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

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JAN 19 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
AT&T Corp., VLT Co. L.L.C., Violet	)	
License Co. LLC and TNV [Bahamas]	)	
Limited Seek FCC Consent for Grant of	)	IB Docket No. 98-212
Section 214 Authority, Modification of	)	
Authorizations and Assignment of Licenses	)	
in Connection with Proposed Joint Venture	)	
Between AT&T Corporation and British	)	
Telecommunications plc	)	

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

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Dated: January 19, 1999

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SUMMARY

Level 3 urges the Federal Communications Commission to restrain BT's incentive and ability to discriminate against U.S. competitors by approving the Global Venture only on the condition that (1) BT offer unbundled local loops, including unbundled network elements; (2) BT provide equal access; and (3) the Global Venture companies are subject to dominant carrier classification and other safeguards with respect to the U.S.-U.K. route. Because BT controls the U.K. local loop, the Global Venture will be able to offer true end-to-end service, while other competitors lack direct access to this critical segment. Moreover, the unavailability of equal access in the U.K. provides BT and the Global Venture a clear, inherent advantage as the "default" provider of national and international long distance services. In addition, competitive safeguards such as dominant carrier classification and the enhanced no special concessions prohibitions are necessary to permit the FCC and the industry to monitor and restrain the activity of the Global Venture. Conditioning approval of the Global Venture on these requirements will ensure that competing carriers have a chance to compete on fair and equitable terms until such time as all segments of the international telecommunications market become fully competitive.

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In the Matter of AT&T Corp., VLT Co. L.L.C., Violet License Co. LLC and TNV [Bahamas] Limited Seek FCC Consent for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with Proposed Joint Venture Between AT&T Corporation and British Telecommunications plc	)	IB Docket No. 98-212

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

I. INTRODUCTION

Level 3 Communications, LLC ("Level 3"), hereby urges the Federal Communications Commission ("Commission" or "FCC") to condition its approval of the Global Venture of AT&T Corp. ("AT&T")[1] and British Telecommunications plc ("BT") ("Global Venture") to ensure that BT cannot leverage its dominant position in the U.K. market to the competitive disadvantage of competing U.S. carriers. Specifically, in order to eliminate any incentive or ability of BT to discriminate against its competitors, Level 3 strongly recommends that the FCC condition its approval on (1) BT's offering unbundled local loops, including unbundled network elements; (2) BT's provision of equal access; and (3) the classification of VLT Co. L.L.C., Violet License Co.

[1] Hereinafter, "AT&T" refers to AT&T Corp. and its subsidiaries AT&T Alascom, AT&T Puerto Rico, Inc., and AT&T of the Virgin Islands, Inc.

LLC and TNV [Bahamas] Limited, and any other authorized Global Venture company as dominant with respect to the U.S.-U.K. route and the imposition of other safeguards.

By way of background, Level 3, together with its affiliates, is in the process of establishing in the U.S. and in several other countries an advanced, state-of-the art IP-based network that will bring modern, efficient telecommunications services to carriers and end users. In particular, Level 3 intends to make substantial investments to construct its own network facilities and offer a host of services to carriers and consumers in a number of countries, including the U.K.

While Level 3 is not opposed to this transaction, we are gravely concerned that, despite our substantial financial and technical resources, we will not be able to compete on an equal basis with an alliance between AT&T and BT, two former monopoly incumbents that still hold significant market share in their respective countries. Although BT will not have a direct financial stake in AT&T, it will have a direct financial stake in the Global Venture in which AT&T also holds a substantial interest. Imposing the conditions and requirements set forth herein, therefore, are essential to decrease the incentive and ability of BT to discriminate in favor of AT&T and the Global Venture. Although in the long term a fully competitive global market may mitigate these concerns, regulatory safeguards are required now to create a more level playing field while the global market is in a state of transition.

II. DISCUSSION

A. The Public Interest Standard

Sections 214(a) and 310(d) of the Communications Act of 1934, as amended,[2] require AT&T and its Global Venture affiliates to demonstrate that the proposed Global Venture serves the public interest, convenience and necessity. In its public interest analysis, the Commission must consider whether the Global Venture will harm or enhance competition.[3] As part of its analysis, the FCC must determine whether the transaction will increase the incentive or ability of any party to leverage its market power in favor of its affiliate to the detriment of competition. BT's market power and bottleneck control in the U.K. provide it with the incentive and ability to favor the Global Venture. Therefore, as described in greater detail below, the public interest requires the FCC to condition its approval of this transaction.

