

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

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

**REPLY COMMENTS OF CABLE & WIRELESS**

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**REPLY COMMENTS OF CABLE & WIRELESS**

Cable & Wireless plc (“C&W” hereby submits its reply comments on the applications described in the Commission’s public notice of November 27, 1998.<sup>1</sup>

**SUMMARY**

The comments in this proceeding confirm that the proposed Global Venture between British Telecommunications plc (“BT”) and AT&T Corporation (“AT&T”) will harm competition in a number of markets. The remedies proposed by some commenters, however, are entirely inadequate to prevent those anticompetitive consequences. In fact, as Cable & Wireless plc (“C&W”) explains more fully herein, rejection of the Global Venture will better serve the public interest than any form of conditional approval. In the alternative, the Commission should at least condition approval of the Global Venture on

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<sup>1</sup> FCC Public Notice, *AT&T Corporation, 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 (Nov. 27, 1998).

effective requirements that will curb some, if not all, of the incentives for abuse that the joint venture presents.

## **DISCUSSION**

### **I. The Record In This Proceeding Demonstrates That The Global Venture Will Harm Competition**

As C&W's comments point out, the proposed Global Venture will eliminate competition between BT and AT&T for carrier-to-carrier transit services and services to multi-national corporations ("MNCs").<sup>2</sup> The joint venture also will give BT and AT&T strong incentives to raise rivals' costs by exchanging U.S.-U.K. traffic only with each other and manipulating transit traffic sent through the United States to third countries.<sup>3</sup>

#### **A. The Global Venture Will Raise Competitors' Costs**

As C&W made clear in its initial comments, the large amount of "captive" BT and AT&T international traffic that the Global Venture will control, combined with BT's ongoing ownership of bottleneck facilities in the U.K., will raise rivals' costs and harm consumers. Notably, the Global Venture will permit BT and AT&T, which together account for over 50 percent of bilaterally traded telecommunications traffic between their two home markets, to raise the costs of C&W and other international carriers on the U.S.-U.K. route by ensuring that all of AT&T's outbound U.S.-U.K. traffic terminates on BT's facilities rather than facilities of C&W and other competitors of BT. The anticompetitive effect of this strategy on C&W will be two-fold. First, C&W no longer will be a net importer of bilaterally traded minutes of switched transatlantic service, and will have to pay for termination in the United States at rates that are higher than the marginal cost of terminating the return minutes that C&W would have earned if AT&T was not dealing exclusively with BT. Second, by depriving C&W of the return traffic that permits

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<sup>2</sup> Comments of Cable & Wireless at 2-13.

<sup>3</sup> *Id.* at 2-10.

C&W to operate at an efficient scale, the Global Venture may make C&W a higher-cost provider of telecommunications services. Both of these effects will result in higher prices for consumers.

Unfortunately, the market is unlikely to correct for these anticompetitive effects in the U.S.-U.K. market. Specifically, these effects will not be prevented or cured by massive defections of AT&T customers to other carriers, by compensating traffic termination arrangements between C&W and carriers other than AT&T, or by reductions in termination charges of other U.S. carriers serving the U.S.-U.K. route. The possibility of mass defections to other carriers is limited by AT&T's commanding market position in the U.S. and AT&T's ability, long after the divestiture of its local exchange affiliates, to retain customers for reasons other than value.<sup>4</sup> Similarly, the ability of C&W to make up the shortfall in return traffic by dealing with other carriers is fatally limited by AT&T's dominant share of the U.S.-U.K. market and the lack of sufficient non-AT&T traffic for which compensating arrangements can be made.<sup>5</sup> Similarly, there is little reason to believe that AT&T's competitors will cut their termination rates to incremental cost in response to an AT&T price increase to BT's competitors. Instead, those carriers, which lack AT&T's size and cost structure, are likely to charge the same as AT&T or some lower price that still exceeds incremental cost, thereby defraying the competing carriers' fixed costs and generating profit.

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<sup>4</sup> Also, only those rare customers that make large numbers of U.S.-U.K. calls, relative to their total interexchange usage, are likely to change from AT&T to another carrier simply to escape supracompetitive prices on the U.S.-to-U.K. route.

<sup>5</sup> AT&T represents 50 percent of outbound U.S.-U.K. traffic; AT&T's largest competitor, MCI WorldCom, represents only 23 percent of that traffic. Also, AT&T currently accounts for nearly 57 percent of the minutes that C&W receives from U.S. carriers for termination in the U.K. Given these market shares, C&W could make up for the loss of AT&T traffic only by persuading all of AT&T's competitors to shift all of their traffic to C&W and away from BT and BT's competitors. The result will not be a fully competitive market, but a duopoly market for telecommunications services between the U.S. and the U.K.

