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



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| In the Matter of | ) | |
| AT&T Corp., British Telecommunications, plc, | ) | |
| VLT Co. L.L.C., Violet License Co. LLC, and | ) | |
| TNV [Bahamas] Limited Applications | ) | IB Docket No. 98-212 |
| For Grant of Section 214 Authority, Modification | ) | SES-ASG-19981110-01654 (30) |
| of Authorizations and Assignment of Licenses in | ) | SES-ASG-19981110-01655 (2) |
| Connection With the Proposed Joint Venture | ) | |
| Between AT&T Corp. and | ) | |
| British Telecommunications, plc | ) | |

# MEMORANDUM OPINION AND ORDER

Adopted: October 22, 1999 Released: October 29, 1999

By the Commission: Commissioner Furchtgott-Roth issuing a separate statement.

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## I. INTRODUCTION

1. AT&T Corp. (AT&T), British Telecommunications (BT), VLT Co. L.L.C. (VLT), TNV [Bahamas] Limited (TLTD), and Violet License Co. LLC (License Co.), collectively "AT&T/BT," have applied for the Commission's consent, under Sections 214 and 310(d) of the Communications Act of 1934, as amended,[1] and the Submarine Cable Landing Act,[2] to obtain or transfer certain licenses and authorizations in connection with the proposed joint venture (JV) between AT&T and BT to provide international telecommunications services.

2. Because we find that AT&T/BT have demonstrated that the joint venture is in the public interest, we approve, subject to certain conditions: (a) the grant of Section 214 authority to VLT and TLTD to provide facilities-based and resold international common carrier services; (b) the assignment to VLT of submarine cable licenses held by AT&T or its subsidiaries; (c) the assignment to License Co. of certain earth station licenses held by AT&T or its subsidiaries, and (d) the modification of certain Section 214 authorizations held by

[1] Communications Act of 1934, 47 U.S.C. §§ 214 (1991 and Supp. 1998) and 310(d) (1991).

[2] Submarine Cable Landing Act, 47 U.S.C. §§ 34-39 (1991).

AT&T or its subsidiaries.[3]

## II. BACKGROUND

### A. The Applicants

3. AT&T, a corporation organized under the laws of Delaware, is the largest long-distance and international telecommunications services carrier in the United States.[4] It provides voice and data communications services to residential, business, and government customers, and provides service to over 200 countries and territories around the world. AT&T holds Section 214 authorizations and certificates to provide international services and maintain ownership interests in international cable facilities. AT&T also holds radio licenses for earth stations used to provide international services.

4. BT, a company organized under the laws of England and Wales, is the largest telecommunications operator in the United Kingdom, providing local, long-distance, and international telecommunications services and telecommunications equipment to customers' premises. BT also offers a range of other telecommunications services, including private line circuits, mobile telecommunications services, and paging services. BT provides service to over 200 countries around the world. BT's wholly-owned affiliate, BT North America, Inc. (BTNA), is authorized pursuant to Section 214 to provide certain U.S. international telecommunications services.

5. VLT, a Delaware limited liability corporation, is a subsidiary of a holding company based in the Netherlands that will be equally owned by AT&T and BT. AT&T proposes to assign to VLT its ownership interests in cable landing stations in the United States and international submarine cable facilities within the U.S. territorial limits. VLT seeks new Section 214 authorization to provide facilities-based and resold international basic switched, private line, data, television, and business services.

6. TLTD, a Bahamas-based corporation, is also a subsidiary of a holding company based in the Netherlands that will be equally owned by AT&T and BT. AT&T proposes to

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[3] AT&T seeks to modify its Section 214 authorization only to the extent necessary to assign to VLT the ownership interests held by AT&T in international cable facilities within United States territorial limits and to assign to TLTD the ownership interests held by AT&T in international cable facilities outside of the U.S. territorial limit. AT&T does not seek any other changes in its current Section 214 authorization to provide facilities-based and resold international common carrier services.

[4] Federal Communications Commission, *Trends in Telephone Service* at 24, 53-54 (Common Carrier Bur., Industry Analysis Div., Feb. 1998).

assign to TLTD its ownership interests in international submarine cable facilities outside the U.S. territorial limits. TLTD's assets will also include BT's ownership interests in international submarine cable facilities outside the U.K. territorial limits and AT&T's and BT's operating agreements to provide international telecommunications services to various countries. TLTD seeks new Section 214 authorization to provide facilities-based and resold international basic switched, private line, data, television, and business services.

