11 Comments at 33-34; Simply Internet June 11 Comments at 4; Sprint June 11 Comments at 7-8, 13. AT&T also argued that MCI attempted to avoid effective competition by excluding buyers such as AT&T from consideration. AT&T June 11 Comments at 5.

[415] AT&T June 11 Comments at 4; BellSouth June 11 Comments at 3; CWA June 11 Comments at 8; GTE June 11 Comments at 35; Simply Internet June 11 Comments at 5-6; Sprint June 11 Comments at 10-11.

1,000 employees. Sprint contended that, because C&W is not known as a provider of Internet services, it might not be able to retain the customers transferred to it, or obtain new ones.[416] Accordingly, Sprint asserted that MCI should license C&W to use its brand name. MCI has now licensed C&W to use its brand name for one year. Finally, although Simply Internet questioned the number of IP addresses MCI would retain,[417] MCI states that ". . . the new transaction includes all Internet addresses used in the Internet business that C&W is acquiring, whether or not a current customer utilizes a particular address. . . ."[418]

153. We find that the remaining objections raised by commenters do not articulate legitimate anticompetitive harms. With respect to the non-compete clauses contained in the divestiture agreement, some commenters suggest that the time limitations (two years with respect to ISP customers) render them inadequate.[419] We find that C&W's newly acquired retail customer base, coupled with the dynamism of the Internet marketplace,[420] offsets any concern that after two years the transferred customers might migrate to WorldCom in sufficient numbers to give MCI WorldCom market power.[421] Another commenter argues, on the other hand, that the non-compete clause, exempting certain customers from competitive bids by MCI WorldCom, reduces competition.[422] We find that the non-compete clause is appropriate in that it protects against what could otherwise be a "sham" divestiture, *i.e.*, the possibility that MCI WorldCom

[416] Sprint June 11 Comments at 8-9.

[417] Simply Internet June 11 Comments at 4-5.

[418] MCI July 15 Reply Comments at 6.

[419] CWA June 11 Comments at 9-10; Letter from Debbie Goldman, Research Economist, CWA, to Magalie Roman Salas, Secretary, FCC at 8-9 (filed July 24, 1998) (CWA July 24 *Ex Parte*); CWA June 11 Comments at 34-35.

[420] *See, e.g.,* WorldCom/MCI Jan. 26 Reply Comments at 65 (noting that, based on the experience of the Applicants, the demand for Internet services more than doubles every year); GTE Jan. 26 Reply Comments at 4 (stating that the growth in Internet traffic is currently doubling approximately every six months).

[421] C&W itself states that it intends to use the assets purchased to expand its Internet business significantly -- "not sit and watch it wither and return to MCI." C&W June 16 Reply Comments at 6.

[422] Bell Atlantic June 11 Comments at 2-3. Similarly, Telstra asserts that the non-compete provision may be unlawful to the extent it bars Telstra from contracting with the merged entity for new international private line or backhaul facilities during the next two years. Telstra July 22 *Ex Parte* at 4-5. We conclude that it is clear from MCI's description of the divesture agreement that the provisions of the agreement, including the non-compete clause, pertain only to the provision of Internet services and do not preclude the merged entity from competing with respect to provision of common carrier services. MCI July 15 Reply Comments at 10 (stating that C&W will be protected from competition in the "*provision of dedicated Internet access service* by MCI WorldCom for the transferred customers during the specified periods after closing.") (emphasis added).

would immediately win back customer accounts purchased by C&W.[423] Some commenters also argue that the non-compete clause is inadequate, because it exempts customers that were connected to both WorldCom and MCI pre-merger (what the industry refers to as "multi-homed"). Although there is some dispute in the record concerning the percentage of MCI's ISP customers that are multi-homed to UUNet,[424] we find that the exemption of these customers from the non-compete clause poses little risk to competition. Specifically, we find that customers that choose to multi-home do so for purposes of redundancy.[425] Thus, if a customer was multi-homed to both MCI and UUNet prior to the divestiture, these customers are likely to remain multi-homed for purposes of redundancy, and therefore are unlikely to switch all their business to UUNet after the divestiture.

154. Moreover, a few commenters contend that the divestiture will leave C&W overly dependent on MCI. For example, some commenters asserted that, unless MCI also transferred the fiber underlying its backbone, C&W would be too dependent on MCI.[426] We agree with MCI that ". . . to the extent C&W purchases capacity on MCI's long-distance network (at

[423] We note that the non-compete clause does not apply to retail dial-up end user customers of Internet access services. Rather than considering this a deficiency, however, we find that it will allow the combined entity to be a stronger local competitor by enabling it to sell local, long distance, Internet access, and other services to retail end user customers in competition with other providers of these services.

[424] GTE asserts that MCI should be required to reveal how many customers are connected to both WorldCom and MCI pre-merger. GTE July 22 Motion at 3; GTE July 28 Reply at 3. Using the *Boardwatch Magazine Internet Service Provider Directory*, CWA calculates that 36.8% of MCI's ISP customers also connect to UUNet's network. CWA June 11 Comments at 10; *see* Letter from Debbie Goldman, Research Economist, CWA, to Magalie Roman Salas, Secretary, FCC (filed Aug. 7, 1998) (submitting excerpted quote from Bernard J. Ebbers, WorldCom CEO, at investor presentation stating that the existence of multi-homing between WorldCom and MCI Internet customers is "more common than not"). Although MCI claims that it does not know exactly how many of its customers are also WorldCom customers, it states that an unnamed Washington, D.C. law firm has evaluated a list of MCI's ISP customers and UUNet's thirty largest customers and determined that only several of these UUNet customers also purchase Internet access from MCI. *See* Letter from Larry A. Blosser, Senior Counsel, MCI, to Magalie Roman Salas, Secretary, FCC (filed July 31, 1998); Letter from Larry A. Blosser, Senior Counsel, MCI, to Magalie Roman Salas, Secretary, FCC (filed July 28, 1998). *See also* MCI Aug. 25 *Ex Parte* II at 3.

[425] *See, e.g.,* Randy Barrett, *Small ISPs Decry IP Address Shutout*, Inter@ctive Week, July 14, 1997 <http://www4.zdnet.com/intweek/daily/970714a.html>.

[426] GTE June 11 Comments at 34; Internet Service Provider's Consortium June 11 Comments at 2-3. *See* BellSouth June 11 Comments at 3-4 (noting that MCI will retain software and OSS, and that physical assets transferred to C&W will remain in MCI facilities and connected to MCI's transmission facilities); Simply Internet June 11 Comments at 3 (noting that MCI will retain fiber, "the heart of any Internet backbone"). *Cf.* Sprint June 11 Comments at 11, 16 (noting that C&W will be dependent on MCI to provide systems support and postulating that MCI is not transferring enough nodes).

negotiated competitive rates), it is no more dependent on MCI than numerous other backbone providers are on long-distance companies from which they buy long-haul fiber capacity."[427] Similarly, a few commenters assert that, given the integration of MCI's Internet and telecommunications facilities and C&W's dependence on these facilities, C&W is unlikely to be an independent and effective IBP.[428] In addition, at least one commenter maintains that, because MCI will continue to provide a host of non-Internet services to the transferred retail dedicated access customers, C&W will be, in effect, "sharing" its Internet customers with MCI.[429] We are not persuaded by arguments that the integration of MCI's Internet and non-Internet business and facilities will prevent C&W from becoming an effective competitor.[430] We find, for instance, that, given the non-compete clause, MCI will have no undue influence over C&W's newly acquired customers. In addition, we find that C&W is a sophisticated player that has both the ability and the incentive to protect its interests. Significantly, C&W itself rejects the claim that it will be too dependent on MCI or otherwise not a viable competitor.[431] Finally, we note that the DOJ and EC approvals support this conclusion.[432]

155. AT&T, Level 3, and several other commenters suggest that any divestiture would be inadequate unless the Applicants commit to peer with eligible companies on a nondiscriminatory (and impliedly settlements-free) basis.[433] As discussed above, many

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[427] MCI July 15 Reply Comments at 13.

[428] CWA June 11 Comments at 11; GTE June 11 Comments at 29-30; GTE July 22 Motion at 4 (asserting that the "more ties C&W has to the WorldCom/MCI network, the less likely it is that the divestiture will result in the creation of an effective independent competitor in Internet backbone market").

[429] GTE June 11 Comments at 31-32.

[430] *See* GTE July 28 Reply at 4 (arguing that MCI's practice of "main streaming" Internet operations with other services makes the status of multi-use facilities unclear). MCI acknowledges that the divestiture agreement contemplates that MCI and C&W will be sharing certain facilities as well as office space pursuant to a collocation agreement, and that the two companies will be providing one another certain services and sharing certain systems on a "arm's length contractual basis." MCI Aug. 25 *Ex Parte* II at 1-2. We are satisfied that these arrangements will in no way diminish C&W's viability as an independent competitor.

[431] C&W June 16 Reply Comments at 5-8.

[432] *See* DOJ Press Release; EC Press Release.

[433] AT&T June 11 Comments at 6-7; Level 3 May 29 *Ex Parte* at 18. *See* CWA July 24 *Ex Parte* at 7 (asserting that the Commission should also initiate a proceeding to establish a mechanism to collect statistics on Internet traffic flow, market share and other statistics on the Internet marketplace); Fiber Network Solutions Mar. 19 Reply Comments at 9-10; NetSet May 26 *Ex Parte* at 10; Letter from Terrence J. Ferguson, Senior Vice President and General Counsel, Level 3, to Magalie Roman Salas, Secretary, FCC at 5 (filed Aug. 7, 1998) (Level 3 Aug. 7 *Ex Parte*) (stating that the Commission should condition approval of the merger on the Applicants

commenters contend that, by denying peering, the Applicants erect a barrier to the entry of IBPs such as Level 3. We find that, given MCI's complete divestiture of its Internet business, any interconnection difficulties are not exacerbated by the instant merger. Thus, although we are concerned about the interconnection difficulties that commenters such as Level 3 articulate, we agree with the Applicants that the instant merger proceeding is not the appropriate forum to address these concerns.[434] Accordingly, we refuse to condition the merger by requiring MCI WorldCom to adopt nondiscriminatory peering criteria. We note, however, that the difficulties new entrants have encountered in interconnecting with IBPs, which existed prior to the merger, are likely to continue after the merger. Therefore, we conclude that peering is likely to remain an issue that warrants monitoring.

156. We find, after independently reviewing all relevant portions of the proposed divestiture agreement, that it will result in a full and complete divestiture of MCI's Internet assets. Moreover, we conclude that this divestiture agreement eliminates the potential anticompetitive harms that would have resulted from the merger on the provision of Internet backbone services. We reject commenters' claims that the Commission must solicit comment on MCI's current proposal, or that MCI otherwise has not provided us with sufficient information to reach this conclusion.[435] We also reject CWA's suggestion that the Commission adopt a "forward-looking oversight and enforcement mechanism" to ensure that MCI WorldCom complies with the divestiture agreement.[436]

4. International Internet Issues

157. Telstra asserts that foreign ISPs face restrictive pricing, and that access arrangements would be exacerbated by the merger. In particular, Telstra claims that the Commission should examine the practice of major U.S. IBPs, such as WorldCom and MCI, to require foreign ISPs to pay "bundled" rates for private line facilities with Internet services in order to access the U.S. Internet backbone. Telstra also alleges the rates charged by major U.S.

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removing traffic volume or balance requirements from their pre-existing peering guidelines). We note, however, that these parties do not appear to agree about the specific qualities that would make a competitor "eligible" for peering.

[434] Response of WorldCom and MCI to Ex Parte Presentations by Level 3, and Fiber Network Solutions, and to Reply Comments by NetSet at 3-4 (filed June 19, 1998) (WorldCom/MCI June 19 Response); Letter from Jean L. Kiddoo, Counsel for WorldCom, Swidler & Berlin, to Magalie Roman Salas, Secretary, FCC (filed Aug. 19, 1998) (WorldCom Aug. 19 *Ex Parte*).

[435] Bell Atlantic June 11 Comments at 2; BellSouth June 11 Comments at 2; CWA July 24 *Ex Parte* at 7-8; GTE July 22 Motion at 1-2, 6.

[436] CWA July 24 *Ex Parte* at 5-7.

IBPs, including WorldCom and MCI, are not "cost-based" in that foreign ISPs are required to pay for the entire international transmission circuit needed to access the U.S. Internet backbone. According to Telstra, this pricing arrangement is discriminatory because the capacity is used to carry traffic in both directions.[437] Telstra further contends that U.S. carriers can therefore subsidize their affiliated U.S. ISPs, which do not pay for international transmission costs. Telstra claims that this requirement is unjust and unreasonable and violates section 201(b) of the Communications Act.[438]

158. Telstra also argues that the provisions of MCI's divestiture agreement with C&W relating to the lease of international private line and domestic backhaul facilities constitute basic common carrier services subject to the tariffing provisions of Title II of the Communications Act and related regulations.[439] Accordingly, Telstra contends, MCI may not lease such facilities to C&W until it has filed a tariff and obtained Commission approval. MCI, on the other hand, asserts that its agreement to sell its Internet business, and, specifically, that portion of the agreement relating to the lease of transmission capacity to C&W, constitutes "private carriage," and thus is not subject to common carrier filing obligations.[440]

159. We conclude that Telstra's claims do not warrant action in this proceeding. First, we find that "bundling" arrangements do not restrict the options available to foreign ISPs seeking to access the U.S. Internet backbone or disadvantage alternative providers of international transport of Internet backbone services. There is no evidence in the record demonstrating that either WorldCom or MCI require foreign ISPs to pay a bundled rate for access to the U.S. Internet. In fact, UUNET materials indicate that foreign ISPs may choose either a bundled offering to access the U.S. Internet backbone or the backbone services alone. Specifically, UUNET's web site maintains that it "can provision the International leased line or satellite connection, or the customer may deliver the circuit to UUNET."[441] Moreover, Telstra itself has entered into arrangements using its own international circuits to interconnect to the

[437] *See* Telstra Jan. 5 Comments at 7-8.

[438] *See id.*; Telstra Mar. 13 Comments and Petition for Reconsideration at 6. *See also* Inner City Press Jan. 5 Petition at 10 (noting that foreign ISPs are complaining about the high settlement fees they must pay and the requirement that such ISPs pay the price for the full circuit to the United States).

[439] Telstra July 22 *Ex Parte* at 2.

[440] Letter from Larry A. Blosser, Senior Counsel, MCI, to Magalie Roman Salas, Secretary, FCC at 3-4 (filed Aug. 19, 1998) (MCI Aug. 19 *Ex Parte*).

[441] *See* UUNET, *US Transit*, <http://www.us.uu.net/products/access ustrans/>.

U.S. Internet backbone.[442] In addition, the record does not demonstrate that WorldCom or MCI provides services subject to Title II regulation on rates, terms, and conditions that are unjust or unreasonably discriminatory, in violation of the Communications Act.[443] We therefore decline to condition the merger on MCI WorldCom's provision of cost-based unbundled access to the Internet backbone, on tariffed terms, for U.S. and non-U.S. ISPs.[444] Accordingly, we also deny Telstra's request that we adopt corresponding record-keeping and reporting requirements to ensure these conditions can be monitored.[445]

160. Second, we conclude that this merger is not the appropriate forum to consider Telstra's claim regarding Internet cost-sharing. Telstra itself acknowledges that this matter extends beyond the Applicants to "the current pricing arrangements of U.S. carriers for international Internet access."[446] As such, we find that Telstra's claim is beyond of the scope of this proceeding.

161. Third, although we find that Telstra raises serious concerns with respect to the terms and conditions under which C&W is leasing transmission facilities from MCI, we need not resolve its tariffing dispute in the instant proceeding. Notably, Telstra does not allege that MCI is currently in violation of the Communications Act or the Commission's tariffing rules.[447] Indeed, should MCI and C&W effectuate their divestiture agreement, we assume that, to the extent any portions of the agreement involve common carrier services subject to the Commission's tariffing requirements, MCI will adhere to these requirements. If, at that time, Telstra believes that MCI is not in compliance with the Communications Act or our rules, it may press that claim by filing a complaint under section 208. Likewise, should the Commission discover that MCI is not in compliance with our tariffing rules, we have the ability to initiate our own investigation. Although we condition this merger on the sale of MCI's Internet business to

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442 Teleglobe, *Teleglobe, Telstra Launch First High-Speed Internet Link Combining Simplex Satellite and Fiber Cable Facilities*, <http://www.teleglobe.com/en/inc/press/1998/n980115b.html> ("The connection uses Telstra's existing transoceanic cable capacity for the inbound link to the United States and a 45 mbps simplex satellite link for the return link to Australia.").

443 47 U.S.C. §§ 201(b), 202(a).

444 *See* Telstra Jan. 5 Comments at 12-13.

445 *Id*. at 13.

446 *Id*. at 8.

