

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

In re Applications of
AIRTOUCH COMMUNICATIONS, INC.
Transferor,
AND
VODAFONE GROUP, PLC.
Transferee,
For Consent to Transfer of Control of
Licenses and Authorizations
File Nos. 0000003690, et al.

MEMORANDUM OPINION AND ORDER

Adopted: June 21, 1999

Released: June 22, 1999

By the Chief, Wireless Telecommunications Bureau:

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. On February 5, 1999, AirTouch Communications, Inc. (“AirTouch”) and Vodafone Group, Plc. (“Vodafone”) (collectively, “Applicants”) filed applications pursuant to sections 214 and 310 of the Communications Act of 1934, as amended (“the Act”),¹ seeking Commission consent to transfer control of AirTouch’s licenses and authorizations to Vodafone. Applicants intend to accomplish this transaction through a “reverse triangular” merger in which the shareholders of AirTouch will transfer their stock to Vodafone in exchange for cash and Vodafone stock. AirTouch will merge with a Vodafone subsidiary and Vodafone will then change its name to Vodafone AirTouch Plc. After the merger, the former Vodafone and AirTouch shareholders will each own approximately 50 percent of the new Vodafone AirTouch and will share equally the power to appoint members to the Board of Directors.

2. AirTouch is among the largest wireless operators in the United States, serving approximately 11.8 million U.S. subscribers. The company provides cellular, paging, and personal communications services in 13 countries worldwide, serving more than 17 million customers. AirTouch’s revenues for the twelve-month period ending September 30, 1998 were \$7.1 billion.² Vodafone is a leading global provider of mobile telecommunications services, with cellular network interests in Europe, Africa, and Australasia. Vodafone’s revenues for the twelve-month period ending September 30, 1998 were £2,870 million. The merger will create a global wireless company with a combined market capitalization of about \$110 billion.³

3. On February 8, 1999, the Wireless Telecommunications Bureau (“Bureau”), by delegated authority,⁴ issued a Public Notice to announce that the applications had been accepted for filing, and to establish a pleading cycle to permit interested parties an opportunity to comment on the proposed transaction.⁵ In response to this Public Notice, two parties filed Petitions to Deny or Condition the grant of authorization and five parties filed Comments.⁶ As explained below, we find that the proposed merger between AirTouch and Vodafone poses no risk of harm to U.S. telecommunications markets and would permit the merged companies to generate significant

¹ 47 U.S.C. §§ 214, 310(d), 310(b).

² AirTouch Communications, Inc., News Release, “Vodafone and AirTouch Merger To Create Global Mobile Wireless Leader,” January 17, 1999 (available at <http://www.app.airtouch.com>).

³ *Id.*

⁴ 47 C.F.R. § 0.331.

⁵ See Public Notice, DA 99-304 (rel. Feb. 8, 1999). On April 29, 1999, we issued an additional Public Notice announcing our acceptance of an application to transfer control of an air-ground license from AirTouch to Vodafone that had been inadvertently omitted from the original filing. See Public Notice, Report No. CWS-99-36, rel. Apr. 29, 1999. Consideration of this application is included in this Order. On May 27, 1999, we issued a second additional Public Notice announcing our acceptance of an additional application to transfer control of an AirTouch air-ground license that also had been inadvertently omitted from the previous Public Notices. See Public Notice, Report No. CWS-99-40, rel. May 27, 1999. Because the period for filing petitions to deny with respect to this application does not end until June 28, 1999, the application may not be granted until June 29, 1999. See 47 U.S.C. § 309(b). In addition, on May 20, 1999, the *ex parte* status of this proceeding was changed from restricted to permit-but-disclose. See Public Notice, DA 99-304, rel. May 20, 1999.