Similarly, as C&W's comments point out, the Global Venture will further raise rivals' costs by giving BT incentives to deliver all of its net outflows of traffic to third countries for AT&T for reorigination in the U.S. - thereby "earning [AT&T] a greater share of return minutes at the expense of its competitors on third country routes."<sup>6</sup> Similarly, elimination of competition between BT and AT&T on "thin" international routes will permit the Global Venture to raise the costs of competing providers by charging above-cost rates for transit services on routes controlled by the Global Venture.<sup>7</sup>

The comments in this proceeding generally agree with C&W's concerns. Except for AT&T,<sup>8</sup> the commenters generally agree that the market power conferred by BT's continuing control of local termination facilities in the U.K. will permit the Global Venture to discriminate against its competitors and delay the advent of effective alternatives for termination of outbound U.S.-U.K. traffic.<sup>9</sup> Similarly, commenters other than AT&T agree that the aggregation of BT and AT&T transatlantic traffic, as well as traffic to third countries, will permit the Global Venture to manipulate international traffic flows to the detriment of competition in the U.S.<sup>10</sup>

The only submission in the comment round that denies the anticompetitive potential of the Global Venture, in fact, is AT&T's letter to the Commission of January 19, 1999,

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<sup>6</sup> Comments of Cable & Wireless at 9 (quoting Comments of AT&T Corp., in *Merger of MCI Communications Corporation and British Telecommunication plc* at 20 (Jan. 24, 1997)).

<sup>7</sup> Comments of Cable & Wireless at 10.

<sup>8</sup> AT&T, of course, filed FCC comments raising competitive concerns very similar to C&W's when BT proposed to merge with MCI. *See* footnote 6, *supra*.

<sup>9</sup> *See* Comments of MCI WorldCom, Inc. at 3; Comments of Level 3 Communications, LLC; Comments of Esprit Telecom (U.K.) Limited; Comments in Opposition of GTE at 18-22; Comments of Sprint Communications Company L.P.

<sup>10</sup> *See* Comments of Star Telecommunications, Inc.; Comments of Sprint Communications Company L.P.

which argues that the Global Venture will have a small share of the MNC market and therefore will lack the ability to reduce competition and raise prices in that market. As the following discussion shows, however, AT&T's discussion of MNC services is based on a purported relevant market that cannot survive even cursory scrutiny.

**B. The Global Venture Will Reduce Competition In the MNC Market**

AT&T's submission to the Commission of January 19, 1999 reasserts - and purports to offer additional support for - AT&T's claim that BT and AT&T have a combined share of less than 10 percent of the market for "global corporate communications services."<sup>11</sup>

Specifically, AT&T repeats its definition of the market for global corporate communications services as "the furnishing of a combination of voice, data, video and other telecommunications services over a compatible international network of facilities that have the same quality, characteristics, features and capabilities wherever they are provided."<sup>12</sup>

AT&T then cites two studies - one by CIT Research and the other by McGraw-Hill - that adopt different, but similarly expansive, market definitions.<sup>13</sup> The CIT Research report, for example, includes revenues for "network management and support services," which CIT defines to include "managed voice/VPN services . . . , facility management . . . and VSAT facilities management."<sup>14</sup> The McGraw-Hill study includes estimated revenues for a market consisting of "managed data network services, international virtual private network voice

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<sup>11</sup> Letter from Mark D. Schneider and David L. Lawson, counsel for AT&T, to Magalie Roman Salas, Secretary, Federal Communications Commission (Jan. 19, 1999) ("AT&T Letter").

<sup>12</sup> Applications and Public Interest Statement in Support of the Global Venture of AT&T Corp. and British Telecommunications plc at 18 ("AT&T Statement"); AT&T Letter at 3.

<sup>13</sup> *Id.* at 3-5.

<sup>14</sup> *Id.* at 3-4.

and data services, outsourcing and facilities management."<sup>15</sup> AT&T cites these studies to support its claim that BT and AT&T account for less than an aggregate 10 percent of the revenues earned from the sale of the services surveyed in those reports.

In order to carry their burden of defining a relevant market, however, the applicants must do more than list a group of services that corporate customers have been known to purchase together. They must demonstrate that they have identified the smallest group of products over which "a hypothetical profit-maximizing firm . . . that was the only present and future producer or seller of those products . . . would impose at least a small but significant and non-transitory increase in price."<sup>16</sup> Any market larger than the smallest set of products that satisfies this test will understate the competitive impact of the elimination of an existing supplier. The relevant market definition also must take into account any particular groups of buyers that would not respond to a targeted (discriminatory) price increase by switching to other products.<sup>17</sup> Finally, the analysis must inquire as to whether any particular suppliers are close substitutes for one another, such that the elimination of bidding competition between those two suppliers will result in higher prices to consumers.

AT&T ignores these steps in the analysis because the complete analysis exposes the serious anticompetitive consequences of the proposed Global Venture. Most fundamentally, AT&T's definition includes many suppliers that are not, from the perspective of global MNCs, close substitutes for the few providers able to provide the required array of global services competitively. Truly global MNCs have replaced, or are in the process of replacing, the private networks that formerly linked those companies' internationally dispersed operations. These MNCs are discovering that integrated service

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<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 15374 n. 77.