447 Telstra July 22 *Ex Parte* at 2 (stating that "*prior to furnishing C&W* with a 'favorable' two year lease for [international private line] facilities, MCI would need to file appropriate tariffs and/or contracts with the [Commission] for approval") (emphasis added).

C&W, we decline to delay consummation of the instant merger in order to resolve this potential tariffing issue.

D. Local Exchange and Exchange Access Services

162. We consider in this section the competitive effects of the proposed merger in the markets for domestic local exchange and exchange access service. As discussed below, we treat retail local exchange and exchange access service as consisting of two relevant product markets: (1) the mass market; and (2) the larger business market.[448] We conclude that the relevant geographic market in which to measure the effects of this merger on local exchange and exchange access services consists of the local areas in which both of the merging parties provide service.

163. Applicants contend that the proposed merger can have no anticompetitive effects in local exchange and exchange access markets given the continued domination of an incumbent LEC in each geographic region.[449] The Applicants further claim that a primary benefit of this merger is that the merged entity will act as an "icebreaker" in the local exchange and exchange access markets, breaking the market domination of the incumbent LECs and clearing a path that other competing LECs may follow.[450] For the reasons described below, we conclude that the merger likely will not impair competition in the markets for local exchange and exchange access services. We evaluate Applicants' claim that the merger will benefit local exchange and exchange access customers in the potential public interest benefits section of this Order below.[451] We also address below commenters' allegations that MCI WorldCom will retreat from its plans to provide local service to residential customers.[452]

1. Relevant Markets

164. *Product Market.* We identify local exchange and exchange access service as consisting of two distinct product markets: the mass market and the larger business market. We believe it is necessary to distinguish between these two markets because the services offered to

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[448] *See supra* para. 25.

[449] WorldCom/MCI Mar. 20 Reply Comments at 11-12.

[450] WorldCom/MCI Jan. 26 Reply Comments at 17-18.

[451] *See* section V *infra.*

[452] *See* section IV.E *infra.*

one group may not be adequate or feasible substitutes for services offered to the other group,[453] and because firms need different assets and capabilities to target these two markets successfully.[454] We also conclude that local exchange and exchange access service is distinct from long distance service. The Commission has previously identified local exchange and exchange access as a product market separate from long distance.[455] We reaffirm that determination and adopt it here because, in their purchasers' eyes, each of these services is a distinct product lacking good substitutes.

165. We agree with Applicants that, for purposes of analyzing local markets in this case, there is no need to distinguish between medium-sized business customers and large business/government customers, because both sets of customers share many relevant characteristics. For example, both sets of business customers face contract-type tariffs and typically are served by "face-to-face" sales and customer service representatives. Also, both require switched and dedicated access services.[456]

166. *Geographic Market*. In the *LEC Regulatory Treatment Order*, the Commission found that each point-to-point market constituted a separate geographic market, but further concluded that groups of point-to-point markets could be considered relevant markets where consumers faced the same competitive conditions.[457] In the *AT&T/TCG Order*, we observed that discrete local areas may constitute separate relevant geographic markets for local exchange and exchange access services.[458] We affirm that local areas constitute separate geographic markets, because people dissatisfied with their local exchange service cannot substitute a local exchange

[453] For example, residential customers may want local service featuring call waiting, whereas large business/government customers may not need call waiting, but may want or require multiple lines, ISDN, or an extensive voice mail system. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53.

[454] *See AT&T/TCG Order* at para. 20. Further, as the Commission recognized in the *Bell Atlantic/NYNEX Order*, residential and small business customers have a "different decision making process" than larger business customers. For example, residential and small businesses are served primarily through mass marketing techniques including regional advertising and telemarketing, while larger businesses tend to be served under individual contracts and marketed through direct sales contracts. *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53.

[455] *AT&T/TCG Order* at para. 20; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20015, para. 51.

[456] WorldCom/MCI Mar. 20 Reply Comments at 6-7.

[457] *LEC Regulatory Treatment Order*, 12 FCC Rcd at 15792-95, at para. 67 n.181. *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-17, para. 54.

[458] *AT&T/TCG Order* at para. 21.

service from a different area. Consumers of local services in St. Louis, Missouri, for example, cannot substitute the local services offered by carriers in New York City, New York.

167. For purposes of this transaction, we need to analyze those geographic markets for local exchange and exchange access services in which one or both of the merging parties provide service. These markets are ones where both merging parties actually operate or where the potential is greatest that both will operate in the future. We focus on these markets because the merger can have anticompetitive effects only in markets where both firms actually or potentially operate. The arguments in the record, however, are not entirely clear concerning the precise contours of these local geographic markets. GTE, for example, appears to suggest examining the 26 "markets" in which it claims WorldCom and MCI have "overlapping" local facilities in order to evaluate how the merger would affect competition in the local exchange and exchange access market.[459] Applicants contend in their initial filing, however, that WorldCom and MCI networks in the same city frequently do not traverse the same streets and do not serve the same buildings, and that in such cases there is no "overlap" in the sense of duplicate or redundant facilities.[460] In a later filing, the Applicants contend that the properly defined area on which to base geographic market definition is the metropolitan area.[461] We note, in contrast to the Applicants' contention, that there may be metropolitan areas where, because of the location of facilities and the cost of expansion, the geographic market unit might be a smaller area.

168. Although we have concluded, in principle, that the appropriate relevant geographic market consists of the local areas where WorldCom and/or MCI have facilities, we find that, for purposes of this transaction, we need not assess each such area separately in order to determine whether there are potential anticompetitive effects. Competition is still in its infancy in the vast majority of local areas. Applicants have submitted information showing that even in the market for business customers in the New York metropolitan area, which they characterize as "probably the most competitive local exchange market in the country," the incumbent LEC has lost only six percent of the market to competitors.[462] In many other places, the incumbent LEC's market share is or approaches 100 percent.[463] If, as Applicants suggest,

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459 GTE Jan. 5 Petition at 44. *See, e.g.,* GTE Mar. 13 Comments, Attach. 1 at 7 (summarizing petitioners' and commenters' submissions regarding local geographic markets as saying they should be defined as "[e]ach city where MCI and WorldCom have overlapping existing or planned facilities").

460 WorldCom/MCI Jan. 26 Reply Comments at 16.

461 WorldCom/MCI Mar. 20 Reply Comments at 6.

462 WorldCom/MCI Jan. 26 Reply Comments at 8-9, 13-14, Attach. A (citing an analysis of Bell Atlantic and competing LEC access lines prepared by the New York Public Service Commission).

463 WorldCom/MCI Mar. 20 Reply Comments at 7.

incumbent LECs have lost no more than six percent of the market in any local area, then, even assuming that WorldCom and MCI were the only competing LECs, their combined market share could never exceed six percent. These market shares suggest that, even under the worst case of attributing the highest possible local market share to the combined entity, immediate anticompetitive effects are unlikely and, therefore, there is no need to assess each market separately. We now proceed to analyze whether, apart from market share considerations, there are reasons to find the merger anticompetitive in local markets generally.

2. Market Participants

a. Mass Market

169. Having defined relevant markets, we proceed to identify the participants in those markets. Because the local exchange and exchange access markets are in transition, and because both WorldCom and MCI were, until recently, precluded competitors in these market, we identify both actual participants and precluded competitors. We also seek to determine whether, out of the universe of market participants, the merger would eliminate one among a limited number of most significant participants so as to undermine the development of competition as the 1996 Act is being implemented.[464]

170. As we recently noted in the *AT&T/TCG Order*, incumbent LECs are still the sole actual providers of local exchange and exchange access services to the vast majority of mass market customers in most areas of the U.S.[465] This fact is also borne out in the record in the instant proceeding.[466] We therefore consider incumbent LECs to be most significant market participants in the mass market for local exchange and exchange access service.

171. As for other significant market participants, the *AT&T/TCG Order* reaffirmed the Commission's finding in the *Bell Atlantic/NYNEX Order* that AT&T, MCI, and Sprint were previously precluded competitors that were among the most significant participants in the mass market for local exchange and exchange access services.[467] Likewise, we affirm that determination here. The Commission, in the *Bell Atlantic/NYNEX Order*, did not identify WorldCom as among the most significant market participants in the provision of local services

[464] *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20022-23, paras. 65-66.

[465] *See AT&T/TCG Order* at para. 24 & n.80 (noting that incumbent LECs earned 98.6 percent of all the local exchange and exchange access revenues generated nationwide).

[466] *See* WorldCom/MCI Jan. 26 Reply Comments at 13, Carlton and Sider Decl. at 5 and Table 1; WorldCom/MCI Mar. 20 Reply Comments at 7-8.

[467] *See AT&T/TCG Order* at para. 25.

to the mass market.[468] Nor do we find reason now to include WorldCom among the most significant market participants in the instant merger proceeding. Although WorldCom possesses the requisite knowledge, operational infrastructure, and reputation for providing high quality reliable service, all of which are important capabilities to the successful operation of a local telephone company serving residential and small business customers,[469] we find that it lacks the level of brand name recognition enjoyed by the incumbent LEC in its region and the three large IXCs nationwide.[470] Significantly, we also find that WorldCom, in contrast to AT&T, MCI, and Sprint, lacks existing customer relationships with a substantial number of mass market customers.[471] Because WorldCom is not a most significant market participant in the mass market, we conclude below that its combination with MCI is unlikely to retard competition to mass market consumers in any local market. This conclusion is further buttressed when we consider the number of firms, some of which are described below,[472] that appear to be at least as well-situated as WorldCom to provide local exchange and exchange access services to the mass market.

b. Larger Business Market

172. We recently noted in the *AT&T/TCG Order* that incumbent LECs continue to dominate the market for local exchange and exchange access service to business customers.[473] We observed, however, that in contrast with the relative lack of competition incumbent LECs experience in the mass market for local service, they face increasing competition from numerous new facilities-based carriers in serving the larger business market.[474] Nevertheless, we affirm

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[468] *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20032-33, paras. 87-88.

[469] *Id.* at 20020-21, para. 62.

[470] As the Commission noted in the *Bell Atlantic/NYNEX Order,* brand name recognition is a "critical" asset for offering services in the mass market. *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20031, para. 84. Although a competitor can in time develop brand name recognition, the need to do so may render a competitor incapable of having an effect on competition while the 1996 Act is being implemented.

[471] In 1997, the top three long distance carriers had the following residential long distance market shares: AT&T had 67.2 percent, MCI had 12.6 percent, and Sprint had 5.7 percent. WorldCom's residential long distance market share is not separated from the remaining long distance carriers because WorldCom has a small share of the residential end user market. *See 1998 Long Distance Market Shares Report* at 21 n.12 & 22.

[472] *See infra* paras. 174-181.

[473] *AT&T/TCG Order* at para. 26.

[474] *Id.*

our finding that incumbent LECs still dominate the larger business market for local exchange and exchange access service.

173. Our analysis of the record in this proceeding and of publicly available information confirms our earlier conclusion that there are a large number of firms that actually compete or have the potential to compete in this market. We find that a large number of firms, including WorldCom and MCI, all have the necessary capabilities and incentives to compete in the larger business market.[475] In the following paragraphs, we briefly discuss the capabilities and incentives of certain of these firms, including WorldCom and MCI. We note, however, that this list of companies is not intended to be exhaustive.[476]

174. *WorldCom.* Although WorldCom's market share in the local areas in which it serves business customers is quite low, never exceeding 6 percent,[477] we find that WorldCom currently possesses capabilities for success in the larger business market. WorldCom's local exchange subsidiaries, Brooks Fiber and MFS, combine the advantages of extensive facilities,[478] existing customer accounts,[479] substantial experience in both sales and customer care, and superior management. Both Brooks Fiber and MFS have accumulated experience in providing local exchange and exchange access services to business customers. MFS has focused on building extensive fiber networks in a number of major metropolitan areas, including the New York City metropolitan area.[480] Brooks Fiber, by contrast, has built a reputation for providing quality service in smaller cities and, according to one analyst's report, was the first competing

[475] For example, some of the capabilities important for a competing LEC's success include an experienced management team, marketing expertise, ownership of network and infrastructure, access to capital, efficient operations, an integrated product offering, and a high level of customer service.

[476] Applicants argue that competitors, or potential competitors, for local exchange and exchange access services market include electric and gas utilities, wireless carriers, other interexchange carriers, independent telephone carriers, construction companies, cable companies, and out-of-region incumbent LECs. WorldCom/MCI Jan. 26 Reply Comments at 17. We find that there are a sufficient number of market participants on our list below to allay anticompetitive concerns in the larger business market; therefore, we conclude that we need not reach the question of whether the types of companies identified by Applicants are potential competitors in this market.

[477] *See supra* at para. 168.

[478] Applicants describe WorldCom as perhaps the furthest along among competitive LECs in constructing local access facilities, citing 13,000 buildings served in 23 states as a "far greater number than reported by any other competitive access provider." *See* WorldCom/MCI Jan. 26 Reply Comments, Carlton and Sider Decl. at 5-7. This makes WorldCom at least comparable in size to TCG. *See AT&T/TCG Order* at para. 5 n.16.

[479] WorldCom has a "diverse business base." *See* WorldCom/MCI Mar. 20 Reply Comments at v.

[480] *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20032-33, para. 87.

LEC to achieve significant success in using unbundled local loops.[481] WorldCom also has significant capabilities for serving the business long distance market, including facilities, customer relationships, and "know how."

175. *MCI*. Like WorldCom, MCI has a relatively small share of the larger business market for local exchange and exchange access service. The record shows, however, that MCI has a widely-recognized brand name, recognized marketing expertise, and a broad base of business customers.[482] Further, MCI's local exchange services division, MCImetro, has an established network of facilities in place, including switches in 15 cities, with switches planned or pending for another seven cities.[483] Moreover, like WorldCom, MCI has significant capabilities for serving the business long distance market, including a vast customer base, "know how," and existing facilities.

176. *AT&T/TCG*. AT&T/TCG presently has substantial assets, capabilities, and incentives for competition in the larger business market for local exchange and exchange access services. Self-described as the nation's first and largest competing LEC,[484] TCG is a well-established and recognized competing LEC primarily serving the business market. TCG has a large base of business customers, serving 83 markets in the United States, including 29 of the largest 30.[485] It has extensive facilities to serve local exchange and exchange access customers, with 50 local switches deployed and a network encompassing more than 300 communities coast to coast.[486] These assets have been combined with AT&T's access to capital and existing base of business long distance customers, enhancing the combined AT&T/TCG's ability to provide integrated end-to-end services for large and small business customers.[487]

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[481] Bruce J. Roberts, *Local Telecommunications Industry*, SBC Warburg Dillon Read, Inc., Sept. 16, 1997, at 40.

[482] WorldCom/MCI Jan. 26 Reply Comments at 9.

[483] Letter from Andrew D. Lipman, Counsel to WorldCom, Swidler & Berlin, to Magalie Roman Salas, Secretary, FCC, Exhibit 1, (filed June 24, 1998) (citing *1997 Annual Report on Local Telecommunications Competition*, New Paradigm Resources Group, Inc. at 165-85) (WorldCom June 24 *Ex Parte*).

[484] TCG 1997 Annual Report at 17 (1998).

[485] TCG 1997 Annual Report at 5; *AT&T/TCG Order* at para. 5.

[486] AT&T Press Release, *AT&T Completes TCG Merger; TCG Now Core of AT&T Local Services Network Unit* (July 23, 1998) <http://www.att.com/press/0798/980723.chb.html>.

[487] *Id.*

177. *NEXTLINK Communications (NEXTLINK).* NEXTLINK possesses important capabilities and incentives for success in the relevant market, including experienced management and financial ability.[488] Regarding the latter, NEXTLINK is distinguished by the fact that it has a single controlling shareholder, Craig McCaw. According to one financial analysis group, McCaw has a long-term focus and "deep pockets," allowing NEXTLINK not to be concerned about short-term fluctuations in the stock market so that the company may focus on building fundamental growth.[489] Further, NEXTLINK "intends to build robust and extensive networks in its markets in order to ultimately put more customers on-net."[490] At present, NEXTLINK operates 18 switches providing local and long distance service to business customers in 32 markets in nine states.[491]

178. *McLeodUSA.* McLeodUSA currently has 344,000 local lines in service (253,600 on its own facilities) in 10 states.[492] Although it has been noted that McLeod USA's resale strategy has resulted in the company limiting its initial investments in facilities,[493] the company has strategic alliances with utility companies that will aid it in acquiring rights-of-way and in completing future buildouts.[494] In addition, McLeodUSA has been widely renowned for its strong marketing capability[495] and very low customer churn.[496] These assets and capabilities,

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[488] CS First Boston Report at 114.

[489] *Id.*

[490] *Id.* at 113.

[491] NEXTLINK Press Release, *Fast Growing NEXTLINK Communications Reports Strong 2Q Revenue Growth* (July 30, 1998) <http://www.nextlink.net/xpage/xpr_corp_073098a.html>.

[492] McLeodUSA Press Release, *McLeodUSA Reports Continued Growth in Revenues and EBITDA for Second Quarter 1998* (July 29, 1998) <http://www.mcleod-usa.com/Headline7_30.html>.

