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EX PARTE OR LATE FILED

July 8, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

William S. Caton
Acting Secretary
Federal Communications Commission
1919 M St. NW
Washington, D.C. 20554

Re: EX PARTE in Merger of British Telecommunications plc and MCI Communications Corporation, General Docket No. 96-245

Dear Mr. Caton:

On July 7, 1997, the United Stated Department of Justice ("DOJ") announced that it had concluded its review of the above-captioned merger. Enclosed are the DOJ's supporting motion to modify the existing consent decree governing BT's 20 percent investment in MCI, DOJ's supporting memorandum, the Modified Final Judgment and explanation of procedures. I have also provided a copy of the DOJ's press release announcing its decision.

Sincerely,

Mary L. Brown

Mary L. Brown

cc: Kerry Murray
Diane Cornell
Peter Cowhey
John Nakahata
Tom Boasberg
James Casserly
Jane Mago
Rudy Baca

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Department of Justice

FOR IMMEDIATE RELEASE
MONDAY, JULY 7, 1997

AT
(202) 616-2771
TDD (202) 514-1888

JUSTICE DEPARTMENT ASKS COURT TO MODIFY AND EXTEND PREVIOUS BRITISH TELECOM/MCI SETTLEMENT AFTER REVIEWING NEW DEAL

Justice Department Acts to Prevent Discrimination Against Competitors

WASHINGTON, D.C. -- The Department of Justice today asked the U.S. District Court in Washington, D.C. to modify and extend the existing 1994 settlement involving British Telecommunications plc and MCI Communications Corp., to ensure that British Telecom's proposed acquisition of MCI does not disadvantage competitors and raise prices for consumers.

The existing consent decree, entered in September, 1994, settled the Department's charges that British Telecom's acquisition of an initial 20 percent interest in MCI violated merger laws.

In its original complaint, the Department alleged that British Telecom could use its existing market power in the United Kingdom to disadvantage MCI's competitors in the market for telephone calls between the U.S. and the U.K., resulting in higher prices to U.S. consumers making such international calls.

(MORE)

"The existing settlement has worked well to prevent the anticompetitive effects the Department feared would result from the initial transaction," said Joel I. Klein, Acting Assistant Attorney General in charge of the Department's Antitrust Division. "A lot has happened in this dynamic industry since 1994, but British Telecom still has market power in the U.K. We need to make certain changes to the consent decree and extend it to ensure that U.S. consumers continue to enjoy the lower prices and better service associated with competition on international routes."

British Telecom, headquartered in London, England, is the dominant carrier in the U.K. and one of the largest providers of telecommunications services in the world, with 1996 revenues of $23.3 billion. MCI, of Washington, D.C., is the second largest U.S. telecommunications company and the world's third largest international carrier, with 1996 revenues of $18.5 billion.

The original 1994 settlement contained provisions designed to prevent British Telecom from using its market power in the U.K. to discriminate in favor of MCI, or in favor of a British Telecom/MCI joint venture, at the expense of competing carriers in the market for international telecommunications services between the U.S. and the U.K., and around the world.

The proposed modified final judgment filed today in U.S. District Court in Washington, D.C., retains and, in some cases, strengthens these protections to take into account the full

(MORE)

integration of British Telecom and MCI, as well as changed market conditions. Specifically, it requires the newly formed company to increase the amount of information it reports to the Department to facilitate the detection of specific instances of discrimination, and to support any complaints U.S. competitors might make to the relevant U.S. and U.K. regulatory agencies.

The proposed modified final judgment also revises the confidentiality provisions of the existing decree to reduce the risk that confidential, competitively sensitive information that British Telecom obtains in the course of its relationships with other U.S. telecommunications providers is not disclosed to MCI through the corporate parent, Concert plc.

The proposed filing also extends the time period of the existing decree and enhances the Department's ability to monitor and enforce compliance with the decree by naming the newly formed company as a party to the decree, and giving the Department access to its documents and personnel.

While both the U.S. and U.K. governments have enacted reforms since the original settlement was entered that alter the status of competition for international traffic between the U.S. and the U.K., British Telecom still maintains substantial market power in local and domestic long distance services in the U.K.