<sup>17</sup> Horizontal Merger Guidelines - 1992 at § 1.12, 4 Trade Reg. Rep. ¶13,104 (CCH).

packages can be acquired through outsourcing at rates that average 30 percent less than the cost of owning and maintaining a private network.<sup>18</sup> Those savings are only realized, however, where the supplier offers most or all of the global services on a facilities basis through a meshed network architecture, and does so in a single bid. Services acquired from firms without these capabilities cannot offer comparable savings and may even prove more costly than ownership and maintenance of a private network. Accordingly, service packages offered by suppliers that cannot provide the full range of MNC services on a global, facilities basis are not close substitutes for the services of firms that satisfy these criteria. For this reason, the relevant market for telecommunications services provided to truly global MNCs does not, as AT&T claims, include all providers of “network management and support services.” The service packages that are close substitutes for one another are available from a much smaller group of suppliers, and must consist of:

- (1) international long–distance voice communications;
- (2) international data communications in multiple protocols, including Asynchronous Transfer Mode ("ATM"), Frame Relay, X.25 and Internet Protocol, through virtual private networks or managed bandwidth;
- (3) a variety of value–added services, including video and audio conferencing, call centers (*i.e.*, 800 numbers), calling cards, consolidated billing, electronic mail and firewall;
- (4) in a "meshed" network, spanning multiple continents and countries, that links branch offices directly rather than through a headquarters location;
- (5) provided in substantial part over facilities leased or owned by the service provider.

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<sup>18</sup> For this reason, AT&T is simply wrong to claim that the relevant market must include “the substantial portion of global corporate communications services that are supplied through self-provision.” AT&T Letter at 4. Because of the large differential in cost, self-provision and outsourcing are not close substitutes.

The MNC market, properly defined in this way, comprises only a short list of vendors, including BT and AT&T, that can credibly bid for global MNC contracts. As the Commission previously has acknowledged, AT&T and BT are among "only a handful of major competitors world-wide in the global seamless services market."<sup>19</sup> Although no single firm can provide an exhaustively global network, AT&T and BT are each, separately, better positioned than anyone else to do so. Specifically, BT and AT&T enjoy the following advantages that make them close substitutes as providers of MNC services:

(1) **Global Reach.** BT and AT&T serve more direct connections over their own facilities than any other telecommunications companies and have more bilateral relationships with third countries than any of their domestic or global competitors. Accordingly, each company has greater opportunities to secure favorable terms for exchange of traffic with foreign telephone companies than their competitors have.

(2) **Reputation and Track Record.** BT and AT&T have strong reputations for quality and reliability. Such a reputation can result in a successful bid for mission-critical applications, even at a somewhat higher bid price.

(3) **Bid-Response Capability.** BT and AT&T have sufficient personnel and other resources dedicated to the bidding process to permit them each to bid on virtually all of the requests for proposal released by global MNCs each year. Each of these bids costs tens of thousands of dollars to develop (and may rise in some cases to seven figures), and BT and AT&T are unique among participants in the MNC market in the resources they can bring to this process and the number of bids they can process simultaneously.

(4) **Position in Key Domestic Markets.** BT and AT&T are former monopoly telephone companies in two of the most important domestic markets in the world. The U.S. and the U.K. are home to more global companies than any other national markets

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<sup>19</sup> *Merger of MCI Communications Corporation and British Telecommunications plc*, 12 FCC Rcd 15351, 15388 (1997).

(excluding Japan), and global companies based in one of those countries invariably have operations in the other country.

(5) **Familiarity with Customers.** BT and AT&T are former monopolists and still the largest participants in key segments of their home markets. Accordingly, each company has a unique store of information and experience concerning the target base of MNC customers in its home country. Competitors that know only as much about a prospective customer as is disclosed in a request for proposal - or is otherwise publicly available - cannot match this store of customer-specific experience.

(6) **Depth of Data Network and Value-added Offerings.** BT and AT&T offer the most extensive arrays of value-added services available in the MNC market, and have well-established data networks that support a unique range of older and newer data protocols. By contrast, newer competitors, such as MCI WorldCom, do not support many older protocols that still may be important to global MNCs.<sup>20</sup>

On all of these facts, it is clear that the elimination of competition between AT&T and BT in the MNC market would seriously undermine the competitiveness of that market. As the Commission has acknowledged, the global seamless services market already is credibly served only by a "handful" of suppliers. As the discussion above demonstrates, among this handful of suppliers AT&T and BT, as former monopolists in two of the most important domestic markets in which global MNCs operate, are the closest substitutes for many customers. Accordingly, elimination of competition between those entities very likely would leave the Global Venture with the power to raise prices and restrict supply in the MNC market, and unquestionably would leave consumers with a markedly inferior set of choices from which to satisfy their global telecommunications needs. Accordingly, the proposed Global Venture should not be approved.

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<sup>20</sup> Through their BT Syncordia, BT Syntegra and AT&T Solutions operations, BT and AT&T also have unrivalled ability to develop integrated services packages for MNCs.