⁶ Petitions were filed by Crown Communications, L.L.C. and Karl A. Rinker dba Rinkers Communications. Comments were filed by U.S. Federal Bureau of Investigation, U.S. Department of Defense, Communications Information Services, Inc., and jointly by Eastern Airwaves, L.L.C. and Desert Mobile, L.L.C. The Communications Workers of America (“CWA”) filed reply comments only.

efficiencies that would likely result in expanded service options at competitive prices. Accordingly, we find that pursuant to sections 214(a), 310(b) and 310(d) of the Communications Act, as amended (“the Act”), grant of the pending requests for transfer of control would serve the public interest. Hence, we deny the petitions and grant the applications with conditions as discussed below.

II. DISCUSSION

A. Statutory Authority

4. Pursuant to section 214(a) of the Act, the Commission must determine whether the Applicants have demonstrated that their proposed transaction will serve the public interest, convenience and necessity.⁷ Section 310(d) of the Act provides, in pertinent part, that “[n]o construction permit, or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”⁸ Section 310(d) also requires the Commission to consider the license transfer or assignment application as if it were filed pursuant to section 308 of the Act, which governs applications for new facilities and for renewal of existing licenses.⁹

B. Qualifications

1. Transferor

5. In evaluating assignment and transfer applications under section 310(d) of the Act, we do not re-evaluate the qualifications of the assignor or transferor unless issues related to their basic qualifications have been designated for hearing by the Commission.¹⁰ In this case, certain parties have filed oppositions to the merger generally alleging that their pending disputes with AirTouch raise questions as to AirTouch’s character qualifications that should be resolved in a hearing before AirTouch can be permitted to transfer control of its licensees. AirTouch’s basic qualifications are not currently in question; none of the petitioners raised a substantial and material question of fact that would warrant designating for hearing AirTouch’s basic qualifications as a licensee.

6. We dismiss allegations raised by Eastern Airwaves and Desert Mobile regarding applications to serve unserved cellular areas because the dispute cited as a basis for their comments has

⁷ 47 U.S.C. § 214(a). See *Applications of WorldCom and MCI Communications Corporation*, 13 FCC Rcd 18,025, 18,030, at ¶ 8 (1998) (“*MCI-WorldCom Order*”).

⁸ 47 U.S.C. § 310(d).

⁹ Section 308 provides that the Commission shall consider any such applications “. . . as if the proposed transferee or assignee were making application under Section 308 for the permit or license in question.” Furthermore, the Commission is expressly barred from considering “. . . whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.”

¹⁰ See *Mobilemedia Corporation et al.*, FCC 99-15 (rel. Feb. 5, 1999) (citing *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964)). This policy, often referred to as the *Jefferson Radio* policy, is designed to prevent licensees from evading responsibility for misdeeds committed during the license period. See Stephen F. Sewell, “Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934,” 43 Fed. Comm. L.J. 277, 340 (1991).

been resolved by the Commission in AirTouch's favor.¹¹ Next, we dismiss allegations raised by Rinker stemming from a commercial dispute over a paging license because we addressed these issues when we granted AirTouch's application to partially assign that paging license to Schuykill, an entity unrelated to Vodafone.¹² Finally, we find that a pending private action involving a patent infringement claim raised by CommServ,¹³ and a possible partnership dispute raised by Crown,¹⁴ are private matters that are not relevant to exercising our section 310(d) authority but, rather, are best resolved in courts of competent jurisdiction.¹⁵ Moreover, these pending disputes do not appear to relate to the type of anti-competitive conduct that the Commission considers as a relevant character qualification in licensing.¹⁶ Therefore, we find that the allegations based on these parties' disputes with AirTouch should not preclude grant of this application.

2. Transferee

7. As a regular part of our public interest analysis, we must determine whether the proposed licensee is qualified to hold a Commission license and whether grant of the application would result in the proposed licensee violating any Commission rules. As a result of this proposed merger, Vodafone, which is chartered in the United Kingdom, will indirectly own more than 25 percent of

¹¹ See *Eastern Airwaves, L.L.C., Order*, DA 99-1164 (WTB, Policy and Rules Branch, rel. June 14, 1999); see also Comments to AirTouch/Vodafone Transfer of Control Applications filed by Eastern Airwaves, L.L.C. and Desert Mobile, L.L.C., filed Mar. 10, 1999.