The proposed modifications to the final judgment, which require court approval, will continue to protect U.S. consumers from the possibility that the newly formed company, using British

Telecom's local service monopoly, would harm competition in the markets for telephone calls between the U.S. and the U.K., and for worldwide telecommunications services.

During the course of its investigation, the Department also considered whether the newly formed company could deter or delay the entry of new facilities-based competitors on the U.S.-U.K. route by refusing to make available to new entrants certain necessary facilities, such as transatlantic cable capacity, or U.S. backhaul services. Modification of the existing final judgment is not required to ensure that new entrants have access to transatlantic cable capacity, however, because the European Commission has required, as a condition of its approval of the merger, that British Telecom divest all the overlapping cable capacity it will obtain through the proposed merger.

In addition, under a procedure outlined in the 1994 settlement, the Department has referred to the Federal Communications Commission the issue of whether regulatory action is appropriate to ensure that new entrants have access to U.S. backhaul facilities.

At the same time, however, the Department will continue to investigate new entrants' access to backhaul facilities. And, the parties have further agreed not to contest further action by the Department on this issue, if such action is necessary.

The proposed modifications to the decree will be published in the Federal Register, together with the Department's

supporting memorandum. Any person may submit written comments on the proposed decree modifications to Donald J. Russell, Chief, Telecommunications Task Force, Antitrust Division, U.S. Department of Justice, 555 Fourth Street, N.W., Washington, D.C. 20001.

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97-284

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MCI COMMUNICATIONS CORPORATION and BT FORTY-EIGHT COMPANY ("NewCo"), Defendants.	))))))))))))	Civil Action No. 94-1317 (TFH) Filed:

MOTION OF THE UNITED STATES FOR MODIFICATION OF THE FINAL JUDGMENT

Plaintiff, the United States of America, moves this Court to modify the Final Judgment in the above-captioned matter. Plaintiff's motion is based on the following grounds:

1. On June 15, 1994, the United States filed its complaint in the above-captioned case alleging that the acquisition by British Telecommunications plc ("BT") of a 20% ownership interest in MCI Communications Corporation ("MCI") created an incentive for BT, using its existing market power in the United Kingdom, to favor MCI at the expense of other United States international carriers in the market or markets for international telecommunications services in violation of Section 7 of the Clayton Act, 15 U.S.C. §18. The complaint also alleged that the formation of a joint venture between BT and MCI ("NewCo") to provide seamless global network services to multinational corporations created an incentive for BT to use its dominance in the UK to favor the joint venture at the expense of other global network service providers in the provision

of the UK segment essential to any seamless global network.

2. The Final Judgment, filed contemporaneously with the complaint and entered by the Court on September 29, 1994 after a Tunney Act review, contains provisions designed to reduce the risk that BT would use its market power to discriminate in favor of MCI or the joint venture. The Final Judgment further provides that the Department may seek a modification of the Final Judgment in order to prevent future discrimination. The potential discrimination need not have been forseen at the time the Complaint in this matter was filed. If a motion for modification is uncontested, it is analyzed under a public interest standard. After the Final Judgment was entered, BT and MCI consummated BT's 20% acquisition and formed the joint venture, NewCo.

3. In November 1996, BT and MCI entered into a Merger Agreement and Plan of Merger pursuant to which MCI will be completely merged into a wholly-owned subsidiary of BT. The new parent company, BT, will then be renamed Concert, plc.

4. Both the US and UK governments have enacted reforms since the Final Judgment was entered that alter the status of competition for international traffic between the US and the UK. Despite these changes, however, BT still maintains substantial market power in local and domestic long distance services in the United Kingdom and BT's dominance in these markets is unlikely to erode swiftly.

5. Accordingly, certain modifications to the Final Judgment aimed at deterring and detecting discrimination need to be retained and, in some cases, strengthened in order to ensure that the resulting full integration of BT and MCI and changed market conditions will not impair the effectiveness of any protections afforded by the existing decree.

