

In a July 28, 1997 letter to the FCC, MCI acknowledges the importance of equal access for fostering competition.<sup>276</sup> It further states that it supports the European Union's intention to require most E.U. Member States, including the United Kingdom, to implement equal access no later than January 1, 2000. Therefore, as discussed Section VI below, we condition this merger on MCI's commitment not to accept BT traffic from the United Kingdom to the extent equal access has not been implemented as required by the U.K. Government.

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

193. A few commenters note this difference between the U.S. and U.K. regulatory regimes.<sup>278</sup> Commenters argue that the U.K. policy of not requiring BT to resell its local network at a wholesale discount favors facilities-based as opposed to resale competition.<sup>279</sup> ACC argues that real competition on the U.S.-U.K. route cannot occur unless U.S. carriers can compete in the local loop in the United Kingdom, including access to unbundled local loop elements.<sup>280</sup>

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

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

<sup>277</sup> 47 U.S.C. §§ 251-52.

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

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

<sup>280</sup> ACC reply comments at 8-9.

network elements would be unlikely to promote local competition but would instead jeopardize the development of facilities-based local competition now underway.<sup>281</sup>

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

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

197. In the longer term, however, several factors should mitigate or even eliminate our concerns. First, WTO commitments provide market access for local basic telecommunications services.<sup>282</sup> The European Communities, including the United Kingdom, agreed to abide by certain regulatory principles, among which is the requirement to provide interconnection that is "sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided."<sup>283</sup> As a result, once these commitments are implemented by the European Union and the United Kingdom, BT's competitors should be able to compete more effectively with BT in those markets that require access to the local origination market.

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<sup>281</sup> U.K. Government reply comments at 16.

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

<sup>283</sup> *Id.* at 9.

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

### 3. Application of Framework: Predatory Price Squeeze

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

200. We find that BT lacks the ability to effect a price squeeze at present and that the proposed merger will not increase its ability to do so. First, the existing competitors and possible new entrants in all the market segments discussed in the preceding Section of this decision have facilities by which the victims of any price squeeze attempted by BT may simply avoid dealing with BT. To the extent they had to use BT's facilities, BT's domestic intercity and local network interconnection rates are among the lowest in the world, and are expected to fall more (by about ten to twenty percent on average) as a result of the United Kingdom's new network interconnection price cap regime (to commence in October 1997).<sup>285</sup> Second, OFTEL's regulation of BT's network interconnection rates through price caps constrains BT's ability to leverage its significant market power by raising rivals' costs.<sup>286</sup>

201. Third, as we mentioned in paragraph 138 above, BT's settlement rate (i.e., the rate it charges carrier to terminate U.S.-originated calls in the United Kingdom) with U.S. carriers is now \$0.07, which is below the "best practices" rate recently adopted in the

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<sup>284</sup> See AT&T comments at 14-19.

<sup>285</sup> See *infra* Section V.A.1.b.

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

Commission's *Benchmarks Order*.<sup>287</sup> The number of facilities-based competitors and entrants on the U.S.-to-U.K. route will likely keep this rate low over time. Thus, unaffiliated U.S. carriers may hand off their traffic to BT for termination in the United Kingdom at a rate that is relatively close to cost. These factors lead us to conclude that BT would be unable to effect a price squeeze, even with respect to carriers that do not have access to alternative infrastructure in the United Kingdom. None of these factors will be diminished by the proposed merger.

#### 4. Summary of Analysis of Harmful Vertical Competitive Effects

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

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

204. The presence of significant competition and the possibility of still more competition in each of the relevant input markets in the United Kingdom are the most important considerations in our analysis. Competition can protect consumers better than the best-designed and most vigilant regulation. Absent the existing and developing competition in the United Kingdom and the international transport market, the U.K. Government's pro-competitive regulatory policies, and the existence of an experienced, independent regulator

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<sup>287</sup> See *Benchmarks Order* at ¶ 134.

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

with a strong track record, this proposed merger would be highly problematic.<sup>289</sup> It is likely that numerous conditions would be needed to protect U.S. consumers from potential harm to competition.