B. The FCC Should Condition its Approval of the Global Venture on BT's Unbundling the U.K. Local Loop.

In the *BT/MCI Order*, the FCC recognized the critical importance of unbundled local loops and approved the proposed BT/MCI transaction, in part, because it anticipated that the European Union ("EU") and the U.K. would soon require unbundled local loops.[4] If AT&T and/or the Global Venture can reap the benefits of BT's local loop network, but competitors such as Level 3 cannot obtain cost-based local loop elements, competitors on the U.S.-U.K. route may suffer to the ultimate

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[2] 47 U.S.C. §§ 214(a), 310(d).

[3] *Merger of MCI Communications Corporation and British Telecommunications plc, Memorandum*, Opinion and Order, 12 FCC Rcd. 15351 at ¶ 33 (1997) ("*BT/MCI Order*").

[4] *See id.* at ¶ 210.

detriment of the consumer. Thus, the FCC should not approve this transaction, unless it requires BT to offer unbundled local loop elements immediately.

1. Unbundled Local Loops are Critical to the Development of Effective Competition.

As the closest transmission segment to the "end" of virtually every international, long distance and local call, the local loop is a key element in the competitive provision of end-to-end global seamless services on a cost-effective basis. BT still controls this critical segment and essentially requires competitors to pay for facilities and services that they do not need. The opportunity to purchase unbundled local network elements, however, permits emerging facilities-based carriers to tailor their requests for facilities and services based on the actual needs of their network configuration, and thus allows such new entrants to control every segment of the call on a cost-efficient and cost-effective basis. In a competitive environment, these cost savings will be passed on to the consumer. In addition, unbundling avoids expensive, local loop overbuilds where such construction is not economically viable.

Unbundled local loops are not only cost-effective, but also are critical to the development and availability of new services and facilities. One of the broad aims of U.S. policy is "'accelerat[ing] . . . private sector deployment of advanced telecommunications and information technologies and services.'"[5] Unbundling would permit new carriers to co-locate equipment at BT's local exchanges, allowing them to deploy DSL and other advanced technologies that expand the bandwidth of the copper loop, and thus provide consumers ready access to innovative high-speed

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[5] *Id.* at ¶ 3.

services. Moreover, given that unbundling significantly reduces the up-front investment required to establish a network, competing carriers can allocate their resources more efficiently to construct and install new, state-of-the-art facilities such as switches, transmission lines, and other infrastructure that are required to meet the ever-increasing demand for telecommunications services. While BT and the Global Venture can use local loops in this flexible manner, competitors without access to unbundled local loops cannot.

Unbundled local loops are also vital to the development of competition because there is generally no adequate substitute for the ubiquitous loop in most advanced countries. Broadband cables are inadequate because they lack switching capability and usually involve one-way transmissions. In addition, the majority of broadband cables are found predominantly in residential areas, rather than in business districts. Wireless local loops also are not sufficiently viable options because they present capacity, reliability, privacy and spectrum problems that are less prevalent or do not exist for wireline systems. Furthermore, private lines are inadequate substitutes because their complex reconfiguration to a local switch involves greater costs and delays. Private lines also are generally provisioned with unnecessary features, and therefore tend to be far more costly than unbundled local loops.

2. Unbundled Local Loops are Not Available in the U.K.

Despite the many significant benefits of unbundled local loops, the Office of Telecommunications ("OFTEL"), the U.K.'s telecommunications regulator, has not yet required BT to offer unbundled local loops to its competitors. OFTEL has reasoned that, although it is technically feasible, unbundling the local loop undermines the value of the investments made by other operators to construct alternative infrastructure.[6] OFTEL recently issued a public consultation that mentions local loop unbundling as one of five options to encourage the deployment of higher bandwidth services to customers.[7] Although this development appears promising, it is still the case now as it was at the time FCC issued its *BT/MCI Order* that unbundled local loops are unavailable to emerging facilities-based competitors in the U.K. Level 3 anticipates that even if OFTEL concludes that unbundling the local loop is the appropriate option to expand bandwidth, it will take some time to actually implement. Thus, at this time and in the foreseeable future, BT controls direct access to the local loop in the U.K.