6. The proposed Modified Final Judgment, filed contemporaneously herewith, sets

forth the specific modifications agreed to among the parties. Plaintiff's Memorandum In Support Of Modification demonstrates that the proposed modifications are necessary to address the concerns raised by the full integration of BT and MCI as well as certain regulatory changes and, therefore, are in the public interest.

7. Defendants have authorized Plaintiff to state that they concur in this motion.

8. The Department does not believe that this modification is subject to the Tunney Act. Because of the important issues involved, however, the Department intends to follow the comment procedures outlined in the attached Explanation of Procedures. After completion of the procedures, the Department will file another motion requesting that the Court enter the attached Modified Final Judgment.

Respectfully submitted,

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Dated: July 7, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MCI COMMUNICATIONS CORPORATION and BT FORTY-EIGHT COMPANY ("NewCo"), Defendants.	))))))))))))	Civil Action No. 94-1317 (TFH) Filed:

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF MODIFICATION OF THE FINAL JUDGMENT

The United States submits this memorandum in support of its motion to modify the Final Judgment entered in the above-captioned case. Contemporaneously with filing its motion and memorandum, the United States is also filing a proposed Modified Final Judgment and a Stipulation wherein the parties have agreed to be bound by the provisions of the Modified Final Judgment following consummation of the merger and pending entry of the Modified Final Judgment by the Court. A number of factual and legal events have occurred since the entry of the existing Final Judgment, including an agreement among the parties to enter into a full merger. The proposed modifications ensure that these events do not impair the effectiveness of the existing Final Judgment, and are in the public interest.

I. Introduction and Background

On June 15, 1994, the United States filed its complaint in the above-captioned case. The complaint alleged, *inter alia*, that the acquisition by British Telecommunications plc ("BT") of a 20% ownership interest in MCI Communications Corporation ("MCI") created an incentive for BT, using its existing market power in the United Kingdom, to favor MCI at the expense of other United States international carriers in the market or markets for international telecommunications services between the United States and the United Kingdom. *See* Competitive Impact Statement of the United States Department of Justice (hereinafter "CIS"), dated June 15, 1994, at 11. The complaint also alleged that the formation of a joint venture between BT and MCI to provide seamless global network services to multinational corporations created an incentive for BT to use its dominance in the UK to favor the joint venture at the expense of other global network service providers in the provision of the UK segment essential to any seamless global network. *See* CIS at 14-17.

The complaint recognized that BT could effectuate this discrimination in numerous ways, including: 1) offering MCI and the joint venture interconnection and other telecommunications services on more favorable terms and conditions than MCI's competitors and/or providing MCI and the joint venture with advance notice of planned changes to BT's network; 2) providing MCI and the joint venture with confidential, competitively sensitive information that BT obtains from other telecommunications providers through BT's correspondent relationships and/or through BT's provision of interconnection or other telecommunications services within the United Kingdom; and 3) discriminating against other carriers by diverting some or all of BT's international switched traffic between the United Kingdom and the United States to MCI or the

joint venture, outside the correspondent system.[1] If other carriers could not respond to this diversion by diverting their own traffic, they would be left with larger net settlement payments (due to the loss of BT's offsetting minutes of traffic), placing them at a competitive disadvantage to MCI. It would also give BT an incentive to keep the US-UK accounting rate high. *See id.*

The Final Judgment, filed contemporaneously with the complaint and entered by the Court on September 29, 1994 after a Tunney Act review, contains three categories of provisions designed to remedy the anticompetitive effects of the partial acquisition: 1) transparency provisions[2]; 2) confidentiality provisions[3]; and 3) a provision designed to address the diversion issue.[4] These provisions were specifically designed to diminish the risk that BT would successfully act on its incentive to use its market power to discriminate in favor of MCI or the joint venture. After the Final Judgment was entered, BT and MCI consummated BT's 20%