[493] CS First Boston Report at 98. *See also* Ken Hoexter and Richard Klugman, *Competitive Local Exchange Carriers*, Goldman Sachs U.S. Research, July 1, 1997 at 71 (stating that McLeodUSA focuses on short term customer acquisition, using a resale strategy to capture market share in second and third tier markets, prior to a competitive reaction by the incumbent LEC).

[494] CS First Boston Report at 101.

[495] Frank J. Governali, CFA and John D. Doughty, *McLeodUSA Equity Research,* Credit Suisse First Boston Corporation, May 26, 1998 at 2.

[496] *Bruce J. Roberts, Local Telecommunications Industry,* SBC Warburg Dillon Read Industry Report, Sept. 16, 1997, at 77 (stating that a low churn rate indicates that the incumbent LECs are not winning back McLeodUSA customers).

both those existing and under development, may well enable McLeodUSA to acquire a critical mass of business customers.

179. *e.spire Communications (e.spire, formerly ACSI).* e.spire provides switched local exchange service in 37 metropolitan areas, including 32 areas where it maintains its own fiber optic rings,[497] and operates 85,633 local lines.[498] Further, the company has high-caliber management and the operational and marketing capabilities to offer a range of services.[499] e.spire's strategy of providing a fully integrated suite of both voice and data services assists e.spire in differentiating its local service offering, allowing the company to obtain more easily new customers and to reduce churn.[500]

180. *Other Wireline Competing LECs.* As noted above, the preceding list of wireline competing LECs with capabilities and incentives similar to those of WorldCom and MCI should not be taken as exhaustive. The opportunity faced by wireline competing LECs in the larger business market for local exchange and exchange access service is relatively "generic," in the words of one market analyst, not materially favoring any one competing LEC extraordinarily at this time.[501] Currently firms are adopting a variety of strategies for entering this market and meeting with initial success, suggesting that no one combination of capabilities can be deemed essential to success.[502] Although impediments to successful competition with the incumbent LEC may remain significant even after implementation of the 1996 Act, we nevertheless find that many wireline competing LECs appear to have incentives and capabilities similar to those of WorldCom and MCI.

181. *WinStar Communications (WinStar) and Other Fixed Wireless Competing LECs.* We find that WinStar also has the requisite capabilities and incentives to compete in this market.

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497 Mark Kastan, C.F.A., *e.spire Communications, Inc. -- Comment*, Merrill Lynch, May 12, 1998, at 2 (Merrill Lynch May 12 Report).

498 e.spire Press Release, *e.spire Revenue Triples For Sixth Successive Quarter* (July 30, 1998) <http://www2.espire.net/press/press.cfm?PressReleaseID=84>.

499 CS First Boston Report at 45.

500 Merrill Lynch May 12 Report at 2.

501 *See* CS First Boston Report at 7-10.

502 For example, Focal Communications Corporation, a competing LEC founded in 1996, focuses on providing facilities-based switched local services to large telecommunications-intensive users. This contrasts Focal with other competing LECs that also serve small- and medium-sized businesses and provide bundled communications services. *See* Focal Communications Corporation Company Profile (1998) <http://www.focalcom.com/htm/profile.htm>.

WinStar has used a "wireless local loop strategy;" rather than connecting customers to its switches with copper lines or fiber, WinStar employs a wireless transmission process similar to that used in cellular telephones. According to one analyst's report, WinStar's wireless strategy has helped it to obtain a more fully developed buildout than most other competing LECs, a greater number of access lines, and a higher percentage of lines on-net.[503] This strategy also gives WinStar a speed-to-market advantage, through its ability to deploy rapidly as demand increases.[504] Further, WinStar benefits from having experienced managers, many of whom were previously at MCI.[505] The company has increased its nationwide sales presence to 26 markets and has installed lines surpassing 195,000.[506]

182. We find that other wireless competing LECs have or will rapidly acquire sufficient assets, capabilities, and incentives so that they should be counted as equally significant as the merging parties. Teligent, to name one such company, has well-known management talent, has installed ten switches and has recently begun providing voice and data services over its integrated digital wireless networks in five markets.[507]

3. Analysis of Competitive Effects

a. Mass Market

183. We conclude that the proposed merger will likely have no unilateral or coordinated anticompetitive effects on the mass market for local exchange and exchange access service. Given the continued dominance of the incumbent LECs in each local market and the limited market entry of WorldCom and MCI to date in the mass market,[508] we find no basis to conclude that the combined firm could unilaterally increase local prices, or prevent them from falling, after the merger, even in the absence of regulation. Further, we find no reason to believe

[503] CS First Boston Report at 140.

[504] Ken Hoexter and Richard Klugman, *Competitive Local Exchange Carriers*, Goldman Sachs U.S. Research, July 1, 1997 at 5.

[505] CS First Boston Report at 143.

[506] WinStar Press Release, *WinStar Reports Second Quarter CLEC Revenues More than Quadrupled Over 1997* (Aug. 5, 1998) <http://www.winstar.com/CLEC2Q98Revenues.html>.

[507] Teligent Press Release, *Teligent Reports Second Quarter Financial Results, Raises '98 Launch Goal to 15 Markets* (Aug. 11, 1998) <http://www.teligent.com/templates/temp_pressrel.asp?content_id=146>.

[508] As noted *supra* at para. 168, incumbent LECs have, at minimum, a 94 percent market share of the local exchange and exchange access services in every geographic market. Thus, WorldCom's share of local mass market customers could not be higher than six percent in any region, and is likely to be substantially lower.

that the merger would lead to coordinated interaction with incumbent LECs or other current market participants. Indeed, we find persuasive Applicants' contention that, in entering local markets, they must strive to undercut the incumbent's price in order to grow market share.[509]

184. Nor do we believe that the merger will retard the development of competition in the slightly longer term, because WorldCom is not among a limited number of most significant market participants serving the mass market.[510] Rather, as we recognized above, there are a number of firms that appear to be at least as well-situated as WorldCom to provide local exchange and exchange access services to the mass market.[511] Thus, we disagree with commenters' claims that the merger of WorldCom and MCI will result in a reduction in the number of most significant market participants.[512] As the Applicants point out, because "the number of significant participants does not change for local markets, no 'smaller' group exists that makes such [coordinated] interaction possible."[513]

b. Larger Business Market

185. We conclude that the merger of WorldCom and MCI is unlikely to result in unilateral or coordinated anticompetitive effects in the provision of local exchange and exchange access services to larger business customers. Our conclusion is based on the large number of other participants serving the larger business market, as described above, that have capabilities and incentives similar to those of WorldCom and MCI, and on the relative ease of acquisition of the assets and capabilities needed to compete successfully for business customers. We expect that, in all the relevant geographic markets, a number of competing LECs have, or will soon have, the ability to enter those markets successfully, and will do so with diverse combinations of assets and capabilities.

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509 WorldCom/MCI Jan. 26 Reply Comments at 8.

510 We therefore disagree with those commenters that contend that WorldCom is a most significant participant in the mass market. *See* GTE Mar. 13 Comments at 89; GTE June 11 Renewed Motion at 58. As noted above, however, the Commission has previously found MCI to be a significant competitor in the mass market for local exchange and exchange access services.

511 *See supra* para. 171.

512 *See* GTE Jan. 5 Comments at 43; GTE June 11 Renewed Motion at iv. *See also* Rainbow/PUSH May 21 Renewed Motion at 8. We address commenters' concern that MCI will exit the residential market as a result of this merger in section IV.E *infra*.

513 WorldCom/MCI Mar. 20 Reply Comments at 14.

186. As the Commission noted in the *Bell Atlantic/NYNEX Order,* the potential competitive significance of the loss of a market participant diminishes if there are a large number of other competitors with similar capabilities and incentives remaining after the merger. Specifically, it found that "[i]f one of the merging parties has the same capabilities and incentives as a large number of other competitors, then the loss of that one participant may be unlikely to remove much individual discipline from the market."[514] As we have explained above,[515] there are a large number of competitors with the requisite capabilities and incentives for success, certainly more than the limited number of most significant participants found by the Commission in the *Bell Atlantic/NYNEX Order*. We thus conclude that the merger will not eliminate one of a limited number of most significant market participants.

187. Moreover, the merger does not appear to raise competitive concerns in the near term or the slightly longer term. In the near term, we expect that, in some local areas, few competing LECs other than MCI WorldCom will have the customer accounts or extensive facilities possessed by the merged entity. In all such cases, however, the merged entity will face competition from an incumbent LEC with a dominant market share which, as Applicants have noted, will substantially curb the risk of unilateral anticompetitive effects from the merger.[516] We also agree with Applicants that anticompetitive coordinated effects are unlikely to arise from the merger in the near term, because the merged entity will be sufficiently small relative to the incumbent LEC in each market that it will have a strong incentive to undercut the incumbent to gain market share.[517] In addition, we find that, because a large number of firms possess the necessary capabilities and incentives to compete in this market, they will be able to replicate relatively quickly the merged entity's facilities and customer base, thus alleviating any potential for coordinated effects in the slightly longer term.[518]

E. Provision of Long Distance and Local Service to Residential Customers

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[514] *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20022, para. 65.

[515] *See supra* paras. 174-181.

[516] WorldCom/MCI Jan. 26 Reply Comments at 8; WorldCom/MCI Mar. 20 Reply Comments at 8.

[517] WorldCom/MCI Jan. 26 Reply Comments at 8.

[518] The Commission has noted previously that having fewer firms in the market facilitates coordinated interaction for at least three reasons: (1) the relative gains from "cheating" against the other firms decrease; (2) it becomes easier to detect deviations from the coordinated conduct; and (3) other firms are better able to punish cheating by a deviant firm through retaliation. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20047-48, para. 121. We find, conversely, that markets with large numbers of participants are less likely to experience coordinated interaction.

188. In this section we address allegations that the merger is contrary to the public interest because, as a direct consequence of the merger, the merged entity will jettison some or all of its residential long distance customers[519] and retreat from what commenters identify as MCI's prior intention to provide local exchange and exchange access service to mass market customers.[520] Several commenters contend that a merged MCI WorldCom is unlikely to serve mass market customers in the future, because the merged entity would claim that serving these customers is unprofitable.[521] For example, commenters point to an announcement in the *Washington Post*, attributed to WorldCom's Vice-Chairman and Chief Operating Officer John Sidgmore, that the merger entity would transfer MCI's current long distance customers to another firm, because it is difficult to "make economic sense" out of the "consumer business."[522] In particular, CWA argues that the merged entity will be a financially weaker, company because of the premium price WorldCom paid for MCI and the debt WorldCom will incur to pay for British Telecom's share of MCI.[523] As a result, CWA concludes, the merged entity will be under

[519] *See, e.g.,* BellSouth Jan. 5 Petition at 6-7; Rainbow/PUSH Jan. 5 Petition at 19.

[520] AFL-CIO Jan. 5 Comments at 6; CWA Jan. 5 Comments at 20-24; Rainbow/PUSH Jan. 5 Petition at 18; CWA Jan. 26 Reply Comments at 14; CWA Mar. 20 Reply Comments at 8-16; GTE June 11 Renewed Motion at 55-57; Letter from Damon A. Silvers, Associate General Counsel, AFL-CIO, to Magalie Roman Salas, Secretary, FCC, Attach. at 2-3 (Letter from John J. Sweeney, President, AFL-CIO, Steve Protulis, Executive Director, National Council of Senior Citizens, and Rev. Dr. Joan Brown Campbell, National Council of Churches to William E. Kennard, Chairman, FCC) (filed Aug. 7, 1998) (AFL-CIO Aug. 7 *Ex Parte*); Letter from Gene Kimmelman, Co-Director, Washington Office, Consumers Union, to William E. Kennard, Chairman, FCC at 1-2 (filed Aug. 10, 1998).

[521] Rainbow/PUSH Jan. 5 Petition at 18-19; CWA Jan. 5 Comments at 19-20.

[522] *See, e.g.*, CWA Jan. 5 Comments at 19 (citing Mike Mills, "WorldCom Would Shift MCI's Focus; Bidder Plans to Shed Residential Service," Washington Post, Oct. 3, 1997); Alliance for Public Technology Jan. 26 Reply Comments at 3. Commenters assert that MCI WorldCom's withdrawal from providing long distance service to the mass market would make it less likely that the merged entity would offer local exchange and exchange access services to this market. *See* Rainbow/PUSH Jan. 5 Petition at 18; AFL-CIO Jan. 5 Comments at 6; AFL-CIO Aug. 7 *Ex Parte* at 2-3.

[523] Letter from Debbie Goldman, Research Economist, CWA to Magalie Roman Salas, Secretary, FCC, Attachment "Taking the MCI Out of Local Competition" Report at 1 (filed July 2, 1998) (CWA July 2 *Ex Parte*); CWA Mar. 20 Reply Comments, Shapiro Aff. at 6 (asserting that a merger between WorldCom and MCI will create an entity that will be under extreme pressure to deliver on promised market share growth, cost reductions, and other synergies). *See* CWA Jan. 5 Comments at 22 n. 51; CWA Mar. 20 Reply Comments, Shapiro Aff. at 4-5 (contending that the debt overhang will reduce cash flow that might otherwise have been available for infrastructure expansion).

financial pressure to pursue high-margin business customers and abandon the pursuit of low-margin residential customers.[524]

189. In support of its claim that the merger will cause MCI to abandon its plans to enter the residential local market, CWA argues that the "overwhelming portion" of what CWA characterizes as $5.3 billion in "synergy" savings cited by Applicants in their filings will be realized through a withdrawal from plans to provide local service to the mass market.[525] Similarly, AFL-CIO refers to the $5.3 billion figure as "reduced local spending," reflecting a "change in business strategy, not just efficiency savings."[526] Moreover, BellSouth and Rainbow/PUSH argue that the cost of the merger will force MCI WorldCom to stop serving or cease pursuing residential long distance customers.[527]

190. Applicants respond that it would not be economically rational to abandon MCI's long distance residential customers. They contend that residential long distance service has been a cornerstone of both companies' business for years, and they point out that MCI has provided such service directly, and WorldCom indirectly, through the provision of capacity to resellers who serve residential consumers.[528] Applicants maintain that, given the time and expense they invested in attracting residential customers, it would be illogical for them to abandon these customers after the merger.[529] Moreover, the Applicants maintain that, to the extent MCI WorldCom seeks to provide a bundle of local with long distance and Internet services, it is advantageous to have an existing base of residential long distance customers to whom to market

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[524] *See, e.g.*, CWA July 2 *Ex Parte* at 1; Letter from George Kohl, Senior Executive Director, CWA, to Magalie Roman Salas, Secretary, FCC at 10 (filed Aug. 5, 1998) (CWA Aug. 5 *Ex Parte*).

[525] CWA Jan. 5 Comments at 16-24 (citing WorldCom SEC Form 8-K, Exhibit 99.3, "MCI and WorldCom Analysts Presentation Given on Nov. 10, 1997"); CWA Jan. 26 Reply Comments at 12-14.

[526] AFL-CIO Aug. 7 *Ex Parte* at 2.

[527] BellSouth Jan. 5 Petition at 17 (contending that, in order to fund the "premium" price WorldCom has offered for MCI, it will be necessary for the merged entity to improve long distance margins, either by jettisoning residential customers or by raising residential prices); Rainbow/PUSH Jan. 5 Petition at 19 (arguing that the merged entity might jettison long distance residential customers to fund the merger premium, and suggesting that, to achieve this, a merged MCI WorldCom might slow telemarketing efforts aimed at expanding the base of residential customers); Rainbow/PUSH May 21 Renewed Motion at 7-8 (stating that the merger would do little more than shrink the pool of potential competitors, creating a local phone system that would focus on serving large business customers while ignoring small business and residential customers).

[528] WorldCom/MCI Jan. 26 Reply Comments at 46.

[529] *Id.* at 46, Hall Decl. at 28 (stating that "[i]t would be economically irrational for the merged entity not to capture the value of that reputational capital by failing to continue the business").

these bundled offerings.[530] Further, they contend that residential customers utilize network capacity during off-peak hours and thus help spread costs over a wider base.[531]

191. With respect to their commitment to providing local residential service, Applicants submitted two letters from WorldCom Chairman, President, and CEO Bernard J. Ebbers and MCI Chairman Bert C. Roberts. The first letter states MCI WorldCom's intention to be "the leading local service competitor for both residential and business customers of all sizes across the country."[532] The second letter cites Mr. Ebbers' testimony before the House Judiciary Committee where he stated that WorldCom and MCI "are absolutely committed to consumers and residential customers, both on a facilities basis and any other way [the companies] can do it." Messrs. Ebbers and Roberts further assert that there "is absolutely no intention by the companies to lessen their efforts in this regard or to divest any of their retail local services following the merger."[533] In fact, Messrs. Ebbers and Roberts contend they intend "to use every viable means at [their] disposal to participate in the local residential market" and to offer consumers a "total package of services."[534] Significantly, Applicants also contend that MCI WorldCom will use the fiber that it has deployed in city centers to provide residential service to multiple dwelling units (MDUs).[535] This will be done on a "targeted basis", much as other telecommunications service providers, including wireless cable operators, and cable companies providing telephone currently deploy their services to MDUs.[536]

192. These letters from Messrs. Ebbers and Roberts represent a commitment from WorldCom and MCI not to abandon the residential long distance market, to augment their efforts in the residential local market, and to offer residential customers a total package of services including local, long distance, wireless, international, and Internet. We expect parties to

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[530] *Id.* at 4, 19-20. The Applicants also note that, in a market where the ability to sell a total package of services will be a key to success, it "makes no sense to conclude that the merged company will abandon local service as one key element of that package, while expecting to expand its sale of the other elements." WorldCom/MCI Mar. 20 Reply Comments at 13.