3. The FCC's Concerns Regarding the Unavailability of Unbundled Local Loops Have Not Been Eliminated.

The FCC has already recognized the critical importance of unbundled local loops as a key element in the deregulation of the telecommunications market in the United States and abroad. Specifically, the FCC has stated that "preventing access to unbundled local loops would either discourage a potential competitor from entering the market in that area, thereby denying those consumers the benefits of competition, or cause the competitor to construct unnecessarily duplicative facilities, thereby misallocating societal resources."[8] In the *BT/MCI Order*, the FCC stated that the "United Kingdom's policies limiting equal access and the availability of unbundled local network

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[6] OFTEL, *Statement on indirect access, equal access and direct access to the copper loop*, 1996.

[7] OFTEL, *Access to bandwidth: Bringing higher bandwidth services to the consumer*, 1998.

[8] *Implementation of the Local Competition Provisions of the 1996 Telecommunications Act*, First Report and Order, 11 FCC Rcd 15499, 4 CR 1, 407 (1996) (footnotes and subsequent history omitted) ("*Local Competition Order*").

elements will disadvantage competitors of the merged entity."[9] Only because it "anticipate[d] that our concerns will be addressed through European Union (E.U.) and U.K. regulatory processes, and commitments we have received from MCI,"[10] did the FCC approve the merger.

Since the FCC issued the *BT/MCI Order*, the EU and the U.K. have taken steps to investigate whether an unbundling requirement would serve the public interest. The European Commission is expected to examine unbundled local loop issues as part of its telecommunications review this year. In addition, Level 3 applauds the U.K.'s initiative to examine unbundled local loops as an option to promote advanced services and technologies. However, unbundled local loops are currently not available in the U.K., and even if OFTEL introduces an unbundled local loop requirement, it may take some time before such a requirement is implemented. Given that time is of the essence in the fast-paced telecommunications market, the absence of unbundled local loops, even for several months, may significantly undermine the ability of new entrants to enter the market as rapidly as necessary. Furthermore, neither AT&T nor BT has made any commitments to offset the lack of unbundled local loops in the U.K. Thus, Level 3 urges the FCC to examine this issue closely as it did in the BT/MCI proceeding.

4. The FCC Should Condition Approval on BT's Unbundling the Local Loop to Safeguard Against Anticompetitive Behavior.

Given the vital importance of unbundled local loops to competition and BT's control over this essential gateway in the U.K., the FCC must condition its approval of the Global Venture on BT's unbundling its local loop so that competitors can offer global seamless service on an equal

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9 *BT/MCI Order* at ¶ 16.

10 *Id.*

basis. BT is still the dominant provider of local services in the U.K. As the local loop gatekeeper, BT enjoys enormous competitive advantages in terms of network flexibility and pricing, and it is the only carrier that can provide true end-to-end service on the U.S.-U.K. route. Only BT, AT&T, and their commonly-owned affiliates will be able to carry a U.S.-U.K. call from local loop elements they control, over a long distance network they control, and over an international line they control. Moreover, BT will have the ability and incentive to deny this capability to its competitors. Accordingly, although non-dominant competitors like Level 3 may invest substantial resources to establish their networks, they may not have the opportunity to provide cost-effective, end-to-end services on the same basis that the Global Venture will. As a result, competition will suffer and U.S. consumers will have fewer choices in carriers and will pay higher rates. Therefore, the Commission must require BT to unbundle its local loops as a condition to its approval of the Global Venture.

C. The FCC Should Condition Approval on BT's Implementation of Equal Access.

If the FCC decides to approve the Global Venture, the FCC should also condition its approval on BT's offering equal access to customers. Equal access allows a customer of a local exchange company to access its preferred long distance company on a nondiscriminatory basis, either by choosing a "default" carrier ("carrier pre-selection") or by dialing the same number of digits to access every carrier ("dialing parity").

