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

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

MEMORANDUM OPINION AND ORDER

Adopted: August 21, 1997

Released: September 24, 1997

By the Commission: Commissioner Chong issuing a separate statement.

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I. INTRODUCTION

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

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

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

¹ 47 U.S.C. §§ 214(a), 310(d) (1997).

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

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

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

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

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

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

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

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

⁷ 15 U.S.C. § 18.

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

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

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

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

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

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

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

¹¹ *See supra* ¶ 3.

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

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

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

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

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

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

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

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

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

Section 271 of the Communications Act.¹⁶ Even though there is uncertainty as to how quickly changes in the domestic and international regulatory and market environments will occur, we make these assumptions so as to attempt to examine the likely effects of the merger on competition that may be just beginning to develop or, in some cases, may not yet be permitted to develop.¹⁷ We then evaluate the competitive effects of the proposed merger on relevant markets. In particular, we examine whether the merger would consolidate or eliminate firms possessing significant assets or capabilities in particular relevant markets.

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

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

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

¹⁶ 47 U.S.C. § 271 (1997).

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

¹⁸ *Id.* at ¶¶ 13-14.

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

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

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

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

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

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

15. The merger is also likely to enhance competition in the U.S. local exchange markets by strengthening MCI's position as an entrant. Through the merger, MCI will gain access to BT's financial and technical resources. MCI's entry in local exchange markets is

²⁰ *Id.* at ¶ 15.

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

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

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

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

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

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

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

II. BACKGROUND

A. The Applicants

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

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

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

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

B. The Applications

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

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

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

Russia, France, the Netherlands and Gibraltar); *Order, Authorization and Certificate*, 12 FCC Rcd 1985 (Int'l Bur., Telecom. Div., 1997) (authority to provide facilities-based services between the United States and France). In addition, BTNA has applications pending before the Commission to provide facilities-based service between the United States and the United Kingdom as a non-dominant carrier. BT North America Inc., Application for Section 214 Authority, ITC 96-439 (filed Aug. 2, 1996); Motion to be Reclassified as a Non-dominant Carrier for U.S.-U.K. Service, ISP 96-007-ND (filed Aug. 2, 1996).

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

²⁷ *Id.* at 6-7.

24. The Department of Justice (DoJ) has conducted its own review of the proposed merger under its antitrust responsibilities. On July 7, 1997, DoJ signalled its approval of the BT/MCI merger with its filings of several documents with the U.S. District Court for the District of Columbia.²⁸ The *Proposed MFJ* modifies the Final Judgment entered by the Court on September 29, 1994,²⁹ which allowed BT to hold a 20 percent ownership interest in MCI. Although acknowledging that both the U.S. and U.K. Governments have enacted reforms designed to encourage competition on the U.S.-U.K. route, DoJ found that BT retains the ability and the incentive to discriminate against unaffiliated U.S. carriers. Consequently, DoJ proposed certain modifications of the Final Judgment.³⁰ Briefly summarized, the *Proposed MFJ*: (1) modifies and strengthens the parties' existing reporting requirements; (2) prohibits the new Concert and MCI from using any confidential, competitively sensitive information that BT receives through its correspondent relationships and/or as a result of BT's provision of interconnection or other telecommunications services in the United Kingdom for any purpose other than the purpose for which such information is obtained, or to disclose such information to any person other than those persons with a need to know such information; and (3) extends the term of the decree until ten years after the entry of the existing Final Judgment (September 29, 2004).³¹

C. Petitioners and Commenters

25. On December 10, 1996, the International Bureau released a public notice inviting public comment regarding BT/MCI's transfer of control applications.³² On January

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

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

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

³¹ *Proposed MFJ* at 2-10, 21.

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

24, 1997, three parties filed petitions to deny the proposed merger³³ and twelve parties filed comments generally asking the Commission to impose certain conditions on the merged entity.³⁴ The petitioners and commenters include competitors of MCI in the U.S. long distance and international services markets, current and potential U.S. and foreign carrier competitors of BT in the United Kingdom and Europe, BOCs in U.S. local exchange markets MCI seeks to enter, video programmers and distributors, and Executive Branch agencies. On February 24, 1997, BT/MCI and the U.K. Government responded to these petitions and comments.³⁵ On March 24, 1997, ten parties filed final replies.³⁶

D. *BT/MCI I*

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

³³ Bell Atlantic filed a petition to deny. Time Warner, Inc. (Time Warner) and PRIMESTAR Partners L.P. (PRIMESTAR) also filed petitions to deny or condition grant of BT/MCI's application, which were subsequently withdrawn. Letter from Arthur H. Harding, Counsel for Time Warner to William F. Caton, Acting Secretary, FCC (Aug. 14, 1997) (*Time Warner Letter*); Letter from Benjamin J. Griffin, Counsel for PRIMESTAR to William F. Caton, Acting Secretary, FCC (July 16, 1997) (*PRIMESTAR Letter*).