7. License Co., a Delaware limited liability corporation, will be a wholly-owned subsidiary of VLT. AT&T proposes to assign to License Co. its earth station licenses.[5]

### B. The Application

8. *The proposed joint venture.* On November 10, 1998, AT&T/BT filed an application seeking the Commission's consent for the grant, transfer, and modification of certain licenses and authorizations in connection with the proposed joint venture between AT&T and BT to provide international telecommunications services.[6] Under the proposed joint venture, AT&T will continue to offer international services to its customers on a common carrier basis pursuant to its Section 214 authorization. However, AT&T will no longer own any international facilities. Rather, the JV will provision to AT&T the underlying international services components, except for backhaul facilities and domestic switching services.[7] The JV will also provide wholesale, or carriers' carrier, services to international service providers on a common carrier basis. In addition, the JV will develop and offer new services to meet the telecommunications needs of multinational corporations (MNCs). AT&T and BT also propose to make substantial capital investments to enable the JV to replace AT&T's and BT's existing circuit-switched international facilities with a state-of-the-art Internet Protocol-based (IP) global network. AT&T and BT state that the proposed IP network will have a global architecture, based on open standards, to ensure that it is fully

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[5] Applications and Public Interest Statement in Support of the Global Venture of AT&T Corp. and British Telecommunications, plc (AT&T/BT application) at 5-6, (Nov. 10, 1998). In addition, BT will transfer its international cable facilities and cable landing stations to Concert Communications Co. (Concert), which is a U.K.-licensed subsidiary of a holding company based in the Netherlands that will be equally owned by AT&T and BT. *See ex parte* letter from James E. Graf, II, BTNA, to Magalie Roman Salas, Secretary, FCC at 2 (June 28, 1999) (AT&T/BT June 28, 1999 *ex parte* letter). AT&T/BT do not seek Commission authorization for the Concert JV entity.

[6] AT&T/BT application. In addition, on November 16, 1998, AT&T/BT filed the "Framework Agreement" describing the joint venture (*Framework Agreement*), and, on November 23, 1998, they filed additional Exhibits to the Framework Agreement.

[7] AT&T will continue to own backhaul facilities, switches, and other facilities that it uses to provide telecommunications services in the United States.

compatible with the networks of AT&T, BT, and foreign carriers that will operate in conjunction with the JV outside the United States and United Kingdom.

9. AT&T/BT assert that the JV will promote the public interest by: (a) promoting competition in the market for the provision of "global seamless services" to MNCs; (b) promoting competition in the provision of packet-switched international services by enabling AT&T and BT to accelerate the design, construction, and deployment of an advanced IP network; and (c) reducing settlement rates and hastening the demise of the traditional correspondent system through effective exploitation of efficient arrangements for the routing of traffic, such as hubbing and reorigination.

10. *Regulatory action.* In addition to the Commission, the Department of Justice (DOJ), Oftel (the U.K. telecommunications regulator), and the European Commission (EC) also reviewed this proposed joint venture. On March 30, 1999, the EC cleared the joint venture subject to the condition that AT&T sell off certain cable assets, and adopt structural separation safeguards between AT&T and other cable assets, in the United Kingdom. The EC found that AT&T/BT would have a combined market share of 30-50 percent of the global telecommunications services market, 18 percent of international bilateral carrier services traffic, and 50 percent of the traffic and 20 percent of the capacity on the U.S.-U.K. route. The EC concluded that there were several actual and potential competitors in all the markets and "plentiful additional capacity" at declining prices. Thus, the EC determined that the proposed joint venture would not have an anticompetitive effect. The EC authorized the JV to self-correspond on the U.S.-U.K. route.[8]

11. Oftel states that it has considered the effect of the joint venture on the current regulatory regime for international services. On June 1, 1999, Oftel issued a proposed license for the joint venture in which Oftel proposes to transpose a number of special conditions currently applied to BT to the joint venture. The specific conditions relate to BT's obligations to provide universal service, interconnection, non-discriminatory treatment, and to maintain accounting separations.[9]

12. On June 28, 1999, after conducting a review pursuant to the Hart-Scott-Rodino

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[8] *See* European Commission press release, *Commission clears BT/AT&T joint venture with conditions in the U.K. market,* Mar. 30, 1999, attached to *ex parte* letter from James E. Graf, II, BTNA, and Lawrence J. Lafaro, AT&T, to Magalie Roman Salas, Secretary, FCC, (Apr. 13, 1999) (AT&T/BT April 13, 1999 *ex parte* letter). "Self-correspondence" means that a carrier can use its own facilities, rather than the facilities of a correspondent foreign carrier, to terminate traffic at the foreign end of a call.

[9] Oftel, *BT/AT&T proposed joint venture: A consultative document on the Concert license issued by the Director General of Telecommunications,* June 1999 < http://www.oftel.gov.uk/licensing/conc0699htm >.

amendment to the Clayton Act,[10] DOJ concluded that the proposed joint venture may proceed.[11] In this Order, we independently review the proposed joint venture based on our statutory public interest standard, as described below.