1. Equal Access is Not Available in the U.K.

BT does not currently provide equal access, so customers must dial additional digits to access the long distance service of a BT competitor. Otherwise, the customer is defaulted to BT's long distance service. Thus, unless BT chooses to offer equal access to competitors, the Global Venture will be the default international carrier to the competitive disadvantage of Level 3 and other carriers.

2. The FCC's Concerns Regarding the Unavailability of Equal Access Have Not Been Eliminated.

The FCC has consistently recognized that the lack of equal access is a barrier to the development of a fully competitive market.[11] Significantly, the Commission recognized in the *BT/MCI Order* that "[b]y not providing equal access to long distance carriers, BT is engaging in a form of non-price discrimination which allows it to leverage power over the local exchange to enhance its control over the U.K. long distance and international markets."[12] In fact, AT&T agreed, arguing that "BT's dominant position, combined with the lack of dialing parity and carrier pre-selection, will allow BT to maintain the predominant share of U.K. outbound traffic to the United States."[13] The FCC, recognizing the critical importance of equal access to a truly competitive market, conditioned its approval of the BT/MCI merger "upon MCI's non-acceptance of BT traffic originated in the United Kingdom to the extent BT is found to be in non-compliance with U.K. regulations implementing the European Union's equal access requirements."[14] Although OFTEL has initiated a proceeding to implement carrier pre-selection equal access, actual implementation is not likely to occur in the near term. In fact, the U.K. does not intend to implement equal access until late 2000 or 2001, and therefore is seeking a deferral from the European Commission mandate

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[11] In the U.S., equal access enhanced competition significantly. In particular, the Commission acknowledges that "after equal access was deployed throughout the [U.S.], the number of customers using MCI and other long distance carriers increased significantly." *Local Competition Order* at ¶ 17.

[12] *BT/MCI Order* at ¶ 187.

[13] *Id.* at ¶ 185.

[14] *Id.* at ¶ 323.

requiring implementation of equal access by January 1, 2000.[15] Until BT actually implements equal access, the lack of equal access provides BT inherent advantages as the "default" provider of service to the competitive disadvantage of Level 3 and other new competitors. Given that the U.K. has not required equal access and may not until as late as 2001, the FCC's assumption that the U.K. would soon implement equal access has proven incorrect thus far.

3. The FCC Should Condition Approval on BT's Provision of Equal Access.

BT's provision of equal access would provide competitors such as Level 3 a fairer opportunity to compete with the Global Venture. Equal access in the U.K. would afford customers a real opportunity to choose their preferred carrier. As described above, without equal access, customers must exert an extra effort by dialing extra digits to reach competing carriers. Accordingly, there is a much greater chance that customers may forget the required access code or become confused as to how the access system operates and inadvertently dial into BT's and the Global Venture's network. Furthermore, there is no adequate substitute for equal access. Programmed memory phones, smart phones and other equipment may minimize the inconvenience of indirect access, but require competing carriers to absorb the costs associated with the purchase, installation and maintenance of this equipment. Therefore, conditioning approval of the Global Venture on BT's implementation of equal access will speed the elimination of this inherently discriminatory policy, providing carriers such as Level 3 to the opportunity to compete on a level playing field with the Global Venture.

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15 OFTEL, *Carrier Pre-Selection in the UK*, Consultative Document, July 1998.

D. The FCC Should Classify the Global Venture Companies as Dominant with Respect to the U.S.-U.K. Route and Impose Additional Safeguards to Prevent BT from Leveraging its Market Power in the U.S. Marketplace.

Because BT has market power in the U.K., the Global Venture companies should be regulated as dominant on the U.S.-U.K. route. The FCC imposes dominant carrier classification where an applicant cannot demonstrate that its foreign affiliate lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market. In particular, if a U.S. carrier demonstrates that the foreign affiliate has less than 50 percent market share in the international transport and the local access markets on the foreign end of the route, the U.S. carrier shall presumptively be classified as non-dominant.[16] In the *BT/MCI Order*, the FCC determined that the merged BT/MCI entity was subject to dominant carrier regulation since "BT retain[ed] market power in the United Kingdom through its ownership of the only ubiquitous local and intercity networks in the United Kingdom."[17]

As in the BT/MCI proceeding, the Global Venture companies have not demonstrated that BT has less than a 50 percent market share in the U.K. international transport or local access markets. In fact, AT&T acknowledges that "BT is the largest provider of local exchange service in the UK, and thus terminates and originates more international calls from the US than any other carrier."[18] Therefore, since the Global Venture is affiliated with BT and BT has market power in the U.K., the

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[16] 47 C.F.R. § 63.10(a)(3).