¹² See *In the Matter of AirTouch Paging, Inc., Order*, DA 99-1175 (WTB, Policy and Rules Branch, rel. June 16, 1999) (granting application to partially assign Paging Station KCC85 to Schuylkill Mobile Fone Inc.); see also Petition to Deny or Condition filed by Karl A. Rinker dba Rinker Communications, filed Mar. 10, 1999 ("Rinker"). Rinker further argues that the merger applications are defective because a single paging call sign was omitted from the initial filing. We note that the ULS database was subsequently updated to reflect the correction and, as discussed above, appropriate public notices have been issued. We will not deny or delay consideration of the merger applications on this basis because the February 8, 1999 Public Notice specified that all of AirTouch's paging licenses and authorizations were being transferred to Vodafone and, therefore, provided sufficient notice to parties of the competitive implications of this transaction.

¹³ Comments to AirTouch/Vodafone Transfer of Control Applications filed by Communications Information Services, Inc., filed Mar. 10, 1999 (regarding civil suit against AirTouch and a company that installed cellular fraud deterrent systems on AirTouch facilities).

¹⁴ See Petition to Deny or Condition Grant of Application filed by Crown Communications L.L.C., filed Mar. 10, 1999 (alleging that AirTouch is not providing sufficient information to its partners regarding the proposed merger).

¹⁵ See, e.g., *Listeners Guild, Inc. v FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987); *Applications of Centel Corp., Sprint Corp., and FW Sub Inc.*, 8 FCC Rcd 1829, 1831 (1993) ("alleged violation of . . . partnership agreements amounts to a contractual dispute . . . and therefore is a matter for resolution by a private cause of action, rather than resolution by the Commission"). The Commission has consistently refused to interject itself into private matters, finding that a court, and not the Commission, is the proper forum for resolving such disputes. *MCI-WorldCom Order*, 13 FCC Rcd at 18,148 (1998); *PCS 2000, L.P.*, 12 FCC Rcd 1681, 1691 (citing *United Tel. Co of Carolinas v. FCC*, 599 F.2d 720,732 (D.C. Cir. 1977)).

¹⁶ See *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.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). The Commission has consistently refused to interject itself into private matters, finding that a court, and not the Commission, is the proper forum for resolving such disputes. *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515 n.14 (1988) (character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context).

current AirTouch subsidiaries that hold common carrier radio licenses.¹⁷ Under section 310(b)(4) of the Act, we analyze whether the public interest would be served by denying the assignment or transfer of control of those licenses to Vodafone.

8. According to Applicants, approximately 60 percent of the shares of the merged company will be held by U.S. citizens, 32 percent by U.K. citizens, and eight percent by citizens of other countries. Applicants state also that it would not be unreasonable to expect a flow-back of equity to the United Kingdom,¹⁸ resulting in U.S. citizens and U.K. citizens holding approximately equal percentages of stock.¹⁹

9. Because the United Kingdom is a Member of the World Trade Organization (WTO), under the Commission's *Foreign Participation Order*, we presume that the public interest would be served by authorizing, under section 310(b)(4), common carrier radio licenses held by entities indirectly owned by Vodafone and citizens of the United Kingdom.²⁰ No party has raised an argument rebutting this presumption, and we are aware of no other reason to rebut the presumption here. Also pertaining to Vodafone's qualifications, we note that the CWA filed reply comments, though not initial comments, suggesting that this transaction is structured to "skirt" the U.S. tax code. Additionally, on April 20, 1999, AirTouch filed a copy of a letter from the Internal Revenue Service evaluating the proposed transaction under the U.S. tax code. We do not find that CWA's unsupported allegations justify denying the Applications, and we find nothing in the record on this issue that would justify denying the Applications. Therefore, we find, pursuant to section 310(b)(4), that Vodafone and its U.K. shareholders may acquire up to 100 percent indirect ownership of the AirTouch subsidiaries holding common carrier radio licenses.