## II. If The Commission Approves The Global Venture, It Should Condition That Approval Upon Effective Safeguards

A number of commenters acknowledge the anticompetitive potential of the Global Venture but urge the Commission only to condition approval of the applications on a modest set of regulatory requirements. Some commenters, for example, urge the Commission to impose dominant carrier requirements and the “no special concessions” rule.<sup>21</sup> One commenter proposes, as an additional condition, that AT&T be required to withdraw from its WorldPartners and Unisource alliances;<sup>22</sup> and another commenter suggests that approval be conditioned upon BT’s implementing equal access and making unbundled local loops available to competitors in the U.K.<sup>23</sup> These suggested conditions, however, will not adequately constrain the ability of the joint venture to misuse its market power. Instead, if the Commission elects to approve the Global Venture, it must condition that approval upon a package of effective regulatory safeguards that includes, but is not limited to, dominant carrier regulation, the no special concessions requirement and withdrawal of AT&T from the WorldPartners and Unisource alliances.<sup>24</sup>

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<sup>21</sup> Comments of MCI WorldCom, Inc. at 10; Comments of Level 3 Communications, LLC at 12; Comments of Sprint Communications Company L. P. at 2-7.

<sup>22</sup> Comments of MCI WorldCom, Inc. at 11.

<sup>23</sup> Comments of Level 3 Communications, LLC at 3-10.

<sup>24</sup> The conditions imposed on the Global Venture certainly should be no less stringent than those the Commission adopted in its *BT-MCI I* and *BT-MCI II* orders. *MCI Communications Corporation, British Telecommunications plc, Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended*, 9 FCC Rcd 3960 (1994); *Merger of MCI Communications Corporation and British Telecommunications plc*, 12 FCC Rcd 15351 (1997). In light of the greater competitive risks presented by the Global Venture, the conditions imposed upon the Global Venture should be more stringent than those adopted in *BT-MCI I* and *BT-MCI II*.

**A. Dominant Carrier And “No Special Concessions” Rules Are Inadequate In Themselves To Control The Global Venture’s Market Power**

Some commenters suggest that the Commission subject AT&T, the Global Venture, US LLC, US Sub LLC and TLTD to dominant carrier regulation and apply the “no special concessions” rule to “AT&T, the Global Venture, and each of the Global Venture subsidiaries that hold Section 214 authorizations, vis-à-vis BT and each of the Global Venture subsidiaries that are licensed to operate in the United Kingdom.”<sup>25</sup> These proposed requirements, however, will not address all of the anticompetitive incentives that the Global Venture creates.

Dominant carrier regulation, for example, will require AT&T, the Global Venture and its licensed subsidiaries to: file tariffs upon one day’s notice (with a presumption of lawfulness);<sup>26</sup> file quarterly traffic and revenue reports for their dominant routes;<sup>27</sup> file quarterly reports summarizing the provisioning of all basic network facilities and services they procure from BT;<sup>28</sup> and file quarterly circuit status reports.<sup>29</sup> These measures are designed to assist the Commission in determining whether dominant foreign affiliates of U.S. carriers are sending more than proportionate return traffic to their US affiliates<sup>30</sup> or are

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<sup>25</sup> Comments of MCI WorldCom, Inc. at 10; *see also* Comments of Level 3 Communications, LLC at 12.

<sup>26</sup> *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, FCC 97-398, at ¶ 222. (Nov. 26, 1997) (“*Foreign Participation Order*”).

<sup>27</sup> *Id.* ¶ 271.

<sup>28</sup> *Id.* ¶ 277.

<sup>29</sup> *Id.* ¶ 283.

<sup>30</sup> *Id.* ¶ 271.

discriminating against nonaffiliated US carriers in the provision of basic network facilities and services.<sup>31</sup>

Even if fully adequate for their intended purposes, these dominant carrier regulations would not address all of the competitive risks posed by the Global Venture. Notably, the reporting requirements would not prevent BT from dealing exclusively with its joint venture partner on the U.S.-U.K. route and manipulating transit traffic flows through the U.S. to third countries. Similarly, the dominant carrier reporting and tariffing requirements would not address the increased concentration in the carriers' carrier and MNC markets that would result from the elimination of competition between BT and AT&T in those markets.

Imposition of the "no special concessions" rule, in the form described by the commenters advocating that requirement, also will impose constraints on the behavior of the Global Venture but will not fully address its anticompetitive potential. MCI WorldCom, for example, urges the Commission to interpret the "no special concessions" rule as prohibiting AT&T, the Global Venture and the Global Venture's subsidiaries from obtaining preferential access to basic BT services such as Home Country Direct, 1-800 and ISDN.<sup>32</sup> Level 3 requests that the "no special concessions" rule be interpreted to prohibit AT&T and the Global Venture entities from accepting unspecified "special deals for the global routing of traffic."<sup>33</sup>

Although the versions of the "no special concessions" rule proposed by MCI WorldCom and Level 3 have some merit, they will not squarely address the anticompetitive incentives identified in C&W's comments. Notably, prohibitions on preferential access to basic BT services and "special deals" on routing of AT&T's outbound U.S. traffic through

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<sup>31</sup> *Id.* ¶ 277.

<sup>32</sup> Comments of MCI WorldCom, Inc. at 10.