[531] WorldCom/MCI Jan. 26 Reply Comments at 47.

[532] WorldCom/MCI Mar. 20 Reply Comments, Attach. A at 1.

[533] Letter from Bernard J. Ebbers, Chairman, President, and CEO, WorldCom, and Bert C. Roberts, Jr., Chairman, MCI, to Magalie Roman Salas, Secretary, FCC at 1 (filed Aug. 14, 1998) (WorldCom/MCI Aug. 14 *Ex Parte*).

[534] *Id.* at 1-3.

[535] MCI Aug. 19 *Ex Parte* at 2.

[536] *Id.*

be forthright in their communications with the Commission, and to take seriously commitments they make in proceedings before us. Accordingly, we will be monitoring MCI WorldCom's progress as it brings its considerable assets and capabilities to bear in bringing new choices to residential customers.[537] Beyond this commitment, we find that MCI WorldCom's incentive to provide local service or long distance to mass market customers will not change with the merger, and that essential assets and capabilities for serving that market will not necessarily be shed or depleted as a consequence of the merger. To put it simply, we believe that if there was a good business case for WorldCom and MCI to serve mass market customers prior to the merger, then the combined entity would ensure that sufficient assets were in place and sufficient capabilities retained to serve this market going forward. There is no reason to predict that, as a result of this merger, the conditions confronting MCI or the merged MCI WorldCom in local exchange markets will be changed or that the merged entity will have any lesser incentive to pursue rational, profitable strategic opportunities. We agree with the Applicants that "[n]one of the commenters has shown that there is *any* reason why residential service that made economic sense for either of the companies to pursue separately should become uneconomic simply because the companies are combined."[538] Indeed, as we find below, the merged entity is likely to enter or expand local markets more quickly than either could alone.[539]

193. We do not find persuasive BellSouth's claim that the combined MCI WorldCom would jettison residential long distance customers to fund the premium price that WorldCom has offered for MCI. The fact that both WorldCom and MCI are currently serving these customers, suggests that they are profitable. MCI WorldCom's best strategy for funding the "premium," therefore, would be to keep their residential customers, not to drop them. Nor are we persuaded by CWA's assertion that, in order to achieve the Applicants' purported cost savings, the combined entity will be forced to forgo residential market competition. Even assuming that CWA's extensive financial analysis is correct and the merged entity will be a financially weaker company than each company separately was before the merger, it does not necessarily follow that the merged entity will abandon the residential market. We therefore reject CWA's claim as speculative. Applicants maintain instead that these savings will occur because MCI will have use of WorldCom's existing local facilities and will avoid duplicative capital and operating expenditures. As a result, according to WorldCom and MCI, planned expansion into residential

[537] The Commission has regularly been gathering, and will continue to gather, a wide range of information about the status of competition in telecommunications markets, including residential markets. *See, e.g., 1998 Long Distance Market Shares Report*; *1998 Trends in Telephone Service Report*. Moreover, in this period of dynamic change and increasing competition, we will be increasing our efforts and buttressing our capability to understand fully the state of competition in these markets. These activities will allow the Commission to follow closely the progress being made by the Applicants, as well as by other firms, in telecommunications markets.

[538] WorldCom/MCI Jan. 26 Reply Comments at 22, 46, & Hall Decl. at 28.

[539] *See infra* section V.

markets will not be diminished, but rather can proceed more efficiently.[540] Finally, Applicants have clearly stated their intentions to maintain and expand their residential local and long distance service offerings. Although these statements of intent are inherently subjective and predictive, they are presumably made in accordance with the Commission's requirements of candor and truthfulness.[541] For this reason, we award them substantial weight given the absence of persuasive evidence to the contrary.

V. POTENTIAL PUBLIC INTEREST BENEFITS

A. Background

194. In addition to examining the potential competitive harms of a proposed merger, an integral part of our public interest analysis is considering whether the merger is likely to have pro-competitive benefits.[542] Applicants claim that the primary benefit of this merger is that it "will create a strong, aggressive nationwide competitor that is better positioned than either of the two companies would be separately to challenge successfully the monopoly control presently exercised by the incumbent companies."[543] Thus, Applicants claim, the merger carries the promise that local exchange markets will become more competitive.[544] Indeed, they contend that the resulting company will have the resources and assets to lead the way in reducing local entry barriers, which will enable other competitors to enter the local market more readily -- much as MCI was a pathbreaker in the long distance market.[545] Applicants argue that the increased

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540 WorldCom/MCI Jan. 26 Reply Comments at 11, 20-21.

541 *See* 47 C.F.R. § 1.17.

542 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157.

543 WorldCom/MCI Jan. 26 Reply Comments at 6-7.

544 *Id*. at 6. *See* Letter from Jean L. Kiddoo, Counsel to WorldCom, Swidler & Berlin, to Magalie Roman Salas, Secretary, FCC, Attach. "Presentation on Local Services" at 2, 3, 10, 11 (filed July 1, 1998) (WorldCom July 1 *Ex Parte*) (asserting that merged MCI WorldCom is the best opportunity for local competition because its national scale and scope, proven commitment to facilities-based local service, experience and commitment to competition will result in a stronger competitor in local markets).

545 WorldCom/MCI Mar. 20 Reply Comments at 101 (asserting that, as the history of competition in the long distance market demonstrates, the successful entry into the local market by MCI WorldCom will lower entry barriers for other competitors, which will serve to benefit all customers). *See* WorldCom/MCI Jan. 26 Reply Comments, Carlton and Sider Decl. at 8-11 (arguing that successful local entry is likely to generate information that subsequent entrants can use, such as information needed for deploying new technology and establishing interconnection agreements, and lower consumer prices) (quoting *Lehman Brothers Inc.'s 1998: The Year of Accelerating Telecom Consolidation* that the MCI-WorldCom deal has clearly upped the ante and time frame for all competitors).

competitive strength of the combined entity will result from the combination of their complementary strengths,[546] the anticipated synergies and cost savings resulting from the merger,[547] and the increased ability of the merged entity to provide bundled services and innovative product combinations to consumers.[548] Further, Applicants assert that, as a result of the merger, the merged entity will be able to offer multi-location customers seamless door-to-door or end-to-end connectivity over their own fiber transport and intelligent network facilities.[549] As a result of the merger's impact on the local exchange market, the Applicants maintain, the merger's potential for enhancing consumer benefit is "enormous."[550]

195. WorldCom and MCI also claim significant cost savings as a result of the merger.[551] They contend that there will be more than $24 billion in synergies and savings over four years, in both capital expenditures and operational costs (which include reduced domestic network costs, avoided costs in MCI's local activities, lower core sales, general and administrative expenses, and reduced cost of terminating international traffic).[552] Applicants

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546 WorldCom/MCI Mar. 20 Reply Comments at v (stating that this merger will create a more forceful local competitor by combining MCI's broad-based marketing experience and expansive residential and large business base with WorldCom's diverse business base and strong local networks); WorldCom July 1 *Ex Parte* at 3, 10.

547 WorldCom/MCI Mar. 20 Reply Comments at 100-01; WorldCom/MCI Jan. 26 Reply Comments at 12.

548 Worldcom/MCI Jan. 26 Reply Comments at 3, 19 (stating that "WorldCom and MCI have invested billions of dollars precisely so that they can capture customers from the incumbents through competitively priced packages of innovative services").

549 Letter from Larry Blosser, Senior Counsel, MCI, to Magalie Roman Salas, Secretary, FCC at 1 (filed July 15, 1998) (MCI July 15 *Ex Parte*). Multi-location customers are those with locations in cities where either of the two companies has local facilities in place.

550 WorldCom/MCI Mar. 20 Reply Comments at vi, 101.

551 WorldCom/MCI Jan. 26 Reply Comments at 11-12. *See, e.g*, Letter from Jean Kiddoo, Counsel for WorldCom, Swidler & Berlin, to Magalie Roman Salas, Secretary FCC, Att. 2 at 16 (filed July 13, 1998) (WorldCom July 13 *Ex Parte*)

552 WorldCom/MCI Jan. 26 Reply Comments, App. G at 42-43 (WorldCom Amendment No. 3 to SEC Form S-4). Although Applicants' purported public interest benefits pertain primarily to the local market, Applicants also contend that the merger will benefit domestic long distance and international service customers as well. *See id.* at 26; WorldCom/MCI Mar. 20 Reply Comments at 101-02 (contending that "the merged company will benefit its long distance customers by producing significant access charge savings that will result in lower long distance prices.... Lower costs, including lower costs of capital, mean lower prices, and increased ability to make the investments needed for further innovation and continued growth"). *See also* WorldCom/MCI Mar. 20 Reply Comments at vii, 104 (maintaining that the merger will result in significant savings in the international market, including a decrease in above-cost termination rates that WorldCom and MCI must presently pay to foreign carriers and pass on to their U.S. customers).

claim that these savings will enhance the merged entity's ability to raise capital and will give it greater financial strength.[553] WorldCom and MCI assert that because many of these savings will reduce the cost of providing local service, they will accelerate local market entry and make it more economically feasible for the merged entity to offer local service to customers who might not be able to provide the revenue needed to support a higher cost structure. Applicants also maintain that these cost savings should allow the merged entity to build and operate additional local network facilities more quickly and expansively than the two companies could do separately.[554]

196. Several commenters dispute these claims. CWA, GTE, and others argue that WorldCom and MCI have failed to substantiate their claim that the merged entity will be a stronger competitor.[555] CWA asserts that the merged company will be a bigger, but financially weaker, company and that, as a result of the merger, it will be a less powerful competitor in the local exchange market with fewer resources available to break into the stronghold of the incumbents.[556] Commenters also contend that many of the purported cost savings result not from efficiencies, but from a reduction in investment in local facilities.[557] GTE alleges that the Applicants' cost savings are exaggerated because the Applicants' estimate of savings from self-provisioning access and transport does not account for offsetting opportunity costs, and that their

[553] WorldCom/MCI Mar. 20 Reply Comments at 18.

[554] *Id*. at 100-01; WorldCom/MCI Jan. 26 Reply Comments at 12.

[555] *See* CWA July 2 *Ex Parte* at 1; GTE Jan. 5 Petition at 44 (arguing that the proposed merger simply combines two existing competitors or potential entrants into a single entity, with no evidence that there will be any measurable increase from competition or substantial benefits to end users); GTE Mar. 13 Comments at 85, 89 (stating that the combined entity may be a strengthened competitor, or may simply benefit from less competitive pressure by virtue of eliminating a significant competitor); Bell Atlantic Jan. 5 Petition at 16 (disputing Applicants' claims that the merger will create a strong local competitor to incumbent LECs and stating that even Bell Atlantic cannot predict whether the merger will increase, decrease, or have no effect on the rate of competition in the local marketplace); BellSouth Mar. 13 Comments at 3-4 (arguing that the benefits of the merger are not quantified and thus do not meet the Commission's requirements); Rainbow/PUSH May 21 Renewed Motion at 3-5.

[556] CWA July 2 *Ex Parte* at 1, 5, 11.

[557] CWA Jan. 5 Comments at 21-23; CWA Jan. 26 Reply Comments at 12; CWA Mar. 20 Reply Comments at 6; CWA Aug. 5 *Ex Parte* at 3. As discussed *supra*, in section IV.E, CWA contends that in order to achieve the Applicants' claimed cost savings, the merged entity will be forced to retreat from local service. *See also* GTE Feb. 5 Comments at 12-13; GTE June 11 Renewed Motion at v (claiming that any savings will flow largely from diminished competition).

estimate of savings from more efficient trunking arrangements ignores the fact that the vast majority of access charges cannot be minimized though more efficient trunking.[558]

B. Discussion

197. In this Order, we have found that WorldCom's acquisition of MCI is not likely to result in anticompetitive effects in any relevant market. As the Commission noted in the *Bell Atlantic/NYNEX Order*, "[a]s the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest, convenience, and necessity."[559] This sliding scale approach suggests that, where, as here, potential harms are unlikely, Applicants' demonstration of potential benefits need not be as certain.

198. Although we do not believe that Applicants have provided sufficient evidence to support all of their claims, we conclude that Applicants have made a sufficient showing here of potential benefits to find that, on balance, the merger is in the public interest, convenience, and necessity. Because, as described below, we find that the merger will result in a stronger competitor, we need not resolve whether the Applicants have fully substantiated all of their alleged cost savings in order to find that this merger is, on balance, in the public interest.

199. More specifically, we conclude that WorldCom and MCI have made a sufficient showing that, as a result of combining certain of the firms' complementary assets, the merged entity will be able to expand its operations and enter into new local markets more quickly than either party alone could absent the merger.[560] For example, the Applicants claim that MCI Metro and Brooks Fiber will accelerate local city network deployment in secondary markets by 1-2 years.[561] The complementary assets of the merged entity include MCI's national brand name,[562] marketing expertise and broad residential base, and WorldCom's extensive local exchange

558 GTE Mar. 13 Comments at 95; GTE June 11 Renewed Motion at 69-70. *See* Rainbow/PUSH June 11 Renewed Motion at 6-7 (stating that Applicants overstate the positives and eliminate the negatives by ignoring the inevitable costs associated with integrating the systems and networks of two companies.)

559 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157.

560 *See AT&T/TCG Order* at para. 48.

561 WorldCom, Nov. 9, 1997 SEC Form 8-K, Exhibit 99.3, Slide 17 (WorldCom Nov. 9, 1997 8-K)

562 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd 20024-25, para. 70 (stating that AT&T, MCI, and Sprint distinguish themselves . . . by their strong brand reputation in the provision of telephone service to the mass market) & para. 82 n. 179 (citing customer preference survey information).

facilities,[563] small and medium business customer base and foreign networks. [564] We also find persuasive Applicants' assertions that the merger will allow them to service multi-location customers over their own networks, and that this will enable such customers to receive higher quality and more reliable services than each company is currently able to offer separately.

VI. OTHER ISSUES

A. Other Public Interest Concerns

1. Background

200. Several commenters in this proceeding allege that grant of the instant transfer of control application is inconsistent with the public interest and request that the Commission designate the proposed merger, or specific issues raised by the merger, for a trial-type evidentiary hearing before an administrative law judge to determine whether approval of the transfer of control request resulting from the proposed merger would serve the public interest.[565]

201. The Communications Act provides that the Commission may grant a transfer of control application only when we determine that doing so would serve the "public interest, convenience, and necessity."[566] If the Commission concludes, on the basis of the record before it, that there are no substantial and material questions of fact and that a grant of the application

[563] WorldCom July 8 *Ex Parte*, Grillo Decl. at 3 (stating that WorldCom's competing LEC network has the largest reach of any competing LEC). WorldCom currently operates local networks in 71 metropolitan statistical areas (MSAs) nationwide. As of December 1997, the next five largest competing LECs operating local networks were TCG (54 MSAs), Intermedia (44 MSAs), MCImetro (43 MSAs), e.spire (32 MSAs) and ICG (31 MSAs). *Id.*, Beaumont Decl. at 3 (citing the 1998 Annual Report on Local Telecommunications Competition by the New Paradigm Resources Group).

[564] *See, e.g.,* WorldCom/MCI Mar. 20 Reply Comments at 103.

[565] *See* Inner City Press Jan. 5 Petition at 6, 11-12, 17; Rainbow/PUSH Jan. 5 Petition at 5, 12; Simply Internet Jan. 5 Petition at 3, 12; TMB Jan. 5 Petition at 7; The Greenlining Institute Mar. 13 Petition at 7; GTE Mar. 13 Comments at 101.

[566] 47 U.S.C. § 309(a). Section 310(d) of the Communications Act requires the Commission to dispose of applications for transfer of control "as if the proposed transferee or assignee were making application under section 308 for the permit or license in question." *Id.* § 310(d). Section 309(a) directs the Commission to make its finding whether the public interest, convenience, and necessity will be served "in the case of each application . . . to which section 308 applies." *Id.* § 309(a).

would be consistent with the public interest, we must grant the transfer of control application and deny any petitions to deny and requests for evidentiary hearing.[567]

202. In the alternative, the Communications Act requires the Commission to hold an evidentiary hearing on transfer of control in certain circumstances to aid in furthering its mandate to promote the public interest.[568] Parties challenging an application to transfer control by means of a petition to deny and seeking a hearing on the matter must satisfy a two-step test established in section 309(d).[569] As explained by the D.C. Circuit in *Gencom*

567 *Id.* § 309(d)(2).