#### F. Possible Efficiencies of the Merger

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

206. As discussed above, unlike the merger of Bell Atlantic and NYNEX, the proposed merger between BT and MCI is predominately one between firms in a vertical relationship (*i.e.*, they predominately interact through the supply of inputs to each other as opposed to through competing for customers). The antitrust laws have been characterized as consistent with the view that "cooperation among firms in a vertical relationship in general has greater efficiency potential than does cooperation among horizontal competitors."<sup>293</sup> Among the potential efficiencies that may be produced by a vertical merger are: (1) better coordination in design and production between the firms than could be achieved if the firms were to remain separate and interact through contracts or other arrangements; (2) elimination of instances where one of the merging firms "free rides" before the merger by attempting to

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

<sup>290</sup> *Id.* at ¶ 158 (citing *1997 Horizontal Merger Guidelines Revisions*).

<sup>291</sup> See *1997 Horizontal Merger Guidelines Revisions*.

<sup>292</sup> *Id.*

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

benefit from the activities of the other firm without contributing to the cost of those activities (resulting in less than the socially-optimal, efficient amount of the activity), a problem that may be overcome because the combined firm will have the incentive to take account of all of the costs and benefits of its actions; and (3) elimination of inefficiency associated with the double markup of costs (because there are two firms) in cases where input and output markets are not perfectly competitive and prices, and thus above economic cost, by permitting the combined firm to consider the actual economic costs of the inputs and use.<sup>294</sup> These categories of potential efficiencies are given here solely for the purpose of illustration; we do not in any way imply that these are the only, or the most significant, kinds of efficiency benefits that may be associated with a merger.

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

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

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

<sup>295</sup> BT/MCI application at 12.

<sup>296</sup> *Id.*

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

<sup>298</sup> *Bell Atlantic/NYNEX Order* at ¶ 158.

## G. Conclusion

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

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

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

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

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

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

### A. Effective Competitive Opportunities Analysis

214. In the *Foreign Carrier Entry Order*, we determined that foreign carriers or affiliates of foreign carriers<sup>301</sup> seeking to provide U.S. international services to destination countries in which they have market power must demonstrate that such destination countries offer effective competitive opportunities for U.S. carriers to offer like services. Under our rules, an applicant that is affiliated with a foreign carrier that is not a monopoly in a destination market bears the burden of submitting information sufficient to demonstrate that

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<sup>299</sup> See *Foreign Carrier Entry Order*, *supra* note 23.

<sup>300</sup> See *Foreign Participation Notice*, *supra* note 9.

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

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

### 1. Section 214 Authorizations

215. Under the ECO analysis, we first examine the legal or *de jure* ability of U.S. carriers to enter the destination foreign country and provide international facilities-based

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

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

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

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

<sup>306</sup> *See supra* ¶¶ 178, 181.

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

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

**a. Legal Ability to Enter**

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

**b. Interconnection**

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

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<sup>308</sup> See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3892.

<sup>309</sup> *Id.* at 3890.

<sup>310</sup> BT/MCI application at 20.

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

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

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

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

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

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

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

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

<sup>315</sup> BT/MCI application at 25-26.

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

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

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

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

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

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

<sup>318</sup> *OFTEL 1997 Network Charges* at 5.21.

<sup>319</sup> BT/MCI application at 27.

<sup>320</sup> *Id.* at 27-43.

<sup>321</sup> *Id.* at 37.

<sup>322</sup> *Id.* at 43.

<sup>323</sup> Frontier comments at 2-3.

<sup>324</sup> FT comments at 15-20.

<sup>325</sup> *Id.* at 18-19.

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

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

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

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<sup>326</sup> Bell Atlantic petition to deny at 2-3.

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

<sup>328</sup> BellSouth/PacTel/SBC comments at 9-10.