<sup>33</sup> Comments of Level 3 Communications, Inc. at 13.

the U.K. to third countries will not prevent exclusive self-dealing between BT and AT&T on the US-U.K. route. Similarly, those restrictions will not prevent BT from routing all of its third-country traffic transited through the U.S. to AT&T, will not correct the concentration of market power for carriers' carrier service on "thin routes" that the Global Venture will cause, and will not reduce the concentration of market power that the Global Venture will cause in the market for global services provided to MNCs. Accordingly, dominant carrier and "no special concessions" requirements, if imposed as conditions of approval of the Global Venture, must be combined with the other safeguards described below.

**B. The Global Venture Should Not Be Approved Upon AT&T's Withdrawal From Its WorldPartners And Unisource Alliances**

MCI WorldCom, Inc. suggests that in addition to imposing dominant carrier and "no special concessions" requirements on the Global Venture, the Commission should require AT&T to withdraw from its WorldPartners and Unisource alliances.<sup>34</sup> C&W agrees that if the proposed Global Venture is approved, AT&T's participation in the WorldPartners and Unisource alliances will exacerbate the effects of the resulting elimination of competition between AT&T and BT in the market for global services provided to MNCs. Specifically, AT&T's continued participation in these alliances would facilitate coordinated bidding, allocation of customers and reduced choice for MNCs. C&W does not agree, however, that AT&T's withdrawal from these alliances would reduce the anticompetitive effects of the Global Venture in the MNC market. As C&W has explained, BT and AT&T are the closest substitute suppliers among the handful of credible providers of MNC services, and elimination of competition between those companies is alone sufficient to produce a

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<sup>34</sup> Comments of MCI WorldCom, Inc. at 11.

dangerous reduction of competition in the MNC market. Accordingly, this condition, too, should be imposed only in conjunction with other regulatory safeguards.

**C. Commission Requirements For Local Loop Unbundling And Equal Access Requirements In The U.K. Will Not Adequately Protect Consumers**

In their efforts to liberalize their telecommunications sectors, national administrations confront the task of controlling the market power of the incumbent local exchange carrier in a competitive environment - including the incumbent's ability to leverage that power in downstream markets such as long distance and international services. National regulators have tailored their responses to this problem to fit national industrial policy and the circumstances of their telecommunications industries.

Level 3 Communications, however, suggests that imposition of "unbundling" and "equal access" requirements on BT might offer a sufficient condition for approval of the Global Venture. This suggestion, however, calls upon the Commission to graft a U.S. regulatory requirement on the present U.K. regulatory regime. Such a condition will not correct for the anticompetitive incentives of the joint venture and will undermine the infrastructure-based model of telecommunications market liberalization in the U.K.

BT is unlike the RBOCs to which unbundling and equal access requirements are applied by the Telecommunications Act of 1996. BT was never required to divest its local exchange facilities and services from its long-distance facilities and service. BT operates as a vertically integrated incumbent with the types of vertical advantages about which AT&T has expressed fears in its opposition to the authorization requests of RBOCs to provide long distance services in the U.S.

U.K. policymakers sought to address BT's control of the local loop by actively encouraging the deployment of alternative local network infrastructure, particularly cable TV/telephony networks. This approach reflected a policy determination that if competitors owned their own infrastructure, their reliance on the incumbent would be substantially

reduced and the opportunities for the incumbent to exercise vertical power against new entrants would be lessened.

In enacting the Telecommunications Act of 1996, the U.S. Congress elected not to rely solely on local network construction but also to permit local competition based on resale and unbundling. However, Congress was starting with a “clean slate” in the 1996 Act because competition in local services was largely foreclosed before that statute was enacted. By contrast, the U.K. facilities-based infrastructure approach to local competition has been in place for over 10 years.

As unbundling involves reliance on the incumbent local exchange carrier’s network and processes, new and more sophisticated regulatory controls on the incumbent local exchange carriers has been considered necessary in the U.S. As the experience of competing local exchange carriers and the FCC’s decisionmaking shows, a “bare” obligation on an incumbent to unbundle its local network is unlikely to be effective. The U.K. regulatory regime almost totally lacks the supporting non-accounting safeguards, electronic interfacing and reporting requirements necessary for effective unbundling. Obviously, the FCC cannot monitor and implement a detailed unbundling regime in the U.K. from a distance.

A number of differences between the regulation of the RBOCs and other ILECs in the U.S., and regulation of BT in the U.K., demonstrate the difference between the two national approaches and the likely ineffectiveness of an unbundling requirement in the U.K. These differences include:

- **Equal Access and Presubscription.** Equal access has not been a feature of the U.K. regulatory regime. A form of presubscription will be introduced in the U.K. in accordance with EU requirements, but not before mid 2000. However, as presubscription is being introduced in the U.K. more than 10 years after initial market liberalization, presubscription will have less impact in diluting BT’s dominant position than in the U.S. where it became

available much earlier in the development of competition. Finally, as the BOCs could not compete in long distance services, they had no incentive to introduce and administer presubscription in a manner that advantaged one interexchange carrier over another. Presubscription is being introduced in the U.K. with virtually no safeguards, such as the FCC's constraints on joint marketing pursuant to section 251(g) of the Telecommunications Act of 1996 to protect competitors against BTs' exploitation of presubscription processes in its local network to benefit its competing long distance services.