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[1] Under the correspondent system, carriers from one nation set up correspondent relationships with carriers from other nations to facilitate the movement of traffic between their respective countries. The negotiated rate at which such traffic is carried is called the Accounting Rate. In order to prevent foreign monopoly carriers from discriminating against United States carriers by threatening to send all of their traffic to any one US carrier unless the other carriers accepted a higher accounting rate (a practice known as "whipsawing"), the FCC promulgated the International Settlements Policy or ISP. Pursuant to the ISP, each carrier must pay ½ of the accounting rate, known as the Settlement Rate, for the completion of calls on the corresponding carrier's network; all US carriers must be charged the same accounting rate (non-discrimination); and traffic must be returned to a particular US carrier in proportion to the traffic received from that US carrier (proportionate return). Because the US sends more minutes of traffic to the UK than UK carriers send to the US, US carriers end up with a net settlement outpayment to UK carriers equal to the settlement rate multiplied by the imbalance of minutes.

[2] *See* Sections II.A.1-5.

[3] *See* Sections II.B-D.

[4] *See* Section II.E.

acquisition and formed the joint venture, NewCo.[5]

The Final Judgment also specifically provided a mechanism for allowing modifications of the judgment to expand, alter or reduce its terms in order for the United States to maintain the status quo or to prevent new forms of discrimination that would result in harm to United States consumers.[6] Under the terms of the decree, the event or change that triggers the need for the modification need not have been foreseen at the time the Final Judgment was entered. Such an event could include new forms of discrimination that were not anticipated at the time the Final Judgment was entered and thus, not referenced or described in the CIS. *See* CIS at 32-33, 38.[7] Whether based on foreseen or unforeseen circumstances, a modification that is uncontested is reviewed under a public interest standard. *Id.* at 31-32. The modifications proposed herein have been agreed to by all parties, and this memorandum, therefore, analyzes the proposed modifications under a public interest standard.

II. Factual And Legal Events Occurring Since The Final Judgment Was Entered

The United States seeks to modify the Final Judgment, in part, because BT and MCI have now agreed to enter into a full merger. In November 1996, a Merger Agreement and Plan of Merger was executed pursuant to which MCI shall be merged into a wholly-owned subsidiary of

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[5] The joint venture ultimately came to be known as Concert Communications Company, *not* to be confused with Concert plc (the proposed name of the fully merged company as discussed below).

[6] The modification provision of the Final Judgment also allows the parties to seek changes in order to prevent undue hardship to them.

[7] Before concluding that discrimination against any particular competitor of MCI or NewCo necessitates modification of the Final Judgment, however, the Department would ordinarily first inquire whether the injured party had availed itself of existing regulatory remedies in the United States or the United Kingdom. *See* CIS at 32-33.

BT. The new parent company, BT, will be renamed Concert plc. Although the Department thoroughly analyzed all of the competitive consequences associated with BT's initial 20% acquisition of MCI, the Department undertook an evaluation of the changes in market conditions since 1994 in order to determine whether a modification of the existing decree was appropriate under the circumstances.

In addition to the full merger of BT and MCI, both the US and UK governments have enacted reforms since the Final Judgment was entered that alter the status of competition for international traffic between the US and the UK. These changes were designed to move international telecommunications services from the highly regulated correspondent system characterized by few providers (many of which have substantial market power in their home countries) and above-cost prices, to a more competitive environment. As discussed in more detail below, these regulatory changes and, in particular, the granting of International Simple Resale ("ISR") licenses[8], have been somewhat effective in lowering the US-UK accounting rate. Despite these changes, however, the US-UK accounting rate is still above-cost and, thus, BT's incentive to discriminate against its and MCI's competitors still exists.

In addition to BT's incentive to discriminate, concerns about BT's ability to discriminate against its and MCI's competitors also still exist. BT maintains substantial market power in local and domestic long distance services in the United Kingdom. Currently, BT has an 80% share of switched long distance revenues in the UK. Although cable companies have made some inroads

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[8] International Simple Resale or ISR means the use of telecommunications facilities to carry international telecommunications traffic without measuring usage (e.g., over private leased lines), where such traffic is carried over the public switched network in the nation where it originates and where it terminates.

into the local market, BT maintains a 91% share of local revenues. BT's position in these markets is unlikely to erode swiftly.[9] For the foreseeable future, international carriers will be required to obtain interconnection and other services from BT in order to terminate calls in the UK.