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

charges other operators.<sup>330</sup> Since March 1995, OFTEL has set most of BT's interconnection charges. The U.K. Government further notes that OFTEL has proposed to: (1) change the cost base for determining interconnection charges from fully allocated costs to LRIC; (2) cease annual determinations of interconnection charges and establish a broad framework under which BT will have increased pricing flexibility, depending on the competitiveness of the service; and (3) publish transparent guidelines on how OFTEL will approach complaints about anti-competitive charging for interconnection services.<sup>331</sup>

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

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<sup>330</sup> U.K. Government reply comments at 19. According to the U.K. Government, OFTEL currently arrives at BT's interconnection charges as follows: "Each year, [OFTEL] specifies the charge for each service on BT's standard list of interconnection services on the basis of BT's fully allocated historic costs. These costs are drawn from the Financial Statements - regulatory accounts - which BT is required to produce and publish and which show the activities of BT Network [wholesale services] as a business separate from BT Retail and other regulatory businesses. BT is required to attribute network costs to unbundled components of the network according to the principles set out in published Accounting Documents. The unbundled component costs are set out in the Financial Statements which also show how the costs of interconnection services are built up from the individual component costs. OFTEL excludes from its calculations (and BT's determined charges) costs incurred by BT that OFTEL considers are not relevant to the provision of network services." *Id.* at 20.

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

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

<sup>333</sup> *Id.* at 6248, 6252-6255.

carriers on a nondiscriminatory and published basis.<sup>334</sup> We therefore concluded that, for the purposes of an equivalency evaluation, the nondiscriminatory offering of published standard interconnect arrangements at standard prices was an adequate alternative to our regulatory approach of requiring tariffed service offerings and rates.<sup>335</sup>

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

226. BT's relatively low interconnection charges further demonstrate that interconnection is available in the United Kingdom at reasonable terms. Although the precise cost per minute of the interconnection arrangement depends on many variables,<sup>338</sup> it is

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

<sup>335</sup> *Id.* at 6254.

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

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

<sup>338</sup> The typical international call that terminates in the United Kingdom transits several different types of facilities before reaching the end user. In a typical arrangement, 2 Mbps backhaul circuits can be leased from the Land's End cable station to the customer's switch nearest BT's international gateway switch in London. From the customer's switch, the customer can arrange the delivery of traffic to end users anywhere on BT's

possible to make a rough estimate of the cost. The combined transport and termination charges average one to two cents per minute, and the cost of leased circuits adds only a few cents per minute more.<sup>339</sup> This cost compares favorably with the cost of interconnection in most other countries. A well-engineered arrangement enables a customer to terminate calls from Land's End to a BT customer in London for about five cents a minute.

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

### c. Competitive Safeguards

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

### i. Cost Allocation Rules

229. We first examine whether the United Kingdom has cost allocation rules in place to protect against cross-subsidization. BT/MCI state that in March 1995, OFTEL and BT agreed to Condition 20B which prescribes accounting separation between specified BT "regulatory businesses."<sup>341</sup> For these regulatory businesses, BT is required to produce and

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network. Delivery involves leasing a 2 Mbps circuit between the customer switch and a BT domestic switch and paying BT distance-sensitive per-minute charges for conveyance of traffic to the end user's local exchange and for termination at the end user's location. Variables include the exchange rate, the amortization period for nonrecurring charges assessed by BT for circuit installation, whether the leased circuit has a speed of 2 Mbps or 140 Mbps, and the traffic fill amount on the leased circuit.

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

<sup>340</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd at 3893.

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

publish separated and audited financial statements on both an interim and annual basis. BT/MCI assert that Condition 20B also gives OFTEL the power to investigate any alleged subsidy or cross-subsidy among any of these operations (*e.g.*, between BT's network and retail operations) and to direct BT to redress any such subsidy.<sup>342</sup>

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

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

## ii. Disclosure of Network Information

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

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<sup>342</sup> BT/MCI application at 45.

<sup>343</sup> FT comments at 20-21.