**Nondiscrimination Requirements.** While BT's license to provide service in the U.K. includes a general requirement that BT not discriminate in the supply of specified interconnection services to its competitors, monitoring and reporting mechanisms in the U.K. are less rigorous than those of the FCC. BT also is not subject to detailed reporting requirements on the comparative treatment of competitors and its own operations in relation to pre-ordering, ordering, provisioning and maintenance processes.

- **Structural Separation.** BT is not required to operate its local exchange business and its long distance business in separate subsidiaries and at arm's length, as the ILECs are required to do under section 272 of the Telecommunications Act of 1996. BT not only operates its long distance and local businesses within the same corporate entity, but these businesses are combined together by customer segment: *e.g.*, a retail division jointly markets local and long distance services to residential customers.

Accordingly, BT would not meet the requirements of section 272 because the same Board of Directors, senior executives and marketing staff manage and participate in both the local and long distance businesses. U.K. regulation requires BT to separately account for its network access business, but BT is

not subject to any internal constraints on its leveraging advantage on non-price issues, such as cross-marketing.

- **CPNI Rules.** BT, unlike the ILECs, is not subject to significant constraints on the use of customer information derived from its local exchange business in its other businesses. It is C&W's understanding that BT holds all information about its customers, including their local and long distance calling information, in a single or interconnected databases accessible across its marketing staff. C&W also is concerned that there are not adequate, externally verified controls on BT using information about competing carriers' customers that BT gains in the course of providing interconnection services or implementing presubscription choices.
- **Collocation Requirements.** BT has no obligation to permit competing carriers to share BT ducts, towers or space in BT exchanges.<sup>35</sup> BT therefore has substantially greater ability than the ILECs to delay and frustrate alternative network facilities by refusing requests for collocation.
- **Operational Support Systems.** BT is not explicitly required to implement electronic interfaces that provide competitors with real-time, equivalent access to pre-ordering, ordering, provisioning and maintenance systems, as ILECs are required to do in the U.S. Many inter-carrier processes in the U.K. remain manual or involve only the electronic transmission of data without a direct interface with BT's systems of the kind that BT's own, competing operations enjoy. As AT&T has pointed out, a manual process for ordering, provisioning and maintenance of an incumbent's facilities and

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<sup>35</sup> AT&T has been quite vocal in its demands for explicit rules detailing extensive collocation requirements in the U.S. Comments of AT&T Corporation in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, at 39-42 (May 16, 1996) ("AT&T Local Competition Comments").

services is clearly discriminatory and “intolerable”.<sup>36</sup> BT has proposed using electronic transmission of messages between carriers, but this falls short of the electronic interface considered necessary by AT&T and the Commission for support of resale and unbundling.

AT&T has stated that the requirements of the Telecommunications Act and the implementation rules adopted by the FCC are necessary to "eliminat[e] the economic and legal barriers to the nationwide introduction of exchange services competition."<sup>37</sup> AT&T has been a strong advocate of prescriptive rules to promote local competition because “the reality is that all incumbent LECs have the ability and overwhelming incentives to refuse to accept any arrangement that would permit effective competition with their monopoly exchange and exchange access services unless they believe that less advantageous arrangements are nearly certain otherwise to be imposed”<sup>38</sup>

However, even if unbundling was to be introduced in the U.K. with the necessary safeguards, such a requirement still would not effectively address the anti-competitive impact of this merger. First, unbundling the BT U.K. network does nothing to redress the adverse impact of the loss of AT&T traffic on U.K. carriers providing termination services to U.S. carriers. Unbundling also is no remedy for the ability of AT&T/BT to raise their competitors’ costs by manipulating traffic streams and accounting rates between the US and the U.K. and third countries.

Second, based on the U.S. experience, unbundling is not likely to be used by U.S. or U.K. carriers to serve residential and small business customers, who account for a substantial proportion of inbound and outbound international calls. Unbundling also is not

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<sup>36</sup> AT&T Local Competition Comments at 34.

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

<sup>38</sup> *Id.* at 7.

likely to be used outside the main U.K. cities by U.S. or U.K. carriers. Therefore, U.S. carriers will continue to be heavily dependent on U.K. carriers to terminate inbound calls from the U.S. U.S. carriers critically depend on the success of the U.K. carriers competing against BT in the local network and in the supply of national termination services.