As a result of its new analysis, the Department has concluded that provisions of the Final Judgment aimed at deterring and detecting discrimination need to be retained and, in some cases, strengthened. In addition, certain modifications are required in order to ensure that the resulting full integration of BT and MCI will not impair the effectiveness of the protections afforded by the existing decree.

III. Explanation of The Proposed Modifications

BT's merger with MCI, combined with the regulatory changes outlined above, justify modifying certain substantive and procedural provisions of the existing Final Judgment. These proposed modifications are discussed seriatim.

A. Transparency Provisions

Sections II.A.1-6 of the existing Final Judgment require MCI and NewCo (the joint venture of BT and MCI that provides global network services), to report certain information, including but not limited to prices, terms and conditions of interconnection and other arrangements between MCI, NewCo and BT, data concerning the quality of service provided by BT to MCI and NewCo, and the total minutes of traffic that MCI sends to and receives from BT in each accounting rate category. *See* CIS at 18-26. These provisions were included to allow

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[9] These figures have not changed substantially since the complaint was filed in this case. *See* CIS at 7-8. Although UK regulators have taken steps to encourage competition, they do not require BT to unbundle local loops or to provide dialing parity and/or presubscription to competing providers. Such requirements have been imposed in the US to speed the introduction of competition into telecommunications markets.

principal competitors of MCI and the joint venture (who have signed confidentiality agreements with the US government) to monitor whether BT is discriminating in favor of these entities and to provide evidence that could be used in support of complaints to the relevant US or UK government agencies.

The proposed Modified Final Judgment retains all of the transparency provisions of the existing Final Judgment with two notable modifications. First, in addition to MCI, the proposed Modified Final Judgment directs the ultimate corporate parent, Concert plc, to report the requisite information.[10] This ensures that the required information is reported regardless of what entity within Concert maintains it and whether Concert in the future undergoes substantial reorganization. The second modification requires MCI and Concert, in addition to reporting the total number of minutes that MCI sends to and receives from BT, to report information regarding time-of-day, point-of-termination and type of transmission facility. This information is designed to enable competitors to more easily detect a particular type of discrimination. Given BT's ownership of MCI there is a concern that BT could discriminate by sending *better* traffic (i.e., traffic that is less expensive to terminate and, therefore, more profitable) to MCI, thus disadvantaging MCI's competitors. The Modified Final Judgment also requires the parties to report this information on a semiannual, as opposed to annual, basis and no later than 60 days after the end of the six month period being reported.

Under a separate provision, defendants have also agreed to provide notification to the

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[10] Concert plc, the ultimate parent, is thus named as a party to the Modified Final Judgment. Because Concert plc is defined therein to include NewCo, and because Concert plc has agreed to assume liability for certain acts of NewCo, NewCo is deleted as a separately named party to the Modified Final Judgment.

United States prior to any corporate reorganization that would combine the functions of or otherwise eliminate the separate identities of MCI, NewCo and BT. Such reorganizations may make it difficult for the parties to accurately report the data required under the transparency provisions or make the data reported insufficient to detect discriminatory conduct. The provision further establishes a procedure whereby the United States can obtain additional information prior to any such reorganization in order to evaluate the impact of such reorganization on the Modified Final Judgment and, if required, to seek further modifications so as to maintain the viability of the Modified Final Judgment.[11]

B. Confidentiality Provisions

Sections II.B, II.C and II.D of the existing Final Judgment prohibit MCI and NewCo from *receiving* confidential, competitively sensitive information that BT receives in the course of its correspondent relationships with other United States telecommunications providers and/or in the provision of interconnection or other telecommunications services within the United Kingdom. This prohibition made sense in the context of BT's 20% acquisition because MCI remained an independent, fully accountable company.