C. Public Interest Analysis

10. In addition to ensuring that transferor and transferee are duly qualified and comply with our rules, we also consider, as part of our examination under the "public interest, convenience, and necessity" standard of section 310(d) of the Communications Act, the effects on competition of a proposed transfer of control.²¹ At a minimum, this requires that a merger not interfere with the

¹⁷ "Indirect" foreign ownership refers to ownership by a foreign entity of an entity that directly or indirectly owns all or part of the licensee.

¹⁸ "Flow-back" refers here to an international shift in shareholdings that will likely result from both the delisting of AirTouch from the S&P 500 composite index, and the increased weighting that Vodafone AirTouch will be assigned in the FTSE Index in London following consummation of the merger. Letter from Jean L. Kiddoo and Eliot Greenwald to Magalie Roman Salas, filed May 5, 1999.

¹⁹ Application at Exhibit 3.

²⁰ See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23,891, 23,940 (¶¶ 111-112) (1997), *recon. pending* (Foreign Participation Order).

²¹ *MCI-WorldCom Order*, 13 FCC Rcd at 18,030-33, ¶¶ 9-12 (1998). The Commission also has independent authority under Sections 7 and 11 of Clayton Act to disapprove the acquisition of common carriers engaged in wire or radio communications or radio transmissions of energy in any line of commerce in any section of the country where the effects of such an acquisition may substantially lessen competition, or tend to create a monopoly. 15 U.S.C. §§ 18, 21(a). The Bureau, acting pursuant to delegated authority, 47 C.F.R. § 0.331, chooses not to exercise its statutory authority under the Clayton Act in this case because the Commission's jurisdiction under the Communications Act is sufficient to address all questions regarding the competitive effects of the proposed transfer, including the issue of whether the transfer may substantially lessen competition or tend to create a monopoly. See, e.g., *Craig O. McCaw and American Telephone and Telegraph Company*, 9 FCC Rcd 5836 (1994), *recon. denied on other grounds*,

objectives of the Communications Act and must include, among other things, consideration of the possible competitive effects of the transfer.²² Under Commission precedent, our public interest analysis is not limited to traditional antitrust principles,²³ but also encompasses the broad aims of the Communications Act,²⁴ including evaluating whether any public interest benefits may result from the merger.²⁵ Applicants bear the burden of proving that the proposed transaction serves the public interest,²⁶ and we must determine whether they have met this burden.²⁷

1. Competitive Framework

11. Where the transfer or assignment of licenses involves telecommunications service providers, the Commission's public interest determination must be guided primarily by the Communications Act, as amended.²⁸ In cases such as this that involve an international carrier, we are guided also by the U.S. Government's commitment under the WTO Basic Telecommunications Agreement, which seeks to promote global markets for telecommunications so that consumers may enjoy the benefits of competition.²⁹ Our analysis of competitive effects under the Commission's public interest standard consists of four steps. First, we define the relevant product and geographic markets.³⁰ Second, we identify current and potential participants in each relevant market, especially those that are likely to have a significant competitive effect. Third, we evaluate the effects that the merger may have on competition in the relevant markets.³¹ Fourth, we consider whether the proposed transaction will result in merger-specific efficiencies, such as cost reductions, productivity enhancements, or improved

Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11,786 (1995), *aff'd sub nom. SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

²² *MCI-WorldCom Order*, 13 FCC Rcd at 18,030-33 ¶¶ 9-12.

²³ *See Satellite Business Systems*, 62 F.C.C.2d 997, 1069, 1088 (1977), *aff'd sub nom. United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*).

²⁴ *MCI-WorldCom Order*, 13 FCC Rcd at 18,030 ¶ 9 (citing *Applications of NYNEX Corporation and Bell Atlantic Corporation*, 12 FCC Rcd 19,985, 19,987 ¶ 2 & n.2 (1997) ("*Bell Atlantic-NYNEX Order*").