Third, unbundling does little to dilute the power that AT&T/BT will acquire in the market for services to multi-national corporations. Access by competitors to unbundled lines to serve the U.K. offices of MNCs might be of some limited assistance, but the advantages discussed above that AT&T/BT have over their rivals are too substantial and pervasive to be overcome by an unbundling requirement. Finally, U.S. competitors themselves are becoming less sanguine about the advantages of unbundling over network construction. AT&T's own experience, and its recent change in strategy with purchase of TCI and the Time Warner joint venture, suggest that unbundling is not as effective as a new entrant deploying its own alternative network. As the Chief Executive Officer of AT&T, Michael Armstrong, recently said after complaining about the operational and other problems his company faced in using resale and unbundling:

“The moral of that story is - you can't sell your competitor's service, over their plant and equipment, at high prices, with weeks to handle an order. That's one reason we decided to buy TCI - to give US a way around the local phone company bottleneck.”<sup>39</sup>

In other words, AT&T is now following the same “game plan” as the U.K. cable telephony companies, such as C&W. The interests of U.S. carriers in ensuring a competitive U.K. market for termination are better protected by ensuring that the cable telephony operators in the U.K. remain viable competitors of BT and are able to continue

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<sup>39</sup> Michael Armstrong, Remarks to The Economic Club of Detroit (September 29, 1998).

deploying their own network facilities, than by imposing unbundling requirements that will not be fully effective and are inconsistent with longstanding regulatory policy in the U.K.

**D. The Global Venture Joint Partners Must Observe Proportionate Return Requirements On The U.S.-U.K. Route**

As C&W explained in its comments, C&W is today a competitor of BT for termination of outbound U.S.-U.K. communications. As a result of that competition, C&W charges as little as 4.2 cents per minute to terminate a call in the U.K. If the Global Venture is approved, however, the present competitive market, in which return minutes are earned by the strongest competitor, will be replaced by a system in which private arrangements and self-dealing within the BT-AT&T joint enterprise determine which carrier receives exchange traffic.

The result will be precisely the kind of alignment between incumbent operators that the proportionate return rule was designed to prevent. Removal of the proportionate return rule should have represented the next step in the evolution of a competitive market for termination services across the Atlantic by allowing carriers to bid against each other for return traffic irrespective of their share of outbound traffic. Rather than hastening the end of the accounting rate system, as the parties claim, the Global Venture represents a retreat to exclusive dealings between incumbents, which locks out new entrants. The result will be an increase in the costs of BT's competitors, further delay in local competition in the U.K. and higher costs for consumers.

If the Global Venture is approved, the Commission must protect competition in the market for telecommunications between the U.S. and U.K. by imposing a requirement of proportionate return on AT&T and the Global Venture in their dealings with BT. Specifically, C&W proposes that proportionate return requirements be retained for as long as the BT-AT&T share of two way traffic between the U.S. and U.K. is above one-third of total traffic on that route, or after three years from the date of the Commission's order in the proceeding - whichever is sooner. This will provide a reasonable opportunity for U.S. and

U.K. competition to evolve, and for the market power of BT and AT&T to decline, to the point that BT and AT&T remain strong participants but their influence is more effectively counterbalanced by other competitors.

The entry of the RBOCs into long distance competition also may provide alternative sources of return traffic that eventually may match the AT&T traffic taken off the table when the Global Venture self-corresponds. AT&T and BT are skillfully exploiting the asymmetrical rules between the U.K. and the U.S. concerning the participation of the incumbent local exchange carrier in international services.

AT&T, through the Global Venture, will take advantage of BT's ability as a vertically integrated dominant carrier to capture most of the U.K.'s international traffic. Internalization of this traffic by the Global Venture will allow AT&T to lower its cost base and raise its rivals costs. At the same time, the continuing exclusion of the RBOCs from long distance competition in the U.S., as they attempt to meet the requirements of the Telecommunications Act of 1996, gives AT&T more time to entrench its market position.

For its part, BT also benefits from exclusion of the RBOCs because its U.K. competitors have no alternative source of return traffic to replace the AT&T traffic lost to the Global Venture. This allows BT also to raise its U.K. rivals' costs and entrench its position in advance of regulatory changes, such as the introduction of presubscription, in the U.K.

C&W does not propose that, in order to ameliorate the impact of the Global Venture, the RBOCs should be permitted to enter long distance competition before they have satisfied U.S. requirements for local competition. Rather, the Global Venture should not be permitted to move to internalization of traffic in advance of the entry of the RBOCs as a counterbalancing force to AT&T. Accordingly, in addition to the above tests, C&W proposes that proportional return rules should continue to apply to BT and AT&T until ILECs representing three quarters or more of U.S. exchange lines have been authorized by the FCC to provide long distance services.

**E. BT and AT&T Must Divest Half Circuits At The Election Of Correspondent Carriers**

Approval of the Global Venture will directly raise the question of those international half-circuits that BT and AT&T maintain with other correspondent carriers. In order to protect competition, BT and AT&T should be required to divest those half-circuits, at cost, upon election of the correspondent carriers. Also, where BT and AT&T supply half circuits for competitors of themselves and the Global Venture, they should be required to institute verifiable procedures to ensure that they do not use customer-specific information concerning customers of their correspondent competitors in their own marketing efforts.