568 *Id.* § 309(e).

569 *Id.* § 309(d).

Inc. v. FCC,[570] a protesting party seeking to compel the Commission to hold an evidentiary hearing must: (1) submit a petition to deny containing "specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with [the public interest];"[571] and (2) present to the Commission a "substantial and material question of fact."[572] Should the Commission conclude that the protesting party has met both prongs of the test, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, the Commission must conduct a hearing in accordance with section 309(e).[573]

203. To satisfy the threshold inquiry, the allegations set forth by the petitioning party must be supported by an affidavit and "be specific evidentiary facts, not 'ultimate conclusionary facts or more general allegations . . . '"[574] The Commission must perform section 309(d)'s threshold inquiry in a manner similar to that performed by a trial judge considering a motion for summary judgment: "if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established."[575]

204. If the Commission determines that a petitioner has satisfied the threshold standard of alleging a *prima facie* inconsistency with the public interest, it must then proceed to the second phase of the inquiry and determine whether, "on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice," petitioners have presented a "substantial and material question of fact."[576] If the Commission concludes that a "totality of the evidence arouses a sufficient doubt on the [question whether grant of the

[570] *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (*Gencom Inc.)*; *see Astroline Communications Company Ltd. v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988) (*Astroline*).

[571] 47 U.S.C. § 309(d)(1).

[572] *Id.* § 309(d)(2).

[573] *Astroline*, 857 F.2d at 1561.

[574] *United States v. FCC*, 652 F.2d at 89 (quoting *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323-324 (D.C. Cir. 1974)).

[575] *Gencom*, 832 F.2d at 181.

[576] 47 U.S.C. § 309(d)(2); *see Gencom Inc.*, 832 F.2d at 181. The evidence the Commission may consider under the second phase of this inquiry is much broader than under the first phase. The Commission may consider the entire record, including facts offered in rebuttal of petitioners' evidence, permitted *ex parte* communications with the parties and the DOJ, and any matters which the Commission may officially notice. *Astroline*, 857 F.2d at 1561.

application would serve the public interest], . . ." section 309(e) requires the Commission to hold an evidentiary hearing.[577]

2. Discussion

205. Initially, we note that a number of issues raised in the record do not reflect disputes over material facts, but rather, focus on issues concerning the competitive impact of the merger and the public interest.[578] These types of issues "'manifestly do not' require a live hearing."[579] The voluminous record before us in this proceeding, including the numerous *ex parte* filings we have received and the confidential materials we have inspected, has provided us with sufficient evidence to determine, without conducting an evidentiary hearing, that the Applicants' request serves the public interest, convenience, and necessity.[580] As the D.C. Circuit noted in *United States v. FCC*, the determination as to the adequacy of the record is, in the first instance, a decision that must by made by the Commission in light of its public interest responsibility.[581]

206. We conclude that, even where parties attempt to raise allegations of fact, no party has satisfied the two-step test set out in section 309(d). We, therefore, reject the argument that a full evidentiary hearing is necessary in order for the Commission to resolve the various claims

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[577] *Serafyn v. FCC*, No. 95-1385, slip op. at 4 (D.C. Cir. Aug. 11, 1998) (quoting *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985). A court may disturb the Commission's decision to deny an evidentiary hearing only if, upon examination of the Commission's statement of reasons for denial, the court determines the Commission's decision to be arbitrary and capricious. *Astroline*, 857 F.2d at 1562.

[578] Only three of the parties requesting an evidentiary hearing pursuant to section 309, Rainbow/PUSH, Simply Internet, and TMB, attach supporting affidavits to their petitions. Section 309(d)(1) requires that a petition to deny "shall contain specific allegations of fact . . . supported by affidavit." 47 U.S.C. § 309(d)(1).

[579] *SBC Communications, Inc. v. FCC*, 56 F.3d at 1496-97 (quoting *United States v. FCC*, 652 F.2d at 89-90) (affirming the Commission's decision in the *AT&T/McCaw Order* not to hold a full evidentiary hearing before approving the merger). *See AT&T/McCaw Order*, 9 FCC Rcd. at 5927-28.

[580] 47 U.S.C. § 309(d)(2). *See United States v. FCC*, 652 F.2d at 90 (stating that section 309(e) requires an evidentiary hearing in the alternative where the Commission is unable to make a finding that the application is in the public interest without conducting a hearing). *See also SBC Communications, Inc. v. FCC*, 56 F.3d at 1496-97*(quoting United States v. FCC*, 652 F.2d at 96) (affirming the Commission's decision in the *AT&T/McCaw Order* not to hold a full evidentiary hearing before approving the merger based in part on the conclusion that "an 'evidentiary hearing would less promote reasoned decisionmaking . . . than it would delay and impede' the Commission's decision").

[581] *United States v. FCC*, 652 F.2d at 90-91 (affirming the Commission's decision not to hold an evidentiary hearing on antitrust issues arising out of an application by a joint venture for a domestic satellite communications license).

raised by the parties and conclude, as discussed herein, that a grant of the merger application is consistent with the public interest. We discuss these specific allegations of harm to the public interest below.

a. Allegations of Discriminatory Conduct

207. Rainbow/PUSH, the Greenlining Institute, and Inner City Press argue that the Commission should deny the application or designate the proposed merger for an evidentiary hearing on the grounds that the application raises substantial and material questions of fact regarding major public interest issues such as redlining minority residential customers,[582] failing to offer innovative services and "one-stop-shopping" to low-income customers,[583] and other forms of discrimination.[584] Redlining, as the term is used by Rainbow/PUSH, refers to the deployment of the local network so as to bypass low-income and minority populations, thereby excluding customer classes based on racial or economic criteria.[585] In addition to raising allegations of redlining, commenters seek assurances from the combined entity that it will: (1) not target minorities disproportionately in its decisions to downsize its employees or out-source functions;[586] (2) adopt an "aggressive" affirmative action plan for women and minorities;[587] (3) work to foster minority entrepreneurship and deal fairly with minority entrepreneurs;[588] and (4)

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[582] Rainbow/PUSH Jan. 5 Petition at 4, 14; The Greenlining Institute Mar. 13 Petition at 2-3; and Inner City Press Jan. 5 Petition at 6-7.

[583] The Greenlining Institute Mar. 13 Petition at 4; Inner City Press Jan. 5 Petition at 3.

[584] The Greenlining Institute Mar. 13 Petition at 5; Rainbow/PUSH Jan. 5 Petition at 29, 31-32.

[585] *See* Rainbow/PUSH Jan. 5 Petition; Rainbow/PUSH Mar. 13 Comments at 7; Rainbow/PUSH and The Greenlining Institute "*Ex Parte Presentation*" at 7 (filed June 3, 1998) (Rainbow/PUSH and The Greenlining Institute June 3 *Ex Parte*). Rainbow/PUSH and the Greenlining Institute submit maps of Atlanta, New York, Los Angeles, San Francisco, and Chicago, and allege that WorldCom and MCI have engaged in redlining in the deployment of their fiber networks in these metropolitan areas. Rainbow/PUSH Mar. 13 Comments at 6, Exh. 1; Rainbow/PUSH and The Greenlining Institute June 3 *Ex Parte* at 7-9, Exh. 1-5. According to Rainbow/PUSH, this information casts doubt on the Applicants' public interest claims and raises the specter of discriminatory conduct after the proposed merger. Rainbow/PUSH Mar. 13 Comments at 2.

[586] CWA estimates that the total merger-related job loss in the telecommunications industry due to reduced network investment and operating costs resulting from the proposed merger is 75,000 jobs by the year 2002. CWA Jan. 5 Comments at 31-33. *See* Rainbow/PUSH Jan. 5 Petition at 26-27.

[587] Rainbow/PUSH Jan. 5 Petition at 35.

[588] Rainbow/PUSH argues that TMB's allegations against MCI, as discussed *infra* at para. 214, are a basis for predicting how the combined entity would deal with minority entrepreneurs. *Id.* at 30.

diversify its board of directors and principal executive officers.[589] Applicants dispute Rainbow/PUSH's allegations regarding redlining in various metropolitan areas,[590] and assert that they are committed to equal employment opportunities and serving consumers of all socio-economic levels.[591] Moreover, WorldCom and MCI note that the board of directors of the combined entity will reflect the diversity of the population.[592]

208. Rainbow/PUSH argues that concerns such as redlining, employment diversity, and minority representation are a necessary component of the Commission's public interest analysis in common carrier mergers. Rainbow/PUSH acknowledges, however, that traditionally the Commission has confronted such issues in the context of Title III radio broadcast licenses or other broadcast proceedings.[593] Although this is not the first time that commenters have requested that the Commission examine allegations of discrimination and minority contracting in the context of a common carrier merger,[594] these are relatively novel issues in this context. Indeed, Rainbow/PUSH notes that it is presenting us with a question of first impression.[595] We determine that Rainbow/PUSH has alleged sufficient facts for the Commission to consider, as a factor in its public interest determination, whether the proposed merger would aggravate a situation where either of the merging parties deployed telecommunications facilities in a discriminatory manner.[596] We conclude that such actions would be contrary to the purpose of the Communications Act,[597] the obligations imposed on common carriers in the Communications

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589 *Id.* at 28-32.

590 WorldCom/MCI Mar. 20 Reply Comments at 92-93.

591 *Id*. at 93; WorldCom/MCI Jan. 26 Reply Comments at 93.

592 WorldCom/MCI Mar. 20 Reply Comments at 95-96. On March 11, 1998, WorldCom and MCI announced that Clifford L. Alexander, Jr., of Alexander & Associates, Inc., and Dean Judith Areen of Georgetown University Law Center, have agreed to serve on the Board of Directors of the combined entity. *Id*. at 94-95.

593 *See, e.g., CV Radio Assoc.*, File No. BR-960603C4, Memorandum Opinion and Order and Notice of Apparent Liability, 12 FCC Rcd 14016 (1997). Rainbow/PUSH argues that the fact that a particular Title III license is not used for the purposes of radio broadcasting does not detract from the Commission's Title III authority to promote diversity. Rainbow/PUSH Jan. 5 Petition at 6 & n.5 (*citing Prime Cable,* 4 FCC Rcd 1696 (1989), *aff'd*, 5 FCC Rcd 4590 (1990)).

594 *See AT&T/TCG Order* at paras. 49-50; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20089, para. 226.

595 Rainbow/PUSH Jan. 5 Petition at 31 n.32.

596 *See* 47 U.S.C. § 309(d)(1).

597 *See id.* § 151 (Section 151 of the Communications Act charges the Commission with ensuring that communications services are made available, "so far as possible, to all the people of the United States, without

Act,[598] and the fundamental goal of the 1996 Act to bring communications services "to all Americans."[599]

209. Before we are required to designate an issue for evidentiary hearing to examine whether the merger is not in the public interest based on such grounds, we must find that the specific claims of those parties opposing the application raise substantial and material questions of fact.[600] In reaching this determination, the Commission may consider "the entire record, weighing the petitioner's evidence against facts offered in rebuttal."[601] We are not convinced that the record evidence raises substantial and material questions of fact regarding whether Applicants either have engaged in or will engage in discriminatory conduct by avoiding minority communities in their deployment of telecommunications facilities. Rainbow/PUSH and The Greenlining Institute provide maps allegedly showing that Applicants' fiber routes bypass African-American residences and businesses.[602] Although WorldCom and MCI note that the current networks have expanded considerably from those represented on the maps that Rainbow/PUSH submits,[603] the Applicants do not dispute that the maps reflect the networks as originally deployed. We are persuaded by Applicants' response that the WorldCom networks depicted on the maps were originally built by MFS as a competitive access provider (CAP) network designed to serve business customers with special access and private line needs. Similarly, because MCI historically did not consider fiber a viable mechanism for the delivery of telephone service to mass market customers, it deployed fiber based on considerations that relate

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discrimination on the basis of race, color, religion, national origin, or sex . . .").

[598] *See id.* § 201 ("It shall be the duty of every common carrier . . . to furnish such communication service upon reasonable request."); *Id.* § 202 ("It shall be unlawful for any common carrier to make unjust or unreasonable discrimination in charges, practices, classification, regulations, facilities, or services . . . , or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.").

[599] Joint Managers' Statement, S. Conf. Rep. No. 104-230 at 113. *See* 47 U.S.C. § 254(b)(3) (the 1996 Act envisions that "[c]onsumers in all regions of the Nation, including low income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services . . .").

[600] 47 U.S.C. § 309(d)(2).

[601] *Astroline*, 857 F.2d 1561. The ultimate burden of demonstrating, by a preponderance of the evidence, that the merger application is in the public interest lies, of course, with the Applicants. *See supra* para. 10.

[602] Rainbow/PUSH Mar. 13 Comments at 6, Exh. 1; Rainbow/PUSH and The Greenlining Institute June 3 *Ex Parte* at 7-9, Exh. 1-5.

[603] WorldCom July 8 *Ex Parte*, Beaumont Aff. at 1-2.

exclusively to business customers.[604] As such, both the WorldCom and MCI networks were located near business users with high volumes of telecommunications traffic rather than near residential customers, regardless of the nature of the residential neighborhood.[605]

210. We conclude that the maps provided by petitioners, when viewed in light of the explanations provided by the Applicants, do not indicate redlining or the intent to engage in redlining by the combined entity, as defined by Rainbow/PUSH. Rather, we find that the existence of WorldCom fiber in certain areas appears to reflect business decisions made by MFS based on the economic and regulatory environment at the time the fiber was originally deployed. Similarly, we find the deployment of MCI's fiber in certain areas reflects MCI's historical business strategy, which deployed fiber based on the locations of its existing base of business customers and did not view fiber as a primary means of reaching residential customers. Moreover, we agree with the Applicants that the current placement of fiber networks in and around city centers means that, as the combined entity builds out its local networks, low-income and minority communities located in and around these city centers are well-positioned to receive the benefits of local competition.[606]

211. We reject arguments that, even in those areas where the Applicants have deployed fiber in low-income and minority communities, they have failed to serve such customer groups altogether.[607] We further find no evidence to support allegations that the combined entity will discriminate against low-income residential customers in its offering of telecommunications services in the future. To the extent petitioners assert that the Applicants have avoided serving certain customers even in those areas where fiber has been deployed, we note that petitioners do not provide any specific instances where the Applicants have discriminated in their provision of telecommunications services due to race. In addition, petitioners' allegations regarding the merged entity's intent to provide affluent customers "one stop shopping" or innovative services, to the exclusion of low-income or minority customers, are conclusory and unsupported. The Applicants have asserted that it is not, nor will it be, their policy or practice to discriminate on the basis of race in the sales, marketing, or provisioning of telecommunications services.[608] Moreover, we agree with the Applicants that there is every economic incentive for the merged

[604] MCI Aug. 19 *Ex Parte* at 1-2.

[605] WorldCom/MCI Mar. 20 Reply Comments at 93; WorldCom July 8 *Ex Parte*, Beaumont Aff. at 1; MCI Aug. 19 *Ex Parte* at 1-2.

[606] WorldCom/MCI Mar. 20 Reply Comments at 93 & n.125; WorldCom July 8 *Ex Parte*, Beaumont Aff. at 1-2.

[607] *See* Rainbow/PUSH and The Greenlining Institute June 3 *Ex Parte* at 7.

[608] MCI Aug. 19 *Ex Parte* at 2.

entity and its sales, marketing, provisioning, and other employees to execute their jobs in a racially neutral manner.[609] We are also encouraged by Applicants' stated intentions to use fiber to provide telecommunications services to MDUs,[610] and we presume that the Applicants' ability to provide such service will not only be advantageous for residential customers in urban areas and large cities,[611] but will enable Applicants to serve consumers of all socio-economic levels.[612]

212. Finally, we find that commenters have not made a *prima facie* showing that the Applicants will engage in discriminatory conduct in the selection of the board of directors of the combined entity.[613] In fact, the Applicants have submitted evidence showing that the board of directors of MCI WorldCom will include both women and minorities. We also find that commenters have not alleged or submitted specific evidence supporting allegations that WorldCom and MCI have engaged in, or intend to engage in, any discriminatory employment policies.[614] Thus, in the absence of credible evidence of discrimination, we decline to condition approval of the instant merger on Applicants' commitments regarding minority board representation or employment policies.[615]

b. Allegations of Reduction in Employment Growth

213. CWA estimates that, due to reduced network investment and operating costs resulting from the proposed merger, employment growth in the U.S. telecommunications industry will be reduced by a total of 75,000 jobs by the year 2002.[616] In addition, noting MCI's announcement that it plans to lay-off 4,500 employees and Applicants' predicted cost savings,

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609 *Id*.