[17] *BT/MCI Order* at ¶ 286; *Rules and Policies on Foreign Market Participation in the U.S. Telecommunications Market*, 12 FCC Rcd. 23891 (1997) ("*Foreign Participation Order*").

[18] Applications and Public Interest Statement in Support of the Global Venture of AT&T Corp. and British Telecommunications plc at 33, IB Docket No. 98-212.

Global Venture companies must be classified as dominant on the U.S.-U.K. route to prevent BT from wielding its market power against unaffiliated U.S. carriers.

Given that BT is dominant in the U.K., the FCC should ensure, pursuant to the Commission's No Special Concessions Rule,[19] that AT&T and its Global Venture affiliates do not agree to accept "special concessions"[20] from BT. In the *Foreign Participation Order*, the FCC continued to prohibit U.S. carriers from accepting special concessions from dominant foreign carriers because it was concerned that "an exclusive vertical arrangement between a foreign carrier with market power on the foreign end and a U.S. carrier (whether through ownership affiliation or contractual arrangement) could result in harm to competition and consumers in the U.S. market."[21] An exclusive arrangement (through their Global Venture alliance) between BT and AT&T, two established powerhouses in the industry, will restrict the ability of competing carriers to provide international service, raise their termination costs or degrade the quality of their service offerings to the detriment of U.S. consumers.[22]

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19 47 C.F.R. § 63.14.

20 Section 63.14 of the Commission's Rules defines a "special concession" as an exclusive arrangement involving services, facilities or functions on the foreign end of the international route that are necessary for the provision of basic telecommunications services where the arrangement is not offered to similarly situated carriers and involves (1) operating agreements; (2) distribution arrangements or interconnection arrangements; and (3) any information, prior to public disclosure, about foreign carriers' basic network services that affect the provision of basic or enhanced services or interconnection to domestic network by U.S. carriers. 47 C.F.R. § 63.14(b).

21 *Foreign Participation Order* at ¶ 157.

22 *Id.*

Moreover, Level 3 submits that, in this special case, prohibited "special concessions" should include transit arrangements between AT&T and its Global Venture affiliates and BT. AT&T and BT, once monopoly providers of long distance and international service, have long-established relationships on other routes. While the FCC may wish to preserve the rights of carriers to engage in "switched hubbing" through publicly available services in a hubbing country such as the U.K., Level 3 believes that BT will have a substantially increased incentive and ability to offer AT&T and the Global Venture special deals for the global routing of traffic. In particular, BT will have a 50 percent stake in the success of the Global Venture in obtaining increased traffic volumes from the United States. If AT&T, the Global Venture companies, and BT are free to establish exclusive transit arrangements, the ability of U.S. carriers, especially new entrants, to provide competitive service on significant routes will be impaired.

Finally, Level 3 requests that the FCC require AT&T and the Global Venture companies to provide information regarding how AT&T, the Global Venture companies and BT will interact with each other. How these companies interact could determine whether there will be a negative competitive effect on the U.S. market, but the application contains little explanation as to the exact manner in which these companies will deal with one another. Additional information will provide the FCC an opportunity to assess the potential for anticompetitive behavior as well as the overall impact of the Global Venture on the development of effective competition in the international telecommunications market.

III. CONCLUSION

For the foregoing reasons, Level 3 Communications, LLC respectfully requests that the Commission approve the Global Venture of AT&T and BT only on the condition that (1) BT promptly offer unbundled local loops; (2) BT offer equal access; and (3) the Global Venture companies are subject to dominant carrier classification and other safeguards with respect to the U.S.-U.K. route to ensure that the proposed transaction will serve the public interest, convenience and necessity.

Respectfully submitted,

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Dated: January 19, 1999

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 1999, a copy of the foregoing "Comments of Level 3 Communications, LLC," in IB Docket No. 98-212, was delivered by First Class mail to the following:

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