<sup>344</sup> BT/MCI application at 45-46.

sufficient and that it would be inappropriate and unnecessarily burdensome for the Commission to engage in an analysis of precisely what information is necessary.<sup>345</sup>

233. We find that there are adequate requirements in the United Kingdom to ensure that carriers receive the technical information necessary to interconnect with BT. The disclosure requirements implemented in the 1994 Code of Practice serve this purpose by requiring timely and nondiscriminatory disclosure of technical information needed to use or interconnect with BT's facilities. Moreover, no party has alleged that any carrier has been denied technical information needed to operate a telecommunications network in the United Kingdom. Finally, we note that OFTEL has broad ability to act quickly against any conduct that distorts competition, such as the withholding of essential technical information needed to interconnect.<sup>346</sup>

### iii. Safeguards for Carrier and Customer Proprietary Information

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

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

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<sup>345</sup> FT comments at 20-21.

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

<sup>347</sup> BT/MCI application at 46-47.

disclosure outside the course of duty is a criminal offense under Section 45 of the Telecommunications Act 1984.<sup>348</sup>

236. FT states that the Commission should not require that all the safeguards cited in BT/MCI's application be present in order to meet the Commission's ECO standard.<sup>349</sup> Sprint and DT do not address specific conditions in the United Kingdom. Rather, Sprint argues that there are special dangers posed by the vertical integration of BT and MCI, and therefore urges the Commission to prohibit the use of confidential information of non-affiliated U.S. carriers obtained by the new Concert or its subsidiaries to benefit MCI.<sup>350</sup> Similarly, DT argues that a merged entity's bottleneck facilities will extend beyond the terms of BT's U.K. license and therefore the Commission should impose broad confidentiality requirements to protect customer and competitor proprietary information.<sup>351</sup>

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

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

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<sup>348</sup> *Id.* at 47-48.

<sup>349</sup> FT comments at 22.

<sup>350</sup> Sprint comments at 8.

<sup>351</sup> DT comments at 14.

<sup>352</sup> BT/MCI application at 47-48.

information, and protection of carrier and customer proprietary information against unauthorized disclosure.

**d. Regulatory Framework**

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

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

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

242. We find that DTI and OFTEL, the U.K. governmental agencies responsible for telecommunications policymaking and licensing, are sufficiently separate from the carriers they regulate.<sup>357</sup> DTI is a U.K. Government Ministry that issues licenses, defines the telecommunications system that the holder is allowed to run, and specifies the services that

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<sup>353</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd at 3894.

<sup>354</sup> BT/MCI application at 43.

<sup>355</sup> *Sprint Declaratory Ruling*, *supra* note 92.

<sup>356</sup> FT comments at 22-24.

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

can be provided. DTI also retains primary responsibility for formulating and implementing general government telecommunications policies.<sup>358</sup>

243. OFTEL, the U.K. governmental agency responsible for the administration of the U.K.'s regulatory policies, is an independent regulatory body with no connection to any U.K. operator. OFTEL is a non-ministerial department not subject to direct control by the majority government. OFTEL is headed by a single individual, the Director General of Telecommunications, who is appointed for a term by the Secretary of State for DTI. OFTEL's Director General has the statutory duty to ensure that licensees comply with the conditions incorporated into their licenses, including conditions relating to competition and fair trading.<sup>359</sup> OFTEL's responsibility for the day-to-day administration of the regulatory regime has established it as the primary agency in implementing competition policy in the U.K. telecommunications market.<sup>360</sup>

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

245. Because OFTEL's enforcement powers are defined by the terms of the relevant license conditions, the scope of these conditions is critical to OFTEL's effectiveness. Since January 1, 1997, BT and any other carrier found to be "well established" is subject to the Fair

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<sup>358</sup> See *C&W Order*, 11 FCC Rcd at 16496.

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

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

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

Trading Condition, described above.<sup>363</sup> The Fair Trading Condition generally prohibits "any act or omission which has, or is intended to have, or is likely to have, the effect of unfairly preventing, restricting, or distorting competition" in the U.K. telecommunications markets.<sup>364</sup> It is designed to prevent abuses of market power by a dominant operator, or agreements that restrict, distort or prevent competition in the field of telecommunications. The lawfulness of OFTEL's insistence on this condition was affirmed by Britain's High Court in December 1996. The Fair Trading Condition strengthens OFTEL's ability to deal with anti-competitive conduct.