²⁵ *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20,063 ¶ 158; *Applications of MCI Communications Corporation and British Telecommunications P.L.C.*, 12 FCC Rcd 15,351, 15,367 ¶ 33 (1997) ("*BT-MCI Order*").

²⁶ *MCI-WorldCom Order*, 13 FCC Rcd at 18,031 ¶ 10 n.33 (citing 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant) and *LeFlore Broadcasting Co., Inc.*, Docket No. 20026, *Initial Decision*, 66 F.C.C.2d 734, 736-37 ¶¶ 2-3 (1975) (burden of proof is on licensee on issue of whether applicants have the requisite qualifications to be or to remain Commission licensees and whether grant of applications would serve public interest, convenience and necessity)).

²⁷ *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20,001, 20,007, ¶¶ 29, 36; *BT-MCI Order*, 12 FCC Rcd at 15,367, ¶ 33.

²⁸ We note that the 1996 amendments to the Communications Act were specifically intended to produce competitive telecommunications markets. *AT&T Corporation, et al., v. Iowa Utils. Bd.*, 119 S. Ct. 721, 724 (1999).

²⁹ The commitments undertaken as a result of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS. *Fourth Protocol to the General Agreement on Trade in Services (WTO 1997)*, 36 I.L.M. 354, 366 (1997). These commitments are colloquially referred to as the WTO Basic Telecom Agreement, though they are not technically contained in a stand-alone agreement.

³⁰ *See Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20,014, ¶ 49; *BT-MCI Order*, 12 FCC Rcd at 15,368, ¶ 35.

³¹ Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission, 57 Fed. Reg. at 41,558 §§ 2.1, 2.2 ("*Guidelines*").

incentives for innovation.³² Ultimately, we must weigh any harmful and beneficial effects to determine whether, on balance, the merger is likely to enhance competition in the relevant markets.

2. Analysis of Potential Adverse Effects

12. To determine the relevant product and geographic markets, we identify the services offered by Vodafone and AirTouch and evaluate the extent to which services offered by other communications companies compete for the business conducted by the merging parties. According to the Applicants, Vodafone owns interests in companies providing mobile telecommunications services in Europe, Africa, and the South Pacific region.³³ AirTouch also provides mobile communications services, serving the United States, Europe, Africa, and Asia.³⁴ AirTouch is also authorized to provide international services.

a. Mobile Telephone Services

13. Both companies are focused on providing wireless communications services. Vodafone does not currently provide service in the United States. Based on the record, we find no evidence that AirTouch and Vodafone compete against each other in any markets within the United States, including any relevant U.S. wireless market.³⁵

14. We recognize the possibility that AirTouch and Vodafone might have become competitors in the U.S. wireless communications sector at some future date, and that this merger eliminates any such prospects. There is, however, no information on the record suggesting that Vodafone had plans to enter the U.S. market prior to its bid to acquire AirTouch. Moreover, any other avenue for Vodafone to enter the U.S. market would generally have required it to acquire licensed spectrum from an existing licensee, as it is doing here, thereby offsetting some of the benefits of its entry.³⁶ Under the circumstances of this case, therefore, we are not concerned by the elimination of a potential competitor.

³² See Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission (Revised, April 8, 1997) (“1997 Revised Guidelines”).

³³ Application at Exhibit 3.