After the complete merger of MCI into BT, concerns about the inappropriate use of such confidential information continue to exist. For a number of reasons, however, the complete merger of MCI into BT limits the enforceability of the existing provisions. First, after the merger, Concert plc, not MCI, will be the ultimate decision-maker. Confidential information could flow from BT to MCI and the joint venture through the corporate decision-maker, Concert. Second, after the merger, the defendants have proposed to transfer the responsibility for maintaining BT's

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[11] *See* Section VII.B of the proposed Modified Final Judgment.

correspondent relationships with other United States telecommunications carriers to the subsidiary with responsibility for the merged entity's global network services business. The threat of misuse of confidential information is exacerbated when both wholesale and retail functions are housed in the same subsidiary. Third, as discussed above, there is no guarantee that either MCI or NewCo will be maintained as separate subsidiaries from BT post-merger. The merged entity could thwart the existing confidentiality provisions by reorganizing in such a way as to combine the functions of, or otherwise eliminate, the separate identities of BT, MCI and NewCo.

The proposed Modified Final Judgment redresses these problems by prohibiting the parties from inappropriately using any confidential information they obtain from competitors. Specifically, the ultimate parent, Concert, as well as MCI, is prohibited from using any confidential, competitively sensitive information that BT (or any entity performing the same functions as BT) receives through its correspondent relationships and/or as a result of BT's provision of interconnection or other telecommunications services in the United Kingdom, for any purpose other than the purpose for which such information is obtained (or for which BT is otherwise authorized to use such information by the entity from whom such information is obtained) or to disclose such information to any person other than those persons, including supervisory persons, with a need to know such information.[12]

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[12] The Modified Final Judgment also requires the parties to provide the Department with advance notice of any subsequent reorganization that would combine the functions of, or otherwise eliminate, the separate identities of BT, MCI and NewCo. The provision also allows the Department to seek additional information prior to any such reorganization in order to determine whether it would impair the effectiveness of any of the confidentiality provisions and, if so, to seek further modifications of the decree.

C. Diversion Provision

The complaint recognized that one of the ways BT could discriminate against MCI's competitors was by diverting some or all of its international switched traffic over private lines (a practice known as "International Simple Resale" or "ISR") to MCI. Because traffic sent over ISR is outside of the correspondent system, it is not subject to the FCC's rules regarding non-discrimination and proportionate return.[13] If other carriers could not respond to this diversion by diverting their own traffic, they would be left with larger net settlement deficits (due to the loss of BT's offsetting minutes), hence higher costs. BT's ability to divert "could also give BT an increased incentive to keep international accounting rates above costs." CIS at 13-14. The existing Final Judgment sought to ameliorate these anticompetitive consequences by prohibiting BT and MCI from engaging in ISR until, *inter alia,* a selected list of other international telecommunications providers were granted ISR licenses by the UK government. The list of providers was included in Annex A to the existing Final Judgment.

Since the existing Final Judgment was entered, all of the international telecommunications providers listed in Annex A have been granted ISR licenses by the UK government. The grant of these licenses alleviates concerns that BT and MCI could bypass the correspondent system on the US-UK route by sending traffic to the US over ISR when other US carriers could not, thereby gaining an unfair competitive advantage. Because this condition has been fulfilled, it has no

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[13] One of the problems with the ISP is that accounting rates are significantly above-cost. Prior to December 1996, only BT and Mercury Communications, Ltd. were allowed to provide the corresponding half-circuit in the UK. Since US carriers had to correspond with BT or Mercury in order to terminate traffic in the UK, they had no choice but to accept whatever accounting rate that BT and Mercury were offering. ISR was devised as a way of bypassing the ISP and thus, exerting downward pressure on the accounting rate.

continuing legal effect and therefore, is deleted in the proposed Modified Final Judgment.

D. Visitorial Provisions

Section V of the Final Judgment allows the Department of Justice to monitor defendants' compliance by giving the Department access to records and documents of the defendants and also access to their personnel for interviews or to take sworn testimony. Under the original Final Judgment only MCI and NewCo were parties to the decree. In the Modified Final Judgment, Concert has been made a party thus necessitating access by the Department to all of Concert's documents and personnel with information related to compliance issues. Consequently, where applicable, Concert has replaced NewCo in the visitorial provisions of the Modified Final Judgment and language limiting the scope of these provisions to documents and information relating only to NewCo has been deleted. As modified, the visitorial provisions now grant the United States access in the United States to Concert's documents, and personnel, wherever located, for the purposes of determining or securing compliance with the Modified Final Judgment.