**F. AT&T Must Divest Telewest and ACC**

As noted earlier, C&W agrees with the proposal of MCI WorldCom that the Global Venture not be approved unless AT&T withdraws from its WorldPartners and Unisource alliances. In addition, AT&T holds an interest in ACC, a telecommunications reseller in the U.K.; and through its pending merger with TCI, AT&T will hold a significant share in Telewest, one of the major cable telephony providers in the U.K. Approval of the Global Venture will remove any incentive for AT&T to use these holdings to increase competition in the local and intercity markets in the U.K. Accordingly, AT&T should be required to divest these interests as a condition of approval of the Global Venture.

**G. Safeguards on Third Country Routes**

As noted above, BT and AT&T are the world's main providers of transit services and each account for more direct routes than any other carriers. BT and AT&T currently compete against each other to provide other carriers with services to third countries from the U.S. and the U.K.

The well-accepted remedy for a horizontal concentration of power is divestiture. Either BT and AT&T should be required to divest capacity on individual routes on which they are the only two, or two of the only three, facilities-based carriers.

Finally, to ensure that the traffic in the carriers' carrier market remains reasonably contestable, C&W proposes that AT&T/BT contracts to supply international carriage

services to carriers and service providers must not have a term (including renewal periods) of more than 12 months and must not impose onerous termination obligations, such as lengthy termination notice periods or termination penalties.

#### **H. Global Venture's Participation in Cable Consortia**

The Global Venture will be the largest shareholder by a substantial margin in many of the world's cable systems. The Global Venture's power within cable systems will be reflected not only in its voting interests but also the control it may exercise when its personnel chair consortia committees that make decisions on operations, maintenance and capacity. As Sprint's comments point out, the Global Venture also can exploit its position as the landing party for most cable systems in the U.K. and the US.

C&W proposes that the following conditions should be applied to the Global Venture:

- The Global Venture should not be able to vote interests in an individual cable system in excess of 33 per cent of total ownership interests;
- The Global Venture must disqualify itself from voting on a decision about the appointment of a landing party if the Global Venture and another party have both sought to be the landing party for a cable system in a particular country;
- The Global Venture must disqualify itself from voting on a decision about appointment of the billing and administration party for a cable consortium if the Global Venture and another party have been nominated for that role;
- The Global Venture must consent to a request by another owner in a cable consortium for that consortium to reconsider BT's or AT&T's role as the billing and administration party prior to the Global Venture assuming that role; and
- The Global Venture must provide non-discriminatory access at incremental cost to cable landing stations of the Global Venture and to backhaul facilities

required by another operator to establish a point of presence at that cable station. This obligation will extend to BT or AT&T where one of those companies continues to own or operate the cable station or backhauls.

### **I. Interface Disclosure Requirements**

In the U.K., BT is subject to requirements to disclose proposed changes in its network interfaces sufficiently in advance of those proposed changes to permit the industry to consult over appropriate common standards and for individual competitors to implement the changes.<sup>40</sup>

Competitors will be disadvantaged if the transfer of BT's network assets to the Global Venture results in a dilution of these prior disclosure requirements. It is appropriate that such obligations apply to the Global Venture at both ends of the transatlantic route and generally throughout its network.

### **J. The Global Venture Should Comply With Reasonable And Effective Reporting Requirements**

Because of the anticompetitive potential of the Global Venture, approval should be conditioned upon more stringent reporting requirements than those associated with the Commission's dominant carrier regulations. Specifically, AT&T and the Global Venture entities should:

- (1) keep records of all services and facilities and services provided to by BT or AT&T to the Global Venture, or furnished to the Global Venture by AT&T or BT;
- (2) file monthly status reports for circuits between the U.S. and U.K. and publish those reports quarterly;

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<sup>40</sup> *Determination that British Telecommunications plc Has Interface Control with Regard to New Interface Specifications Relating to Telephony Services Provided Over the Telephony and ISDN Networks* (Director General of Telecommunications, January 1999).

- (3) file notifications of all circuits added between the U.S. and U.K., including the ownership of those circuits;
- (4) file quarterly reports of revenue, quantity of messages and minutes of telecommunications traffic originating and terminating on the U.S.–U.K. route within 90 days of the end of each quarter; and
- (5) identify, in their quarterly traffic reports, the volume of traffic reoriginated from the U.K. through the U.S., along with the destinations of that traffic, and the volumes of traffic from third countries reoriginated through the U.S. to the U.K. and Europe.

**K. BT and AT&T Must deal With The Global Venture On A Nondiscriminatory Basis**

The Commission must ensure that dealings between the Global Venture partners and the Global Venture are conducted on a nondiscriminatory basis, and that neither BT nor AT&T receives any commissions from the other for sales or other services performed in connection with the Global Venture.

## Conclusion

As the comments in this proceeding show, the proposed Global Venture cannot be approved, as the applicants suggest, without analysis of its likely effects on consumers. In fact, only outright rejection of the Global Venture will protect consumers from the effects of combining the international resources of two of the world's dominant telecommunications carriers in an entity that will eliminate effective competition in several of the markets it will serve. In the alternative, if the Global Venture is approved, that approval should be conditioned upon the regulatory requirements described in these reply comments.

Respectfully submitted,

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