246. In sum, we find that there is an effective regulatory framework in the United Kingdom that develops, implements and enforces legal requirements, interconnection and other competitive safeguards. Accordingly, we find that no actual or *de facto* conditions exist that warrant a denial under the ECO analysis for the transfer of MCI's Section 214 authorizations.

## 2. Section 310(b)(4) Licenses

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

248. In the *Foreign Carrier Entry Order*, we found that an important part of our determination under Section 310(b)(4) is an examination of whether effective competitive

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

<sup>364</sup> OFTEL, *Pricing of Telecommunications Services From 1997* (June 1996).

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

<sup>366</sup> 47 U.S.C. § 310(b)(4).

opportunities exist in the particular radio-based service in the foreign entity's "home market" that is analogous to the service in which the foreign entity seeks to participate in the U.S. market.<sup>367</sup>

**a. Appropriate Home Market**

249. First, we must determine the appropriate home market for comparison.<sup>368</sup> BT is registered under the laws of England and Wales; its principals, officers, and directors are U.K. citizens; its world headquarters is currently in the United Kingdom, although the merged company will have dual headquarters in the United States and the United Kingdom; the majority of its tangible property is in the United Kingdom; and the United Kingdom is the country from which it derives its greatest sales and revenues from its operations.<sup>369</sup> Given BT's overwhelming nexus to the United Kingdom, we find that the United Kingdom is the appropriate home market for comparison.

**b. Appropriate Market Segment**

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

251. According to BT/MCI, no comparable service to common carrier point-to-point microwave services is available in the United Kingdom, but terrestrial microwave facilities

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<sup>367</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd at 3949.

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

<sup>369</sup> BT/MCI application at n.129.

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

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

**c. De Jure and De Facto Restrictions**

252. Having identified the relevant comparable service within the appropriate home market, we can conduct our ECO analysis. If we determine that no *de jure* restrictions exist and U.S. interests are allowed to hold a controlling interest in a provider of the relevant service in the relevant home market, then the effective competitive opportunities analysis justifies placing no limit on the level of indirect alien ownership in the U.S. service provider, absent significant *de facto* barriers.<sup>373</sup>

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

254. BT/MCI also argue that there are no *de facto* limitations on the provision of terrestrial microwave, fixed satellite services, and TFTS by U.S. entities. BT/MCI argue that, in addition to fair and reasonable terms for interconnection, there are sufficient competitive

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<sup>371</sup> See *supra* notes 117, 118.

<sup>372</sup> BT/MCI application at 54.

<sup>373</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd at 3954.

<sup>374</sup> BT/MCI application at 55.

safeguards and an effective regulator. Moreover, BT/MCI argue that DTI's Radiocommunication Agency, which allocates spectrum and assigns radio licenses to civilian users, has recognized that radio spectrum is critical to the expansion of competition in the U.K. telecommunications markets, and is engaged in an ongoing consultation on ways to manage the radio spectrum to ensure that spectrum scarcity does not become a barrier to radio-dependent services. Finally, BT/MCI assert that a substantial number of U.S. and foreign companies hold licenses under the Wireless Telegraphy Act 1949.<sup>375</sup>

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

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

256. Only one commenter, WorldCom, raised an issue regarding the transfer of control of MCI's radio licenses. The issue raised involves the U.K. Government's "special share" in BT. BT's articles of incorporation provide for one "special share" to be held by the U.K. Government.<sup>377</sup> WorldCom argues that, because the U.K. Government has a special share in BT, BT is prohibited under Section 310(a) of the Act<sup>378</sup> from assuming control of MCI's radio licenses unless the U.K. Government relinquishes its special share.<sup>379</sup>

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<sup>375</sup> *Id.* at 56-58.

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

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

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

<sup>379</sup> WorldCom comments at 2, 19.