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

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

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

³⁷ 47 U.S.C. § 310(b)(4).

MCI over competing U.S. carriers, and we therefore imposed certain conditions on the investment.³⁸

27. In May 1995, MCI requested authority to increase the level of its foreign-owned capital stock from 28 to 35 percent. In an order granting MCI's petition, the International Bureau found that the additional owners were passive and widely dispersed investors and thus would have neither the interest nor the ability to control MCI.³⁹

III. LEGAL STANDARDS

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

³⁸ *BT/MCI I*, 9 FCC Rcd at 3965-72.

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

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

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

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

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

conditions modifying the merger allow us to conclude that the transaction is in the public interest, we decline to exercise our Clayton Act authority in this case.⁴⁴

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

30. The Commission's analysis of the effect of the transfer on competition is informed by antitrust principles,⁴⁷ but not limited to the scope of the antitrust laws.⁴⁸ The

review pending (BAMS/NYNEX).

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

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

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

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

competitive analysis applied under the public interest standard is necessarily broader than the standard applied to ascertain violations of the antitrust laws.⁴⁹

31. In November 1995, subsequent to the *BT/MCI I* decision, we adopted new foreign carrier market entry rules and safeguards in our *Foreign Carrier Entry Order*. Because MCI seeks to transfer control of its Section 214 authorizations to BT, a foreign carrier within the meaning of Section 63.18(h)(1)(ii) of our rules,⁵⁰ we consider under Section 214(a) whether BT/MCI's application satisfies the framework for foreign carrier entry established in the *Foreign Carrier Entry Order*. Likewise, we apply the framework established in our *Foreign Carrier Entry Order* to MCI's proposal to transfer to BT various common carrier wireless licenses. Section 310(b)(4) of the Communications Act establishes a 25 percent benchmark applicable to foreign investment in and ownership of the parent company of a U.S. common carrier radio licensee. This statutory provision affords us the discretion to allow higher levels of foreign ownership as long as we determine that such ownership would not be inconsistent with the public interest.⁵¹ Also, because MCI seeks to transfer ultimate control of its ownership interests in cable landing licenses to BT, we review this application under the Cable Landing License Act.⁵²

32. Finally, as part of our determination under Sections 214(a) and 310(d), we review the citizenship, character, and financial and technical qualifications of the transferee,

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

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

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

⁵¹ 47 U.S.C. § 310(b)(4).

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

which, in this case, is BT.⁵³ BT, through its wholly-owned U.S. affiliate, BTNA, has been a Commission licensee since 1994. No party claims that BT lacks any of the qualifications just mentioned, as defined in the relevant Commission policy statements.⁵⁴ Accordingly, we find that BT satisfies the necessary citizenship, character, financial, and technical qualifications.

IV. PUBLIC INTEREST ANALYSIS OF THE MERGER

A. Background and Summary

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

34. In evaluating the likely competitive effects of a proposed merger and whether the merger will enhance competition, we apply a framework for competitive analysis that we

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

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

⁵⁵ *Supra* ¶ 28.

use for assessing market power in other contexts.⁵⁶ This analytical framework is also embodied in the antitrust laws,⁵⁷ including the Department of Justice and Federal Trade Commission 1992 *Horizontal Merger Guidelines* and the April 8, 1997 revisions of those guidelines.⁵⁸ We also applied and further articulated this framework in the *Bell Atlantic/NYNEX Order*.⁵⁹

1. Identifying Relevant Markets and Market Participants

35. As we explained in the *Bell Atlantic/NYNEX Order*, the first step in analyzing a merger is to define the relevant product and geographic markets.⁶⁰ In defining the relevant product and geographic markets, the Commission follows the approach taken in the *LEC In-Region Interexchange Order*,⁶¹ which in turn was based on the approach taken in the 1992

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

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

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

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

⁶⁰ *Id.* at ¶ 49.