³⁴ AirTouch Communications, AirTouch Factbook: Mid-Year 1998, at 2-3. AirTouch also holds minority investment interests in Globalstar, a satellite-based mobile phone system; in QUALCOMM, a U.S.-based telecommunications equipment manufacturer; and in IDC, a worldwide long distance telephone service. *Id.*

³⁵ We note also that, on May 25, 1999, the European Commission (EC) approved the merger between Vodafone and AirTouch. “Commission authorizes Vodafone and AirTouch to merge,” IP/99/342 (Brussels, May 25, 1999) (available in the Commission’s reference room and at <<http://europa.eu.int/rapid/start/c...txt>>). The EC concluded that there are only two Member States where both companies are active, Sweden and Germany. In Sweden, the EC found that both AirTouch and Vodafone have holdings in Europolitan, a mobile telephone operator, but that this shareholding overlap did not raise any competitive concerns. In Germany, the EC found that the merger would have given the merged company control over two of the four operators in the German market, D2 and E-Plus. According to the EC, these firms jointly would have had more than a 40-percent share of the German market. Vodafone agreed to sell its share in E-Plus to remove the EC’s competitive concerns. Vodafone’s sale of its stake in E-Plus eliminated any overlap in the German market for mobile telecommunications.

³⁶ Application at Exhibit 3.

b. International Services

15. AirTouch is currently authorized to resell international switched telecommunications services.³⁷ A wholly-owned subsidiary of AirTouch, AirTouch Cellular, is also authorized to resell international switched telecommunications services.³⁸ In addition, AirTouch is a 50-percent indirect owner of, and general partner in, PrimeCo Personal Communications, L.P., which is currently authorized to resell international switched telecommunications services.³⁹ Vodafone holds no section 214 authorizations. No party filed in opposition to the Applicants' request that we transfer control of AirTouch's international section 214 authorizations to Vodafone. We find no basis in this record to conclude that the proposed merger would have anti-competitive effects in any U.S. international services market.

16. Pursuant to section 63.18(h)(1) of the Commission's rules,⁴⁰ Applicants have certified that after the merger Vodafone AirTouch and its subsidiaries will become affiliated with the following foreign carriers: Vodafone Network Pty Limited (Australia); Misrfone Telecommunications Company SAE (Egypt); Vodafone Fiji Limited (Fiji); Panfon SA (Greece); Vodafone Malta Limited (Malta); Vodafone New Zealand Limited (New Zealand); Vodacom Pty Limited (South Africa); Libertel BV (the Netherlands); Celtel Limited (Uganda); and Vodafone Limited (United Kingdom). These affiliations raise the issue of whether it is necessary to impose our international "dominant carrier" safeguards on Vodafone AirTouch and its subsidiaries in their provision of service to any of these affiliated routes. In general, the Commission imposes its international dominant carrier safeguards on a U.S. carrier's provision of service on a particular route where an affiliated foreign carrier has sufficient market power to affect competition adversely in the U.S. market.⁴¹ A U.S. carrier will presumptively be classified as non-dominant on an affiliated route if the carrier demonstrates that the foreign affiliate lacks 50-percent market share in the international transport and local access markets on the foreign end of the route.⁴²

17. Applicants request that Vodafone AirTouch be regulated as a non-dominant international carrier on all routes because each foreign affiliate lacks sufficient market power to affect competition adversely in the U.S. market. Applicants support their claim by stating that each affiliate holds significantly less than a 50-percent market share in the international transport and local access markets on the foreign end of each route. No party disputes Applicants' certifications or other information.

18. There is no evidence in the record, and we are aware of no information, that suggests the certifications and statements made by Applicants with respect to its foreign affiliates are not credible. Therefore, pursuant to section 63.10(a)(3) of the Commission's rules, we grant the Applicants' request to be regulated as non-dominant on all U.S. international routes, including those on

³⁷ AirTouch Communications Inc., FCC File No. ITC-96-564, Public Notice Report No. I-8219 (rel. Dec. 5, 1996).

³⁸ AirTouch Cellular, FCC File No. ITC-94-275, Public Notice Report No. I-6990 (rel. June 24, 1994).

³⁹ PrimeCo Personal Communications, L.P., FCC File No. ITC-96-550, Public Notice Report No. I-8218 (rel. Dec. 5, 1996); PrimeCo Personal Communications, L.P., *Order, Authorization and Certificate*, DA 97-699, File No. ITC-96-635 (Int'l Bur., rel. April 10, 1997).

⁴⁰ 47 C.F.R. § 63.18(h)(1).