E. Term of Decree

The Final Judgment was entered on September 29, 1994 and by its terms would have expired on September 29, 1999. The Modified Final Judgment will expire 10 years after the entry of the existing Final Judgment. Although there have been significant changes in the regulatory scheme in the UK and new entry into some segments of the UK telecommunications industry, BT still retains a substantial share of the UK local telecommunications market and is expected to retain its existing market power for a significant period of time. Given BT's continued dominance in the UK as well as its increased interest in MCI, the term of the decree was extended in order to

ensure that US consumers were protected from any anticompetitive consequences of the merger until the risk of discrimination by the defendants has been dissipated by the development of competitive markets in the UK.

IV. Other Concerns Related to the US-UK Route

In the course of the investigation of the proposed merger of BT and MCI, some competitors identified potential new ways in which the merged entity could discriminate and therefore lessen competition in the market for international traffic between the US and UK. Specifically, competitors have argued that the merged entity could deter or delay new facilities-based competitors on the US-UK route by refusing to sell requisite facilities to new entrants. These facilities include capacity on the transatlantic cable as well as interconnection and backhaul[14] services at both ends of the circuit. For the reasons discussed below, the Department has concluded that it is not necessary at present to modify the Final Judgment to resolve these issues.[15]

With respect to cable capacity, BT and MCI are major owners of capacity on transatlantic cables. Presently, BT and MCI are the first and third largest owners of capacity on the eastern

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[14] Backhaul can be defined as the transport of traffic from the international cable head-end to a point of interconnection with a carrier's domestic facilities.

[15] These concerns were not mentioned in the earlier CIS or included in the Complaint filed in June 1994, because, at that time, no one other than BT or Mercury could own facilities on the UK-end of the US-UK transatlantic route for the purposes of providing US-UK telecommunications services. On December 19, 1996, the UK government granted 45 new international facilities licenses ("IFLs") thus allowing, for the first time in history, carriers other than BT and Mercury to become facilities-based providers of international telecommunications services in the UK. The UK indicated that it anticipated that these new licenses would put "further downward pressure on international rates." *See* Press Notice of the United Kingdom's Department of Trade and Industry, dated December 19, 1996, attached hereto as Exhibit A.

end of TAT12/13, the main cable used to provide international telecommunications services between the US and UK.[16] Indeed, BT controls approximately 43% of the eastern end capacity of the TAT 12/13 cable and MCI controls approximately 13%. As a result of the merger, the combined entity will own over 56% of this capacity.

The merged entity's increased ownership of TAT 12/13 cable capacity potentially strengthens its ability to disadvantage potential competitors by denying them access to needed facilities. Given the current shortage of capacity on the transatlantic cables,[17] such denials would be especially detrimental to the new IFLs recently licensed by the UK government who are currently seeking to enter the US-UK international route. As discussed above, it is this entry that is expected to create downward pressure on the US-UK accounting rate.

Modification of the existing Final Judgment is not required to prevent Concert from delaying or deterring IFLs access to the TAT12/13 cable, however, because on May 14, 1997, the European Commission ("EC") required, as a condition of its approval of the merger, that BT

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[16] TAT 12/13 is the largest transatlantic cable and utilizes state-of-the-art self-restoring technology. For these reasons, it is the most desirable cable for the transmission of US-UK international traffic.

[17] On December 20, 1996, the day after the international facilities licenses were granted, MCI put in a demand for 252 circuits on the TAT12/13 cable. MCI's purchase triggered other co-owners' standing orders (BT, for instance, received 155 circuits and AT&T acquired 205), exhausting the TAT12/13 cable capacity and foreclosing access to TAT12/13 cable capacity to all but a few IFLs.