⁶¹ See *supra* note 56.

Horizontal Merger Guidelines. We note that, in defining relevant markets, we may identify both "final product markets" or "end-user markets," where the product or service is sold to end-user customers, and "input markets," where the product or service is sold to firms which use it as an input in producing other products or services.

36. Having defined the relevant markets, we identify the likely market participants in those relevant markets, especially those that are likely to have a significant competitive effect on those markets. As explained in the *Bell Atlantic/NYNEX Order*, in order to evaluate proposed mergers properly in the context of an evolving marketplace and to take account of the uncertainties surrounding the pace and extent of the development of competition, it was necessary to examine the likely competitive effects of the merger "both during implementation of the 1996 Act and as that implementation alters market structure."⁶² More specifically, we examined relevant markets as they exist today and as we expect they will exist after the 1996 Act and the WTO Basic Telecom Agreement have been implemented and after the BOCs have obtained approval to provide in-region, interLATA services.⁶³ Those likely market participants include both "actual competitors"⁶⁴ and "precluded competitors."⁶⁵ From the universe of actual and precluded competitors, we then identify those likely market participants "that have, or are likely to speedily gain, the greatest capabilities and incentives to compete most effectively and soonest in the relevant market."⁶⁶

2. Horizontal Effects on Competition

37. We next evaluate the *horizontal* effects that the merger may have on competition in the relevant markets. Where a relevant market is concentrated and the merger

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

⁶³ *Id.*

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

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

⁶⁶ *Id.* at ¶ 62.

results in a firm that controls a significant portion of the market, the merger may increase or slow the decline of the ability of the merged firm, absent regulation, profitably to exercise *unilateral* market power by raising its price above competitive levels.⁶⁷ Alternatively, where the relevant market is concentrated, the merger may also increase or slow the decrease of the ability of a relatively small number of significant market participants, including the merged firm, to exercise market power through coordinated action, either by increasing price or restricting output.⁶⁸ Where the relevant market is a final product market, consumers will be directly injured through increased prices or reduced quality. Where the relevant product is an input market, end-user customers may be indirectly injured to the extent that final good producers can, and do, pass on the higher input prices to end-user customers in the form of higher end-user prices. We note that, for either unilateral or coordinated horizontal effects to occur, the merged firm, or a group of firms, must possess market power in the relevant product market.

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

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

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

3. Vertical Effects on Competition

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

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

4. Balancing Harmful and Beneficial Competitive Effects

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

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

⁷⁰ See *id.* at ¶¶ 111-19.

made by the parties.⁷¹ We must also consider whether the proposed merger will result in other merger-specific efficiencies, such as cost reductions, productivity enhancements, or improved incentives for innovation, and whether the merger will support the general policies of opening markets and lowering entry barriers that underlie the 1996 Act and the WTO Basic Telecom Agreement. We must weigh those competing harmful and beneficial effects in order to determine whether, on balance, the merger is likely to enhance competition in the relevant markets. We note, however, that, in light of the uncertainty concerning regulatory and market developments, we will scrutinize skeptically any merger that appears likely to remove a firm that might prove a significant competitor in markets that are just opening to competition.

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

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

43. In this case, we conclude that, on balance, the merger of BT and MCI will serve the public interest, convenience, and necessity. In our analysis, we identify three

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

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

relevant *end-user markets* that are likely to be affected by the merger of BT and MCI: (1) U.S. local exchange and exchange access service; (2) U.S.-U.K. outbound international service; and (3) global seamless services. In addition, we identify six relevant *input markets*: (1) international transport between the United States and United Kingdom; (2) U.K. cable landing station access; (3) U.K. backhaul; (4) U.K. intercity transport; (5) U.K. terminating access services; and (6) U.K. originating access services. We identify MCI as among the most significant market participants in each of the relevant end-user markets and in one input market (international transport facilities between the United States and the United Kingdom). In addition, we find that BT is among the most significant market participants in each of the relevant input markets and is a significant participant in the market for U.S.-U.K. outbound international services.

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

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

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

B. Relevant Markets

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

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

49. We recognize that relevant product markets may change over time. For example, as competition increases and more telecommunications carriers enter each others'

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

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

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

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

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

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

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

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

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

⁷⁹ *Id.*

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

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

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

⁸³ *Id.* at ¶¶ 65-67.

⁸⁴ *Id.* at ¶ 66.