⁴¹ *See* 47 C.F.R. § 63.10(a)(3); *see also id.* § 63.10(c) (listing international dominant carrier safeguards).

⁴² *See id.* § 63.10(a)(3).

which Vodafone AirTouch will be affiliated with a foreign carrier.⁴³

3. Public Interest Benefits

19. Applicants contend that the proposed merger will generate significant efficiencies.⁴⁴ Applicants argue that the merged company will be able to achieve cost savings through the worldwide procurement of handsets, transmission equipment, and other purchases. Research and development costs will be amortized over a larger subscriber base, lowering the unit costs of introducing next-generation services. Applicants also contend that the merger will result in the adoption of global best practices.⁴⁵ Finally, Applicants argue that the merged company will result in a global footprint that will significantly expand the coverage available for marketing to global accounts. No party contests these assertions. We determine that at least several of these claimed benefits are likely to occur, although we are unable to gauge the relative magnitude of these benefits based on the information in this record.⁴⁶ Largely because of the absence of any risk of public interest harms, we conclude that Applicants have furnished sufficient information regarding prospects for public interest benefits.

4. Executive Branch Concerns

20. The Executive Branch has raised concerns regarding national security and law enforcement in this proceeding, which, pursuant to the public interest analysis articulated in the Commission's *Foreign Participation Order*,⁴⁷ we must consider. In comments filed with the Commission, the Department of Defense ("DOD") states that there are national security and law enforcement issues raised by the proposed merger and transfer of control because it will result in complete foreign ownership of a very large domestic telecommunications provider.⁴⁸ Similarly, in its comments on the proposed merger, the Federal Bureau of Investigation ("FBI"), through the Department of Justice ("DOJ"), voices concern regarding national security, public safety, and law enforcement.⁴⁹

21. In *ex parte* communications, DOD, FBI and DOJ have raised particular concerns relating to the prospective provision by AirTouch of Globalstar satellite services within the United States.⁵⁰ We determine that this merger is not an appropriate forum for addressing such concerns because the core concerns raised by these agencies are not directly or fundamentally affected by the merger. We note, however, that AirTouch must apply for and obtain a facilities-based section 214

⁴³ 47 C.F.R. § 63.10(a)(1), (3) (1998) (providing that a U.S. carrier that is not affiliated with a foreign carrier in a particular country, or that is affiliated with a carrier that lacks sufficient market power in a particular country to affect competition adversely in the U.S. market, shall presumptively be classified as non-dominant).

⁴⁴ Application at Exhibit 2.

⁴⁵ *Id.* at Exhibit 3.

⁴⁶ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,063 ¶157.

⁴⁷ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Report and Order and Order on Reconsideration*, 12 FCC Rcd 23,891 (1997).

⁴⁸ Comments of the Secretary of Defense, filed Mar. 10, 1999, at 2.

⁴⁹ Comments of the Federal Bureau of Investigation, filed Mar. 10, 1999, at 2.

⁵⁰ Letter from Pamela Riley, AirTouch, to Magalie Roman Salas, Secretary, Federal Communications Commission, filed May 28, 1999 (attaching Letter from Gary G. Grindler, Principal Associate Deputy Attorney General, DOJ, to Howard Shapiro, Wilmer, Cutler & Pickering, dated May 27, 1999).

authorization prior to providing any service within the United States using the Globalstar system. Such proceeding would afford an appropriate forum for addressing these concerns.