The transatlantic capacity shortage is expected to be a short-term problem. A new planned cable, Gemini, is projected to come into service in March 1998 (the southern leg) and September 1998 (the northern leg). Moreover, the TAT 12/13 co-owners recently voted to deploy wave division multiplexing, which will result in a doubling of the capacity of the existing TAT 12/13 cable. Finally, another new cable known as Atlantic Crossing #1 is also under development. The two legs of the Atlantic Crossing #1 are planned to begin service in May 1998 and November 1998, respectively.

make TAT12/13 cable capacity available to certain of these IFLs.[18] Under this condition, BT is required to divest all of the capacity it obtained through its merger with MCI. The Department believes that this divestiture will relieve any potential problem associated with TAT12/13 cable capacity shortages, and BT's and MCI's increased control over existing capacity.

With respect to interconnection and backhaul, concerns have also been raised both with the Department and with the FCC about the availability of backhaul in the US.[19] Entrants seeking to provide international telecommunications services between the US and the UK may have difficulty in obtaining US backhaul facilities as currently, there are only three entities that own backhaul facilities from the TAT12/13 cable head-ends located in the US: AT&T, MCI and Sprint. However, the Department believes that it is appropriate to allow the FCC to evaluate this issue in the first instance. As the Department stated in its CIS, if it subsequently received complaints about potential discrimination, it would not seek to modify the existing Final Judgment unless the injured parties first sought relief from the appropriate regulatory agency. *See* CIS at 32-33. This condition was included in order to minimize the risk that the Final Judgment would

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[18] *See* Statement of the European Commission re: No. IP/97/406, dated May 14, 1997, attached hereto as Exhibit B.

[19] During the course of its investigation, the Department also examined interconnection in the US as well as interconnection and backhaul from the TAT12/13 cable head-end located in the UK in order to determine whether any of these facilities constitute bottlenecks through which the merged entity could exert its market power to deter or delay new entry. After conducting numerous interviews with the industry as well as US and UK regulators, the Department is satisfied at this time that the reporting requirements of the decree, along with regulations currently or soon to be put into place in the US and the UK, are sufficient to alleviate any competitive concerns raised with respect to the merged entity's control over any of these facilities. Accordingly, the Department proposes taking no further relief in this proposed Modified Final Judgment with respect to interconnection in the US or the UK or backhaul from the TAT12/13 cable head-end located in the UK.

contain provisions that were inconsistent with regulatory requirements in the US or the UK.

Accordingly, the Department is not seeking to modify the decree at this time in order to redress potential concerns associated with backhaul facilities in the US. Rather, the Department will continue its investigation of the extent and nature of the problem, if any, raised by the merged entity's control of backhaul facilities in the US. If the Department later concludes that the merged entity could discriminate against new entrants by denying or delaying IFLs access to backhaul facilities in the US and that these concerns are not alleviated by regulatory conditions placed on the parties by the FCC, the Department will seek a further modification of the Final Judgment.[20] The parties have agreed that they will not contest a modification that requires MCI to sell backhaul capacity, equivalent in quantity to the transatlantic capacity which the parties are required to offer pursuant to the EC's order, on reasonable terms and conditions, to certain IFLs or to those corresponding therewith.[21]

V. Modification Is In The Public Interest

Pursuant to Section VII of the Final Judgment, an uncontested motion to modify the Final Judgment "shall be granted if the proposed modification is within the reaches of the public interest." *See, e.g., United States v. Western Electric Co.*, 993 F.2d 1572, 1576 (D.D.C. 1993) (*citing United States v. Western Electric Co.*, 900 F.2d 283, 307 (D.D.C. 1990) (hereinafter *Triennial Review*)). In the context of an uncontested motion to modify an existing consent

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[20] Again, as with the transatlantic cable, any problem with backhaul capacity is expected to be short-term. New entry into the US backhaul market could occur in 2-3 years.

[21] *See* Letter from Anthony C. Epstein to Yvette Benguerel, dated July 1, 1997, and Letter from David J. Saylor and Anthony C. Epstein to Yvette Benguerel, dated July 2, 1997, attached hereto as Exhibits C and D, respectively.