610 *See* discussion of MDUs *supra* at section IV.E. *See also* WorldCom/MCI Aug. 14 *Ex Parte* at 2; MCI Aug. 19 *Ex Parte* at 2.

611 MCI Aug. 19 *Ex Parte* at 2.

612 WorldCom/MCI Jan. 26 Reply Comments at 92; WorldCom/MCI Mar. 20 Reply Comments at 93.

613 *See* Rainbow/PUSH Jan. 5 Petition at 31-35.

614 *See* 47 U.S.C. § 309(d)(1). *See supra* para. 207 for a description of Rainbow/PUSH's concerns regarding the combined entity's employment policies.

615 As noted above in note 588, Rainbow/PUSH seeks assurances from the Applicants regarding their commitment to foster minority contracting based on allegations raised by TMB. We address the evidence presented by TMB *infra* at para. 214.

616 CWA Jan. 5 Comments at 31-33. CWA bases its estimates on the combined entity's proposed cuts in capital expenditures and operating costs as reflected in WorldCom's Nov. 9, 1997 8-K.

CWA estimates that the combined entity will lay-off 10,000 employees in the four years immediately following the merger.[617] Applicants counter that employment growth must occur in order for the combined entity to increase its sales and market share.[618] We conclude that CWA's predictions, based on purported cost savings, are speculative and not substantially supported by the evidence. For example, we do not find credible CWA's assertion that the entirety of the purported savings in capital expenditures, operating costs, and sales, general, and administrative expenses announced by WorldCom and MCI are attributable to personnel cuts.[619] We would also note that there are indications that the changing environment in the telecommunications industry is not adversely affecting overall industry employment levels.[620] Considering the evidence as a whole, therefore, including Applicants' statements regarding their actual business plans, we are not persuaded that CWA has raised a substantial and material question of fact. Accordingly, we reject the argument that the merger should be denied because it will reduce employment at the combined entity and in the telecommunications industry as a whole.

c. Allegations of Misconduct

214. *TMB*. TMB, a minority-owned business and formerly an authorized agent of MCI for the resale of MCI services, contends that MCI treated it in an unfair and discriminatory

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[617] CWA Aug. 5 *Ex Parte* at 6. CWA arrives at 10,000 lay-offs using the following calculation: (1) dividing the savings in sales, general, and administrative (SG&A) expenses in year 2002 announced by MCI WorldCom ($1.3 billion) by a Merrill Lynch estimate of the combined entity's SG&A expenses in 2002 ($10.8 billion), resulting in an estimated 11.9 percent cut in SG&A expenses; then (2) multiplying the total number of WorldCom and MCI employees today (80,809) by the 11.9 percent cut for a total of 9,616 lay-offs. CWA rounded this number up to 10,000 employees. CWA Aug. 5 *Ex Parte* at 6 n.10. *See* CWA Mar. 20 Reply Comments at 30.

[618] WorldCom/MCI Mar. 20 Reply Comments at 96-97.

[619] WorldCom and MCI have stated that most of the SG&A savings resulting from the merger will come in the form of reduced growth in expenditures rather than lay-offs. In fact, MCI WorldCom expects to add up to 10,000 new positions. *See* CWA Aug. 5 *Ex Parte* (citing Transcript of WorldCom MCI Analyst Conference Call, Nov. 10, 1997, at 7).

[620] *See* Gautam Naik, *English Lesson: Telecom Deregulation in Britain Delivered A Nice Surprise: Jobs*, Wall St. J., Mar. 5, 1998, at A1 (citing analysts' predictions that the level of employment in the telecommunications sector will continue to grow in the U.K., the U.S., and Europe. According to DRI/McGraw-Hill, in the past five years, "overall telecom and cable employment in the U.S. has risen 9%."); *see also* Jon Mainwaring, *Jobs Line Up; Telecommunications Sector*, Electronics Weekly, Jan. 14, 1998, at 1 (noting that a study conducted for the EC by a French consultancy, BIPE Conseil, shows that while traditional EC telecommunications companies may lose jobs, by the year 2005, job creation in the EC telecommunications industry as a whole could lead to a net increase of 93,000 jobs); Patricia Horn, *Most Wanted: Telecom Skills -- Jobs Grow with Technology*, Ft. Lauderdale Sun-Sentinel, Dec. 21, 1997, at 16 (citing a survey conducted by Management Recruiters International of Ohio regarding employment trends in the second half of 1997. The survey indicates that 73 percent of U.S. telecommunications companies planned to add staff).

manner, applied economic coercion, and terminated TMB's contract for service unfairly and wrongfully.[621] TMB argues that the Commission must determine whether the merged company would continue to engage in these anticompetitive and predatory acts, thereby continuing to harm small businesses and the public.[622] Applicants respond that this dispute, or any related problems, would not be exacerbated by the proposed merger.[623] It appears that the matters raised by TMB involve a private contractual dispute between TMB and MCI. TMB does not present evidence of any adjudicated anticompetitive or predatory acts.[624] We conclude that such a private contractual dispute between carriers does not raise substantial and material questions of fact regarding Applicants' qualifications or the public interest benefits of the proposed merger, and that the public interest would not be served by our withholding action on the proposed merger.[625] Accordingly, we deny TMB's request for an evidentiary hearing pursuant to section 309(e).

215. *IPSPCC*. IPSPCC alleges that MCI is currently under contract with Bell Atlantic to serve as the sole presubscribed long distance carrier for Bell Atlantic payphones, and that MCI and Bell Atlantic are engaged in an illegal and anticompetitive scheme to keep payphone providers from choosing other long distance carriers.[626] MCI denies IPSPCC's allegations, and is contesting them in a lawsuit pending before the U.S. District Court for the District of Columbia

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[621] TMB alleges that MCI, through misrepresentation, fraud, and deceit, improperly diverted customer revenue that was owed to TMB and failed to provide TMB's customers with timely service levels, discounts, and program benefits that its customers were entitled to receive. It further alleges that MCI engaged in economic coercion and set up an obstacle of procedures, rules, and requirements for engaging in alternative dispute resolution that makes it near impossible for TMB to achieve due process. TMB Jan. 5 Petition at 2-6; TMB Mar. 13 Comments at 3-4.

[622] TMB Mar. 13 Comments at 6.

[623] WorldCom/MCI Jan. 26 Reply Comments at 96-97.

[624] *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1195-97, 1200-03 (1986), *aff'd on recon.*, 1 FCC Rcd 421 (1982), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564, 6566 (1992) (the Commission will consider only adjudicated non-FCC misconduct that involves violations of antitrust or other laws protecting competition). *MCI Telecommunications Corp.*, Order and Notice of Apparent Liability, 3 FCC Rcd 509, 515 n.14 (1988) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context).

[625] We are encouraged, however, that Applicants are committed to working with TMB to resolve the issues TMB raises. *See* WorldCom/MCI Jan. 26 Reply Comments at 96-97. We note, moreover, that TMB can seek recourse from the Commission under section 208 of the Act.

[626] IPSPCC Mar. 13 Comments at 3-5.

that IPSPCC has brought against Bell Atlantic.[627] We agree with Applicants that these unadjudicated matters are not a sufficient basis to conclude that the merger is not in the public interest, and we decline to condition approval of the transfer of control applications on resolution of this dispute.[628]

216. *Fiber Network Solutions*. On July 8, 1998, Fiber Network Solutions filed an *ex parte* with the Commission describing a series of billing disputes with WorldCom and requesting that the Commission stay any action on the instant merger for ninety days pending a "full review of the evidence" surrounding its allegations.[629] According to Fiber Network Solutions, WorldCom threatened to disconnect its connection to WorldCom's Internet backbone for nonpayment of certain bills. Fiber Network Solutions alleges, however, that the evidence of its payment was clear.[630] Fiber Network Solutions suggests that WorldCom made such threats in retaliation for Fiber Network Solutions' participation in this proceeding, in which it expressed concerns about WorldCom's peering policies.[631] Again, this matter involves an unresolved private contractual dispute. It is not a sufficient basis to deny the merger as contrary to the public interest, nor would the public interest be served by our withholding action on the proposed merger in order to conduct fact-finding on Fiber Network Solutions' allegations.

d. Universal Service

217. Commenters argue that the proposed merger fails to preserve and enhance universal service and therefore is not in the public interest. CWA and Alliance for Public Technology claim that, because the combined entity will be able to provide a bundled package of exchange access, long distance, and Internet access entirely on its own network, the merger will harm the goals of universal service by shifting business customers from the public switched network to MCI WorldCom's competing LEC network, thereby diverting revenues away from incumbent LECs that continue to have carrier-of-last-resort obligations and increasing pressure

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[627] WorldCom/MCI Mar. 20 Reply Comments at 89. *See Independent Payphone Service Providers for Consumer Choice v. Bell Atlantic Corp.,* Case No. 98CV-0127 (D.D.C.).

[628] We note that IPSPCC can seek recourse from the Commission under section 208 of the Act.

[629] Letter from David J. Koch, President, Fiber Network Solutions, to Michelle M. Carey, Attorney, FCC (filed July 8, 1998) (Fiber Network Solutions July 8 *Ex Parte*).

[630] *Id.* at 1.

[631] *Id.* at 2.

on the incumbent LEC to raise residential rates and reduce network investment.[632] In addition, CWA asserts that the goals of universal service are threatened by accelerating access charge bypass, thereby prematurely reducing available funds that historically have included a component which subsidizes the high costs incurred by incumbent LECs to provide a ubiquitous local network.[633]

218. Commenters' contentions do not present a public interest basis for denying the proposed merger. As a competing LEC providing both interstate and intrastate telecommunications services, the combined entity will be required to make universal service contributions based on the same contribution percentages as are applied to incumbent LECs.[634] In addition, any inequity to the incumbent LEC with state imposed carrier-of-last-resort obligations resulting from the proposed merger is minimized by the fact that, pursuant to section 214(e)(1) of the Communications Act, only common carriers that offer and advertise the availability of the core universal services throughout a state designated service area may be designated as eligible to receive federal universal service support.[635] Thus, incumbent LECs serving high cost areas, which may be the most difficult to serve without support, may apply for federal universal service support funded, in part, by private network operators.

219. Regarding CWA's second contention, that the combined entity's access charge savings will undermine universal service, we agree with Applicants that the 1996 Act, the *Universal Service Order*, and the *Access Charge Reform Order* contemplate that incumbent LECs will lose customers, and the access revenue generated by those customers, to competing LECs.[636] Under the 1996 Act, however, universal service will be maintained through explicit

[632] Alliance for Public Technology Jan. 26 Reply Comments at 4; CWA Jan. 5 Comments at 26-31; CWA Jan. 26 Reply Comments at 15-16; CWA Aug. 5 *Ex Parte* at 5-6.

[633] CWA Jan. 5 Comments at 26-31; CWA Jan. 26 Reply Comments at 15-16; CWA Aug. 5 *Ex Parte* at 5-6.

[634] Even assuming, as CWA contends, that MCI WorldCom would be operating a "private network," the combined entity will be required to make universal service contributions. Pursuant to section 254(d) of the Communications Act, the Commission has held that "private service providers that offer their services to others for a fee" are subject to the same universal service contribution obligations as common carrier providers of telecommunications services. *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9183-84, para. 795 (1997) (subsequent history omitted) (*Universal Service Order*).

[635] 47 U.S.C. § 214(e)(1).

[636] *See Universal Service Order,* 12 FCC Rcd at 8847-60, paras 127-149; Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997), *aff'd sub nom.Southwestern Bell Telephone Co.v FCC,* Nos. 97-2618 *et al*. (Aug. 19, 1998) (other subsequent history omitted) (*Access Charge Reform Order*).

subsidies to eligible telecommunications carriers.[637] Based on our foregoing conclusions, it is not necessary for the Commission to require the combined entity to dedicate a portion of the efficiency savings resulting from the proposed merger to supplement discounts provided to schools, libraries, and rural health care providers as part of the universal service program, as CWA suggests.[638] Moreover, we decline to condition the merger, as suggested by the Alliance for Public Technology, on the combined entity's investment in telecommunications infrastructure for underserved communities.[639]

B. Procedural Motions

220. *Motions to Dismiss*. GTE and Rainbow/PUSH filed motions urging the Commission summarily to dismiss the applications, because Applicants have failed to provide sufficient information showing that the proposed transaction is in the public interest and will not eliminate potentially significant sources of competition.[640] As our extensive analysis indicates, we find that the Applicants have presented sufficient evidence for the Commission to find that the instant merger is in the public interest. We, therefore, reject their motions to dismiss.

221. *Motions to Establish a Procedural Schedule*. To the extent that GTE, in its motion filed July 28, 1998, seeks, in addition to expedited consideration of its original motion to establish a procedural schedule, production of MCI and C&W's divestiture agreement, we have, as explained above, requested that agreement and it has been placed in the record. We deny, however, GTE's motion to establish a procedural schedule to permit comment on the divestiture agreement.[641] We believe further pleading cycles are unnecessary, particularly in light of the permit-but-disclose *ex parte* posture of this proceeding.

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637 *See* 47 U.S.C. §§ 254(b)(5) & (e); WorldCom/MCI Jan. 26 Reply Comments at 24-25.

638 CWA Aug. 5 *Ex Parte* at 5.

639 Alliance for Public Technology Jan. 26 Reply Comments at 7. We note that the Commission has recently initiated proceedings to address issues regarding the deployment of advanced services. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Notice of Inquiry, FCC 98-187 (rel. Aug. 7, 1998); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 98-188 (rel. Aug. 7, 1998).

640 *See* GTE Motion to Dismiss; GTE June 11 Renewed Motion (asserting that the Applicants have failed to demonstrate that the adverse competitive effects of the merger are outweighed by the tangible public interest benefits); Rainbow/PUSH May 21 Renewed Motion (contending that Applicants have failed to satisfy their burden of proof).

641 *See* GTE's Motion for Establishment of Procedural Schedule (filed June 17, 1998); GTE July 22 Motion.

222. *Petition for Reconsideration*. We deny Telstra's petition for reconsideration of the Common Carrier Bureau's (Bureau) order[642] that established an additional pleading cycle to permit parties to comment on WorldCom and MCI's reply comments.[643] Telstra asserts that another pleading cycle, beyond the one established by the Bureau's order, is necessary to allow interested parties to comment after they have inspected "all relevant documents including the HSR documents which the [Commission] obtains in due course from the DOJ."[644] Again, we find that, given the permit-but-disclose posture of this proceeding, parties have sufficient opportunity to express their views on any material that has been submitted into the record by the Applicants.

223. *Motion and Request for Immediate Review of Non-Public Materials.* We dismiss as moot Simply Internet's motion and Inner City Press' request for immediate review of all non-public materials that the Commission has in its possession.[645] All non-public information received by the Commission has been placed in the record in this proceeding and is available for inspection by interested parties under the terms and conditions of the protective order adopted in this proceeding.[646]

VII. CONCLUSION

224. For all the foregoing reasons, we conclude that Applicants have carried their burden of showing that the proposed merger will serve the public interest, convenience, and necessity, if, and only if, MCI first sells it Internet business to C&W prior to the close of its merger with WorldCom. Accordingly, we hereby grant their merger application, subject to the divestiture of MCI's Internet assets. Further, we condition the transfer to WorldCom of MCI's DBS license on whatever action the Commission may take pursuant to the pending application for review of the initial license grant to MCI.

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[642] *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Order, DA 98-384 (rel. Com. Car. Bur. Feb. 27, 1998).

[643] Telstra Mar. 13 Comments and Petition for Reconsideration.

[644] *Id*. at 2.

[645] *See* Simply Internet's Motion for Immediate Review of Non-Public Material (filed Feb. 10, 1998); Inner City Press' Comments/Reply Request for Review of "Non-Public" Materials (filed Mar. 20, 1998).

[646] *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Order Adopting Protective Order, DA 98-1072 (rel. Com. Car. Bur. June 5, 1998).

VIII. ORDERING CLAUSES

225. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the applications filed by WorldCom, Inc. (WorldCom) and MCI Communications Corp. (MCI) in the above-captioned proceeding ARE GRANTED subject to the conditions stated below.

226. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the above grant shall include authority for WorldCom to acquire control of

a) any authorization issued to WorldCom's subsidiaries and affiliates during the Commission's consideration of the transfer of control applications and the period required for consummation of the transaction following approval;

b) construction permits held by licensees involved in this transfer that mature into licenses after closing and that may have been omitted from the transfer of control applications; and

c) applications that will have been filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.[647]

227. IT IS FURTHER ORDERED that this grant IS CONDITIONED on MCI's divestiture of its Internet assets to Cable & Wireless prior to the close of its merger with WorldCom.

228. IT IS FURTHER ORDERED that the transfer to WorldCom of MCI's DBS license IS CONDITIONED on whatever action the Commission may take pursuant to the pending application for review of the initial license grant to MCI.

229. IT IS FURTHER ORDERED that all references to WorldCom and MCI in this Order shall also refer to their respective officers, directors and employees, as well as to any affiliated companies, and their officers, directors and employees.

230. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j),

[647] *AT&T/McCaw Order*, 9 FCC Rcd at 5909 n.300.

214(a), 214(c), 309, 310(d), that GTE's Motion to Dismiss, filed on January 5, 1998, GTE's Renewed Motion to Dismiss, filed on June 11, 1998, and Rainbow/PUSH Coalition's Renewed Motion to Dismiss, filed on May 21, 1998, ARE DENIED.

231. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that GTE's Motion for Establishment of a Procedural Schedule, filed on June 17, 1998, IS DENIED and GTE's Motion for Expedited Consideration of GTE's Motion for Establishment of a Procedural Schedule and Production of Related Materials, filed on July 22, 1998, IS DENIED IN PART AND GRANTED IN PART.

232. IT IS FURTHER ORDERED, pursuant to section 309(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(2), that the requests for evidentiary hearing filed by Inner City Press, Rainbow/PUSH, Simply Internet, and TMB on January 5, 1998, and the requests for evidentiary hearing filed by the Greenlining Institute and GTE on March 13, 1998, ARE DENIED.

233. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Petitions to Deny filed by Bell Atlantic, GTE, Inner City Press, Rainbow/PUSH Coalition, Simply Internet, TMB, and the United Church of Christ on January 5, 1998, the Petition for Conditional Approval filed by BellSouth on January 5, 1998, and the Petition to Deny filed by the Greenlining Institute on March 13, 1998, ARE DENIED.

234. IT IS FURTHER ORDERED that Telstra's Petition for Reconsideration of the Common Carrier Bureau's order establishing an additional pleading cycle filed on March 13, 1998, IS DENIED.

235. IT IS FURTHER ORDERED that Simply Internet's Motion for Immediate Review of Non-Public Material filed on February 10, 1998, and Inner City Press' Request for Review of Non-Public Materials filed on March 20, 1998, ARE DISMISSED as MOOT.

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

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

APPENDIX

Comments Filed in Response to Pleading Cycles
WorldCom and MCI Merger
CC Docket No. 97-211

Petitions to Deny/Comments on Nov. 21 Amended Application -- January 5, 1998

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
Bell Atlantic
BellSouth Corporation (BellSouth)
Communications Workers of America (CWA)
GTE Service Corporation (GTE)
Inner City Press/Community on the Move (Inner City Press)
Office of Communication of the United Church of Christ, Consumers Union and the National Association for Better Broadcasting (United Church of Christ)
Rainbow/PUSH Coalition (Rainbow/PUSH)
Simply Internet, Inc. (Simply Internet)
Telstra Corporation Limited (Telstra)
TMB Communications, Inc. (TMB)

Reply Comments on Nov. 21 Amended Application -- January 26, 1998

Alliance for Public Technology
Coalition of Utah Independent Internet Service Providers (CUIISP)
CWA
Consumer Project on Technology
GTE
Simply Internet
United States Internet Providers Association (subsequently withdrawn)
WorldCom and MCI

Comments on GTE's Motion to Dismiss -- January 27, 1998

CWA
Rainbow/PUSH
WorldCom and MCI

Reply Comments on GTE's Motion to Dismiss -- February 5, 1998

BellSouth
GTE
WorldCom and MCI

Petitions to Deny/Comments on WorldCom/MCI Joint Reply -- March 13, 1998

Bell Atlantic
BellSouth
The Greenlining Institute
GTE
Independent Payphone Service Providers for Consumer Choice (IPSPCC)
Rainbow/PUSH
Simply Internet
Sprint Corporation (Sprint)
Telstra
TMB

Reply Comments on WorldCom/MCI's Joint Reply -- March 20, 1998

CUIISP
CWA
Fiber Network Solutions, Inc. (Fiber Network Solutions)
David Holub
Inner City Press
Texas Internet Service Providers Association
WorldCom and MCI

Comments on MCI's June 3, 1998 Ex Parte -- June 11, 1998

AT&T
Bell Atlantic
BellSouth
CWA
GTE
Internet Service Provider's Consortium
Simply Internet
Sprint
Telstra

September 14, 1998

SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Application of WorldCom, Inc. and MCI Communications Corporation For Transfer of Control of MCI Communications Corporation to WorldCom, Inc.; CC Docket No. 97-211.

I support today's decision approving the proposed merger between WorldCom, Inc. and MCI Communications Corporation. I concur in that result, but write separately to express my concern with several aspects of the underlying reasoning and to disapprove explicitly of the conditions imposed on this merger. I am also unwilling to adopt in its entirety the proposed framework for analyzing mergers presented here as I believe that it is (i) essentially duplicative of the merger analysis already conducted by the Department of Justice, (ii) excessively time-consuming since this agency waits until after DOJ clearance has been granted before proceeding, and (iii) too speculative in its analysis of who may be potential competitors.

Cumbersome Review Process

We have before us today the merger of two nimble and aggressive firms: WorldCom and MCI. They, and many other firms, operate in many markets, some domestic and some distinctly international. They serve many consumers in the United States and around the world.

Many regulatory authorities, both in the United States at the state and federal level, and in other countries, have already approved the merger with various qualifications. The FCC is the final among countless agencies to offer an opinion. I concur in the decision of this Commission to approve the merger. I concur, however, with deep reservations about the process that these companies have had to endure and about the process that has led to decisions directly affecting American consumers but without recourse to American consumers or American voters.

In part, I am troubled that this agency has taken as long as it has to review this merger, for which we received our first petition for review on October 1, 1997, and which was approved by the Justice Department on July 15, 1998. Surely, future mergers will be handled more expeditiously.[1]

[1] Indeed, I am deeply troubled that other mergers appear to be taking longer to review once they clear Department of Justice. For example, the merger application for SBC Communications Inc. and Southern New England Telephone ("SNET") -- a smaller transfer and one that appears to raise fewer legal issues -- was filed on February 20, 1998 and cleared the Department of Justice without condition on February 21, 1998. But, the Commission does not yet have an item before it. I fear that the Commission's internal procedures that typically limit

Our staff has invested substantial talent and resources in the review of this merger, as is evident by the accompanying Order. But our staff is hard working and has many demands placed on their time. Another agency of the federal government, one with specific statutory authority to review mergers and with substantially more staff that specialize in nothing other than merger analysis, has already examined this merger in all market contexts in great detail and has found it acceptable. The heroic efforts of our staff notwithstanding, we have little to add or to subtract from the market analyses or the judgment of this other federal agency but a more detailed public record.

For this reason, I would prefer a more thorough consideration of ways to eliminate the duplicative nature of this dual analysis of proposed mergers. Surely there is a more efficient and less time-consuming process that could be followed. For example, it is the obligation of this agency to find the transfer of licenses is in the "public interest."[2] A finding by this agency that the transfer of licenses involves merging parties that have in the past and are currently complying with existing Commission rules, and that no extraordinary reason to oppose the transfer of licenses is articulated by the public, would seem the proper basis for this agency to exercise its responsibility.

But instead, the Commission has undertaken a wide-ranging analysis of the merger that exceeds even DOJ's principles and that examines broader social issues beyond this agency's expertise or authority. For example, under the precluded competitor framework used in part here, our analysis of potential competitors is too speculative, as we do not require the same type of evidence that the Department of Justice's merger guidelines require of intent to enter the market. Even with our expertise in telecommunications, I question whether we can make such assumptions and whether they are even relevant to a narrow public interest analysis. In addition, I am not convinced that a review of applications to transfer licenses as part of a merger analysis is an appropriate forum in which to assess or craft commitments for broader social policy questions. Is there any limit on the additional benefits that the Commission could examine or requirements it could impose in determining whether a transfer of licenses is in the public interest?

Conditional Approval

Commissioners' input until after an item has been fully drafted and presented is not only precluding full consideration of important issues by the entire Commission in a timely manner, but ultimately delaying the decision-making process. I look forward to working with my colleagues to attempt to rectify this situation.

[2] I emphasize that it is the obligation of this agency to find only the transfer of licenses is in the public interest, not the merger or acquisition of the underlying firms.

Even if this Commission had stayed narrowly to its statutory authority, however, I would still be troubled by the process outside of this agency that these merging firms have had to endure. I have no reason to doubt that this transfer of licenses falls squarely within any reasonable definition of the "public interest."[3] But I have substantial reason to doubt that the entire process of merger review -- in which this agency is rightly only a small appendix -- is within any reasonable definition of the "public interest."

I fear that the cumbersome nature of this process, and the opportunities for an agency in one country to demand compliance with rules outside of its territorial jurisdiction, pose a threat to international commerce, to firms such as WorldCom and MCI that engage in international commerce, and to American consumers.

I do not have a specific solution to propose to this problem. This agency, by itself, can do little to affect the overall merger process around the world. This agency can, however, voice its concerns. We can state forthrightly that interference in international commerce generally, and international telecommunications in particular, will not be sanctioned by the United States. Enterprises that wish to engage in international commerce need not fear that one nation can dictate the terms and conditions under which that enterprise does business in any other country.

This Commission conditions approval of the merger on MCI's divestiture of Internet assets within the United States. I am not convinced that this divestiture is either economically or legally necessary. Entry and exit in various segments of the Internet business do not appear to have substantial barriers. Indeed, the market structure changes rapidly with countless entities vying in different segments. Were ours a truly independent review, I would emphatically oppose conditioning the merger on divestiture, even if I believed that this Commission can properly consider market structure in the review of the transfer of licenses.

But this agency cannot make any pretense of conducting a truly independent review of the newly constituted MCI and WorldCom. The EU has effectively required divestiture of MCI Internet assets in the United States. We, at the FCC, have at best rationalized a decision already made by others.

The Importance of Open Markets to America

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[3] The Commission has some limited shared Clayton Act jurisdiction, but that jurisdiction does not involve a "public interest" standard. The standard there is quite specific: "substantially to lessen competition, or tend to create a monopoly," 15 U.S.C. Section 18, and does not require that a proposed merger be demonstrably "pro-competitive." The Commission makes no specific findings with respect to this standard. Moreover, another federal agency, with substantially more expertise, has already applied that standard.

I was privileged soon after joining the Commission to have an opportunity to vote for rules that would implement the World Trade Organization's (WTO's) agreement to open telecommunications markets in all nations, including the United States, to carriers from any nation. It was a proud moment. Open markets are good for consumers, particularly American consumers. Open markets are good for businesses, particularly the many competitive American businesses that seek to compete around the world.

More fundamentally, however, open markets are important for the fulfillment of American ideals. In America, the government serves the individual, and not visa versa. Whether in individual or business conduct, freedom from excessive regulation has long been important to Americans. It was, indeed, the efforts of a distant government to restrict commerce within America, and international commerce with America, that ignited the American revolution.

The importance of free international commerce has waxed and waned in American history, but in every generation, the United States has taken principled positions to preserve open international commerce. Even as a young and relatively powerless nation, the United States stood for open international commerce. It negotiated treaties with European powers to secure access to commerce in the Mississippi Valley. Restrictions on American commerce on the high seas led to hostilities with England and France. It was the weak and distant United States, not the nearby and powerful European nations, that refused to pay tribute to the Barbary pirates. The federal government of the United States two hundred years ago was, by contemporary standards, extraordinarily weak. It was small, had few assets other than land, regulated little, and taxed perhaps even less. There was little of a standing army or navy. But that government lacked nothing of determination in protecting the young nation's sovereignty. It would not tolerate threats to its sovereignty on the high seas, much less at home.

The Importance of Jurisdictional Boundaries to International Commerce

Open international commerce does not mean that businesses are immune from national or local laws in areas of appropriate jurisdiction or treaty obligations. Those laws, and regulations under them, to the extent they do not obstruct commerce, actually enhance international commerce by providing a clear and predictable legal framework for commercial activities.

Jurisdictional boundaries, however, must be respected for international commerce to be truly open. A nation may reasonably regulate the business activities of a firm within its borders as a condition of operating within that country, but a nation may not reasonably restrict business activities in a third country. Nations do coordinate, harmonize and even reciprocate regulatory treatment of businesses, but only through duly authorized agreements or treaties.

If every one of the nearly two hundred countries in the world sought to require international firms to abide by its regulations not merely within its national boundaries, but in other countries as well, international businesses and international commerce would cease to exist as we know them. Indeed, if even one country sought to compel businesses to conform to its regulations, international commerce would cease to be open.

MCI, the EU, and Duress

To secure approval for its merger with WorldCom from EU regulatory authorities, MCI was forced to make concessions on its assets not merely in countries under EU jurisdiction but in the United States as well. In particular, MCI was required to divest itself of much of its internet business activities in the United States, including retail household services.

Some will say that MCI, a private party, agreed to these conditions, and thus there is no reason for government concern. These concessions, however, were made under duress, concessions that MCI would not willingly have made to another private party, or even to many governmental entities.

Which Merger is the FCC Reviewing?

The matter before this Commission is ostensibly the transfer of licenses between WorldCom and MCI based on a petition filed on October 1, 1997.[4] That petition was made before the EU review and demands. What is before this Commission today is the transfer of licenses between substantially altered entities in large part as the result of requirements on U.S. assets imposed by the EU. The option to review the transfer of licenses between the originally proposed parties is today largely an academic exercise. Even if this Commission were to approve the transfer of licenses between the original unaltered entities, the future of those entities has been irretrievably altered by the EU decision.

In this Order today, we go through the motions of that academic review of the merger of two firms one of which today cannot be sustained in the future. We reach the fortuitous conclusion that all is well if the EU prescription of divestiture is followed. It is a fortuitous conclusion because what would the practical effect have been had the Commission reached the opposite conclusion such as the following: the public interest would be served in the transfer of licenses if MCI does not divest itself of its internet assets but instead WorldCom should divest

[4] Following WorldCom and MCI's November 9, 1997 merger agreement, the companies jointly filed an amended application for transfer of control of MCI's licenses and authorizations to WorldCom on November 21, 1997. On July 31, 1998, Applicants filed a minor amendment listing additional private land mobile radio licenses held by MCI, but not included in the initial application.

itself of its assets? Or what would the result have been if the public interest would best be served if neither company divested anything? Indeed, the FCC has been urging that companies like MCI provide advanced services to the retail consumer markets. What if the Commission had concluded that by forcing the merged company to divest the largest piece of their internet backbone, the Commission only hinders the possibility that residential costumers will indeed see the benefits of such advanced services?

The simple answer to these questions is that the Commission analysis can do little more than rubber stamp those decisions already made by the EU unless we should find that further forms of divestiture, forfeiture, or regulatory punishment are warranted. As I have indicated above, I am troubled that the Commission engages in extensive market analysis and the development of conclusions about market structure and performance and remedies for the illegal use of market power that duplicate work done by other federal agencies. I am even more troubled that we should make these analyses when they can do little more than rubber stamp decisions made by foreign regulatory entities.

Timing and Jurisdiction

In a world of competing jurisdictions over mergers among various international, national, state, and local authorities, agencies that review the merger first -- and impose conditions first -- may have disproportionate effects on the final structure of the multiple reviews. The first judgments can be modified but not fully overturned. In a world of competing jurisdictions, this review process may create incentives for some agencies to attempt to move first to the disadvantage of agencies that move subsequently. The race to review first, however, would largely evaporate if agencies agreed on jurisdictional responsibilities such that there were little if any overlapping jurisdiction.

EU as Close Friends of the United States

The EU consists of some of the United States closest allies and best friends in the world. It is difficult to imagine that the EU would have required MCI divestiture within the United States had there been the slightest likelihood of dissatisfaction from the United States. To exercise jurisdiction where it is tacitly allowed is not a hostile or unwelcome act. The EU should not be blamed for acting where it is allowed. Had the United States simply signalled that we can apply our own laws to assets in the United States, this problem would not have developed.

As I noted upon passage of the WTO implementation rules, in international commerce the United States must lead by example. We must have the most open and freest market in the world. We must champion the cause of consumers and businesses, both in this country and around the world, who seek better lives and more technological advances through competition and free markets. And we must find better and more expeditious ways to review international mergers.

September 14, 1998

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: Memorandum Opinion and Order, Application of WorldCom, Inc. and MCI Telecommunications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc. (CC Docket No. 97-211).

I am pleased the Commission is able to conclude its obligations in this matter by allowing MCI and WorldCom to do what they have been so eager to do for so many months: join forces to bring more of the benefits of competition to themselves and to the American consumer.

This *Order* is the culmination of an enormous amount of work by our dedicated and talented staff. I applaud the staff for their efforts to bring this highly complex proceeding to closure. I sincerely hope, moreover, that the framework we have erected here will serve as a useful template to help expedite future merger review proceedings. We must strive constantly to make the review process more efficient and thereby better keep pace with market developments.

Of course, as a proponent of vigorous antitrust enforcement, I would not celebrate the prospect of the union of MCI and WorldCom were I not confident (as much as our predictive tools allow) that the merger will not aggravate the potential for anti-competitive conduct. As the *Order* thoroughly documents, however, the likelihood that the proposed merger will result in such aggravation is minimal. I take particular solace in the fact that, with this *Order*, the Commission joins the ranks of several state, federal and international regulatory bodies, all of which have seen fit to approve this transaction.