22. Further, DOD, DOJ, FBI, and AirTouch (on behalf of both itself and Vodafone) have informed the Commission that they have reached an agreement that resolves the national security, law enforcement, and public safety issues raised in the DOD, DOJ and FBI comments other than those relating to the Globalstar system.⁵¹ The parties have submitted a copy of the executed agreement (DOD/DOJ/FBI Agreement) and propose that the Commission impose a specific condition requiring compliance with the DOD/DOJ/FBI Agreement. In brief, the DOD/DOJ/FBI Agreement provides that AirTouch facilities that are part of or are used to direct, control, supervise, or manage all or any part of the domestic telecommunications infrastructure owned, managed, or controlled by AirTouch be located in the United States. Further, control of the domestic telecommunications infrastructure and control over monitoring and diagnosis of problems will be performed in the United States. AirTouch agrees to take reasonable and appropriate measures to prevent improper use of facilities used in the domestic telecommunications infrastructure, specifically with respect to personnel holding sensitive positions, information storage and access, and disclosures to foreign entities. The parties have also agreed to adopt and maintain certain policies with regard to confidentiality and security of electronic surveillance orders and authorizations, orders, legal process, and statutory authorizations and certifications related to subscriber records and information. Finally, the parties have also agreed to implement certain measures requiring personnel security clearances, secure storage facilities, and the prevention of access by unauthorized personnel to secure or sensitive network facilities and offices.

23. We note that the Agreement reflects a unique situation, and contains certain terms that, if broadly applied, would have significant consequences for the telecommunications industry. For example, the Agreement includes a provision requiring operation “exclusively from a facility located in the United States” of any satellite that the Applicants control.⁵² This provision, as well as other provisions in the Agreement, if viewed as precedent for other service providers and potential investors, would warrant substantial further inquiry on our part. Therefore, this Agreement does not establish a precedent for future cases. However, notwithstanding these concerns about the potential implications of some terms of this Agreement, we see no reason to modify or disturb the Agreement of the parties on this matter.

24. In accordance with the request of these parties and the discussion above, we condition our grant of the transfer of control of the AirTouch licenses to Vodafone on compliance with the DOD/DOJ/FBI Agreement, a copy of which is attached hereto as Appendix A.⁵³

III. CONCLUSION

25. Based upon our reviews under sections 214 and 310(d), we determine that this merger will not likely result in harm to competition in any relevant market. We also determine that the proposed merger will likely result in several public interest benefits. We therefore conclude that, on

⁵¹ *Id.*

⁵² See DOD/DOJ/FBI Agreement at Section 5.1.

⁵³ The agencies have filed the DOD/DOJ/FBI Agreement with a formal request that we condition our grant of Applicants’ applications on Applicants’ compliance with the Agreement, and we grant the agencies’ petition. See Petition to Adopt Conditions to Authorization and Licenses, filed June 21, 1999.

balance, Applicants have demonstrated that these transfers serve the public interest, convenience, and necessity. Accordingly, we grant the Applications, subject to the conditions set forth herein.

IV. ORDERING CLAUSES

26. IT IS ORDERED, pursuant to sections 4(i) and (j), 214(a) and (c), 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 214(a) and (c), 309, 310(b) and (d), that the Petition to Deny or Condition and supporting pleadings filed by Karl A. Rinker dba Rinker Communications, and Petition to Deny or Condition Grant of Application filed by Crown Communications L.L.C. ARE DENIED.

27. IT IS ORDERED, that the authorizations and licenses related thereto are subject to compliance with provisions of the Agreement between Vodafone, AirTouch, and the United States Department of Defense, the United States Department of Justice, and the United States Federal Bureau of Investigation, dated June 18, 1999, which Agreement is fully binding upon Vodafone and AirTouch and those subsidiaries, successors, and assigns of both companies that provide telecommunications services within the United States and that are not controlled by a U.S. entity. Nothing in the Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. §§ 222(a) and (c)(1) and the Commission's implementing regulations.

28. IT IS ORDERED, that the Petition to Adopt Conditions to Authorization and Licenses, filed by DOD, DOJ and the FBI on June 21, 1999, IS GRANTED.

29. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to sections 4(i) and (j), 214(a) and (c), 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(b), 310(d), that the applications filed by AirTouch Cellular Systems, Inc. and Vodafone Group, Plc. in the above-captioned proceeding ARE GRANTED subject to the above conditions.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Sugrue
Chief, Wireless Telecommunications Bureau