In this statement, I explain the bases upon which I support this *Order*. Specifically, I believe this *Order* appropriately: (1) declines to give significant weight to considerations that fall outside our core function of setting telecommunications policy and the unique expertise deriving from that function; (2) expresses some willingness not to "re-invent the wheel" with respect to competitive analysis of mergers already reviewed by the Department of Justice; and (3) does not impose additional, unnecessary conditions on the merger.

Disciplining the Public Interest Standard

The primary reason I support adoption of this *Order* is that much of the analysis is consistent (or at least not *in*consistent) with my views regarding the considerations that should discipline our pursuit of "the public interest." On several occasions in the broadcast context, I have expressed my discomfort with the "penumbral bounds" of the public interest standard.[1] I

[1] *See, e.g.*, FCC Commissioner Michael K. Powell, " The Public Interest Standard: A New Regulator's Search for Enlightenment," Speech Before the American Bar Association 17th Annual Legal Forum on Communications Law (April 5, 1998); FCC Commissioner Michael K. Powell, "Willful Denial and First Amendment Jurisprudence," Remarks Before the Media Institute (April 22, 1998). Justice Felix Frankfurter said

consequently have tried to develop basic principles that I believe should guide our exercise of this wide discretion.[2] I believe it may prove useful for the Commission to outline such principles in applying the public interest standard for purposes of telecommunications mergers, adjudication and regulation. Only by looking to such principles can the Commission, in my view, reach conclusions that are relatively predictable, reasoned applications of the public interest standard and not just the result of the most effective lobbying or political pressure, or our unguided subjective judgment. In this statement, I begin to sketch the principles I believe should apply in the telecommunications merger context. I also explain how this *Order* comports with these principles.

Fundamentally, I believe that the Commission's public interest authority to review transfers of authorization is not a license to sweep into the review every possible goal that one could argue is supported by or consistent with the statute. Nor should we allow our public interest authority to degenerate -- in reality or impression -- into serving as a "back door" to achieve results the Commission is unable (or unwilling) to accomplish more directly, through traditional rulemaking. Rather, I believe our public interest authority to review transfers of authorizations evidences Congress' recognition that it could not foresee every possible set of facts that might so endanger the pro-competitive, deregulatory framework of the statute that such facts warrant denial of the transfer. Congress gave this broad authority to an expert agency, the Commission, so it could use that expertise to take into consideration facts that Congress could not concretely anticipate.

Based on this fundamental belief, I submit that the decision whether to attribute significant (or any) weight to a particular factor in our public interest merger review should turn on whether:

(1) the Commission has *authority* even to consider that factor;

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that the "vagueish penumbral bounds expressed by the standard of the public interest" "[leave] wide discretion and [call] for imaginative interpretation." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90, 91 (1953). My effort to develop principles for exercising our public interest discretion is an effort to ensure that this discretion is bounded by more than the Commission's collective imagination.

[2] My decisional schematic for broadcast poses five basic questions:
(1) does the Commission have the authority to do what is asked?;
(2) if we have the authority, is it nonetheless better to leave the matter to Congress or await more specific instruction from Congress;
(3) is the issue better addressed by a state or another federal agency;
(4) if the Commission has authority and is the arm of the government best suited to act, should we?; and,
(5) would any action we take be Constitutional?
FCC Commissioner Michael K. Powell, " The Public Interest Standard: A New Regulator's Search for Enlightenment," Speech Before the American Bar Association 17th Annual Legal Forum on Communications Law (April 5, 1998).

(2) the action the Commission would take with respect to that factor is part of our *core function* of setting telecommunications policy; and
(3) the action relies on our *unique expertise* in setting such policy and is not more readily handled by other processes or other institutions vested with Congressional authority.

Let me elaborate on these three principles.

Most obviously, the Commission should not be taking any action that Congress did not delegate it *authority* to take. Conversely, the Commission should not take action that would violate any statute or the Constitution. But given the breadth of the public interest standard itself, answering the authority question may provide clear guidance only in those extreme circumstances in which consideration of the factor would contravene the letter or spirit of some statutory or constitutional provision.

The Commission also should not place significant weight on considerations that do not fall within our *core function* of setting telecommunications policy. Does consideration of a particular factor center on the manner in which firms provide services to end users or to other service providers? Does consideration of the factor involve communications rate-or standard-setting or involve laying the ground rules for competition? Does the factor implicate areas of private conduct that the Commission consistently regulates in the context of telecommunications? If the answer to these and similar questions is "no," I would strongly favor attaching little, if any, weight to that factor in our merger analysis.

Perhaps most important in disciplining our public interest merger analysis is deciding whether consideration of a particular factor relies on our *unique expertise*. Telecommunications affects our lives in countless ways. Thus, it is no surprise that telecommunications may play some part in a wide variety of social issues. Simply because we regulate the provision of telecommunications, however, does not mean that we are experts on all of these issues. Thus, we should be hesitant to give issues with which we have no special talent a prominent place in our merger analysis, even though there may be strong moral and political motivations for doing so.

Instead, I firmly believe the Commission should work to focus its public interest merger analysis on considerations that leverage our unique expertise. We should constantly ask ourselves whether some other agency has roughly equivalent or even superior expertise and authority to address any given factor, either in reviewing the merger at issue or in some other context. In my view, moreover, where another agency has specific statutory jurisdiction to address a particular factor, we should seriously consider the propriety of exercising our broad public interest discretion.

The Commission's credibility -- and thus its influence -- in Congress, the courts and elsewhere in our federal system depends in large measure on the extent to which we act within our jurisdiction and do not stray from the confines of our unique, core expertise. The Supreme

Court has in principle supported this idea in stating that "reviewing courts do not owe deference to an agency's interpretation of statutes outside its particular expertise and special charge to administer."[3] Simply put, we cannot command respect as an "expert agency" if our pronouncements turn on subjects in which we are not expert or which do not rely on our unique capabilities. Likewise, the soundness and clarity of our analysis will suffer if we try to fold into our merger analysis every possible regulatory goal that strikes our fancy or that might be inferred from provisions of the statute. Thus, I am particularly pleased that this *Order* does not weigh too heavily considerations that are inherently speculative and that bear at best a tenuous relationship to the underlying motives and direct consequences of the proposed merger.

I would apply the three guiding principles I have articulated -- authority, core function and unique expertise -- to the types of considerations in this *Order* as follows:

With respect to allegations of intentional discrimination, I believe there may be a plausible argument that the Commission's consideration of some discrimination concerns falls within our core function of setting telecommunications policy and the unique expertise that derives from that function. In particular, I believe there may be merit in attaching some weight to discrimination concerns in our merger review when such discrimination contravenes carriers' universal service obligations or the traditional duty of common carriers to treat all customers equally. Section 201 of the statute, for example, mandates that "[i]t shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor."[4] To the extent allegations of racial and other forms of discrimination amount to violations of that duty, there may be an argument that such alleged violations should be given weight in our merger analysis. I would be open to considering this and other such arguments that focus on the Commission's core function and unique expertise in setting communications policy.

Other discrimination and disparate treatment concerns, such as employment diversity and minority representation -- however sympathetic or onerous to the republic -- generally fall neither within the Commission's core function of setting telecommunications policy, nor within the Commission's unique expertise in setting such policy. Thus, I believe the Commission should leave these latter concerns primarily to the courts and other agencies (*e.g.*, the

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[3] *Ardestani v. Immigration and Naturalization Service,* 502 U.S. 129, 148 (1991) (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990)). *See also Syracuse Peace Council v. FCC*, 867 F.2d 654, 658 ("In making a public interest judgment under the Communications Act, the Commission is exercising both its congressionally-delegated power and its expertise; it clearly enjoys broad deference on issues of both fact and policy."). (D.C. Cir. 1989). The courts' statements appear to acknowledge that, in deciding what degree of deference should be given an agency action, judges will not find it irrelevant that the action does not fall within the agency's core expertise.

[4] 47 U.S.C. § 201(a).

Department of Justice, Equal Employment Opportunity Commission).[5] In those limited circumstances in which these concerns might fall within our core function and unique expertise, the Commission should not address these concerns in an *ad hoc* way, pursuant to its obligation to ensure that transfers of certain types of authorizations are consistent with the public interest. Instead, the Commission should pursue such goals in the context of a rulemaking.[6] This approach would at least make it more likely that all of the parties interested in the topic participate in the proceeding. Parties that might be concerned about how the Commission will police discriminatory conduct may not think to comment on a particular merger, whereas they may take notice of a general rulemaking on discrimination.

With respect to some of the labor-related concerns raised on the record, I would submit that allegations that employment levels will be adversely affected by a given merger should be afforded little, if any, weight in the Commission's merger analysis. Even if we believe we have jurisdiction to consider this factor as part of our merger review, it lies outside our core function of setting communications policy and the unique expertise deriving from that function. Indeed, I believe employment levels are more directly an issue for collective bargaining and the well-established body of labor law. Furthermore, parties who wish to obtain relief regarding employment levels may seek such relief in the courts and before other government entities like the National Labor Relations Board.

I fully recognize that the federal government may play an important role in pursuing some of the social or other goals raised by the commenters that fall outside the rubric of traditional competitive analysis. For example, I firmly believe that the federal government, viewed as a whole, must be vigilant to prevent intentional racial discrimination to the extent the Constitution allows. I also believe the government may play a useful role in devising incentives consistent with market principles that enhance minority participation in the communications sector (*e.g.*, minority tax certificates in the broadcast context).

But just because it may be appropriate for *some* part of the federal government to pursue particular social goals does not mean that the *Federal Communications Commission* must apply the balm for all that ails us; that would be like playing doctor without a license or adequate training. Congress has seen fit to give primary responsibility for overseeing such areas as labor relations and anti-discrimination efforts to other agencies. At best, duplicating such oversight at the Commission may strain precious resources and encourage parties to "forum shop" among various agencies in attempt to obtain desired outcomes.

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[5] I express no opinion here regarding equal employment opportunity concerns in the broadcast context, which may present unique circumstances that I do not address in this statement.

[6] For example, if one can demonstrate a history of intentional racial discrimination, remedies for which fall within our core function and the unique expertise deriving from that function, it may be appropriate for the Commission to conduct a rulemaking to put in place remedial policies, consistent with the law. *See generally City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

I support this *Order,* in part, because it does not afford significant weight to considerations such as employment levels and job discrimination that I believe should not figure prominently in our telecommunications merger analysis. As such, I believe the *Order* evidences at least some reluctance by the Commission to let the scope of our merger analysis sweep too broadly.

Avoiding Re-inventing the Wheel

I also support this *Order* because the analysis leaves open the possibility that the Commission may take into consideration actions taken (or not taken) by the Department of Justice with respect to a proposed merger. This position derives, in part, from my belief that the Commission should focus its public interest merger analysis on factors relating to its unique expertise.

In my view, there is potential in the future for the Commission to devise ways -- formal or informal -- to take into consideration how the Department deals with a particular merger in our own merger analysis. I believe this potential exists even where the Commission performs an independent analysis or the method and scope of our analysis differ from that employed by the Department. As our reliance on the Department's horizontal merger guidelines demonstrates, there may at times be significant overlap between the analytical frameworks employed by the Commission and the Department. To suggest otherwise would strain credulity. Based on my acknowledgment of this analytical overlap, and my deep respect for the diligence and considerable expertise of the Department, I am hopeful that the Commission will, in the future, be able to minimize duplications of effort in the area of competitive analysis and thereby use our regulatory resources most efficiently.

Declining to Impose Unnecessary Conditions

Finally, I support the result here because it evidences at least some reluctance to impose additional, unnecessary conditions on mergers. I believe the Commission must be extremely circumspect about imposing conditions or extracting commitments from the applicants to do things that fall well outside their legal obligations under the statute. New entrants into the local exchange market, for example, are not obligated under the statute to serve every type of customer, no matter how desirable that result might be. Thus, I would seriously question imposing such a requirement on new entrants through the merger review process.

Moreover, just as I believe the Commission should not let its public interest analysis sweep too broadly, I firmly believe that if we begin to impose merger conditions too easily or make those conditions too excessive, we will injure the Commission's credibility and influence. We also may thereby substitute regulators' judgments about how communications resources should be allocated for the judgments of consumers and competitors in the marketplace.

In my view, this *Order* is consistent with these beliefs. I would point out that, other than with respect to the divestiture of Internet assets prompted by the Justice Department and

European Commission, we have imposed no significant conditions on this merger.[7] Rather, the *Order* merely evidences expectations that MCI and WorldCom have honestly represented their intentions to conduct their activities in the manner they have stated on the record (*e.g.*, their representations regarding the types of customers they will serve). As such, I believe the "mere expectations" expressed in the *Order* amount primarily to reminders that parties should not lie or misrepresent their intentions to the Commission.

In conclusion, I should note that I would be especially reluctant to try to punish former applicants if, as they begin to carry out their stated intentions, they find they must divert from their commitments in merger applications for business reasons or legitimate concerns regarding the regulatory environment. Moreover, I would vigorously oppose any efforts by the Commission, formally or informally, to require applicants to submit commitments regarding how the merged entity will conduct its business. Again, the Commission will work harm to its credibility and, I believe, the public interest if it is perceived to be attempting to achieve aims through such "voluntary" commitments that the Commission is unable or unwilling to achieve through more direct means.

For the foregoing reasons, I am pleased to support approval of the proposed merger. I commend the Commission staff for its hard work in this proceeding, and I look forward to working together with everyone at the Commission as we review future proposed transactions.

[7] Note, however, that the transfer of MCI's direct broadcast satellite (DBS) license to WorldCom is subject to the outcome of pending applications for review of the initial license grant to MCI.

September 14, 1998

Separate Statement of
Commissioner Gloria Tristani, Dissenting in Part

Re: Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communication Corporation to WorldCom, Inc., CC Docket No. 97-211.

I write separately and dissent in part from the majority's decision not to impose some type of reporting requirement to monitor the merged company's progress in the local residential market.

The Commission's framework for evaluating mergers is simply that a merger should be approved if its positive effects outweigh its negative effects. One significant negative consequence that was alleged was that the merged company would abandon the possibility of competing for residential customers in the local market. The Order ultimately does not weigh this possibility against that application, in large part because of a commitment by WorldCom and MCI to compete in the local residential market. I place great importance not only on the ability of the merged company to compete, but the likelihood of that it will do so.

After expressing its reliance on the commitment by WorldCom and MCI, the majority notes that it will monitor the merged company's progress in the local residential market. I applaud and fully support their willingness to monitor the company's actions following the merger. However, I respectfully disagree with their decision not to impose some type of reporting requirement on the merged company that would facilitate such monitoring. A minimal reporting requirement seems to me an eminently reasonable way of seeing whether the company follows through on its commitment to compete for residential customers for local service. If the company intends to keep its commitment, what's the harm in keeping us apprised of its progress?

While I recognize, as the majority does, that the Commission has gathered some information about the status of competition in the telecommunications markets, the process is not regularized or particularly useful in providing information about the progress of local competition generally or local residential competition in particular. My preoccupation with getting these facts is based on this Commission's obligation to gauge the progress of competition as we implement the Communications Act's pro-competitive provisions.

It is my hope that at some future date, the Commission will create a meaningful mechanism for measuring the progress of local competition that would obviate the need for a reporting requirement here. At this point, however, I am unwilling to rely on a future mechanism for gathering such information when such mechanism's very existence and suitability for the purposes at hand are uncertain. Additionally, it cannot be reasonably argued that a reporting requirement consisting of a one-page letter every six months is overly burdensome. It is also worth noting that at least two state commissions (Missouri and Georgia) require all local carriers to report regularly on the number of residential lines they serve simply as a condition of providing service in those states. Thus I would think it quite sensible for this Commission to direct the merged company to keep us apprised of its compliance with a commitment that, judging from paragraphs 192-193, was clearly critical to our approval of this merger.

I would underscore my expectation that WorldCom-MCI live up to its commitment to compete for local residential customers, the vast majority of whom continue to have exactly one choice for local telephone service today. And I take this opportunity to make clear that I will take a great interest in seeing that the company adhere to this commitment.

Finally, I take this opportunity to address one issue in Commissioner Powell's separate statement accompanying this Order. I do not share his hesitation to explore, in the context of a merger, allegations that one or both of the applicants has declined to serve customers on the basis of the customers' race. Such allegations were made in this proceeding against the applicants. My colleagues and I ultimately determined that those claims were not actionable because: (1) the applicants sufficiently explained how their networks came to be laid out in this fashion; and (2) the parties seeking to halt the merger on these grounds provided no other evidence of the merged company's intent to discriminate on the basis of race. Nonetheless, I would underscore that I will always be concerned with allegations of racial discrimination in determining whether proposed telecommunications mergers serve the public interest.

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