## III. PUBLIC INTEREST FRAMEWORK

### A. Legal Standards

13. Pursuant to Sections 214(a) and 310(d) of the Communications Act (the Act), the Commission must determine whether AT&T/BT has demonstrated that granting, amending, or transferring control of the requested licenses and authorizations in connection with the proposed joint venture between AT&T and BT would serve the "public interest."[12] More specifically, under Section 214(a) of the Act, the Commission must find that the "present or future public convenience and necessity require or will require" approving AT&T/BTs' applications to modify AT&T's Section 214 authorization to allow it to transfer ownership of certain facilities to VLT and TLTD and to authorize VLT and TLTD to operate the acquired telecommunications lines.[13] Under Section 310(d) of the Act, the Commission must determine that the proposed transfer of earth station licenses "serves the public interest, convenience, and necessity" before it can approve the transaction.[14]

14. The public interest standard of Sections 214(a) and 310(d) of the Act is a

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[10] Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 18 (1997).

[11] Communications Daily, Vol 19, No. 124 (June 29, 1999).

[12] 47 U.S.C. §§ 34-39, 214(a), 303(r), 310(d) (1994). *See Teleport Communications Group Inc., Transferor, and AT&T Corp. Transferee,* 13 FCC Rcd 15,236 (1998) (*AT&T/TCG Order*); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI to WorldCom,* 13 FCC Rcd 18,025, 18,030, at ¶ 8 (1998) (*MCI WorldCom Order*); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries,* File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19,985, 19,987 at ¶¶ 29-36 (1997) (*Bell Atlantic/NYNEX Order*). The Commission also shares jurisdiction with the Department of Justice under sections 7 and 11 of the Clayton Act to disapprove acquisitions of "common carriers engaged in wire or radio communications or radio transmissions of energy" where "in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." *See* 15 U.S.C. §§ 18, 21(a) (recognizing the Commission's role as an antitrust agency with respect to acquisitions of "common carriers engaged in wire or radio communications or radio transmissions of energy").

[13] 47 U.S.C. § 214(a).

[14] 47 U.S.C. § 310(d).

flexible one that encompasses the "broad aims of the Communications Act."[15] These broad aims include, among other things, implementing Congress's "pro-competitive, de-regulatory national policy framework designed to . . . open[] all telecommunications markets to competition"[16] and "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services."[17] The public interest analysis may also consider whether the proposed transaction will affect the quality of telecommunications services provided to consumers or will result in the provision of new or additional services to consumers.[18] In evaluating whether the proposed transaction furthers the aims of the Act, the Commission may consider the trends within, and needs of, the telecommunications industry, the factors that influenced Congress to enact specific provisions of the Act, and the nature, complexity, and rapidity of change in the telecommunications industry.[19]

15. The statutory standard that the Commission must apply in this case requires a balancing of the potential public interest harms against the potential public interest benefits,[20] and AT&T/BT bear the burden of proof of showing that the benefits outweigh the harms.[21] Our public interest analysis is not limited by traditional antitrust principles.[22] In the telecommunications industry for which we have statutory responsibility, as in most others,

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[15] *MCI WorldCom Order*, 13 FCC Rcd at 18,030, ¶ 9; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19,987, ¶ 2; *In the Matter of the Merger of MCI Communications Corp. and British Telecommunications PLC,* 12 FCC Rcd 15,351 (1997) (*BT/MCI Order*), at 15,353, ¶ 3.

[16] H.R. Rep. No. 104-458 at 1 (1996); Preamble to Pub. L. No. 104-104, 110 Stat. 56 (1996).

*See* H.R. Rep. No. 104-458 at 1. *See also, e.g.*, 47 U.S.C. §§ 259, 332(c)(7), 706.

[18] *See, e.g., MCI WorldCom Order*, 13 FCC Rcd at 18,031, ¶ 9; *AT&T/TCG Order*, 13 FCC Rcd at 1523, ¶ 11; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,063, ¶ 158; *BT/MCI Order,* 12 FCC Rcd at 15,430, ¶ 205 (describing "lower prices, improved quality, enhanced service or new products" as examples of consumer benefits resulting from merger-specific efficiencies that are relevant to the public interest analysis).

[19] *MCI WorldCom Order*, 13 FCC Rcd at 18,031, ¶ 9; *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20,003, ¶ 32; *BT/MCI Order*, 12 FCC Rcd at 15,365, ¶ 29.

[20] *MCI WorldCom Order*, 13 FCC Rcd at 18,031, ¶ 10; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,063, ¶ 157.

[21] *See, e.g., MCI WorldCom Order*, 13 FCC Rcd at 18,031-32, ¶ 10; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,000-01, ¶ 29.

[22] *See Satellite Business Systems,* 62 F.C.C. 2d 997, 1069, 1088 (1977) *aff'd. sub. nom. United States v. FCC,* 652 F. 2d 72 (D.C. Cir. 1980) (*en banc*).

competition is shaped not only by antitrust rules but by the regulatory policies that govern interaction of firms inside the industries. An antitrust analysis -- such as that undertaken by the Department of Justice in this case -- focusses solely on whether a proposed merger will harm competition. Our public interest analysis also encompasses the broad aims of the Communications Act.[23] To apply our public interest test, then, we must determine whether the proposed transaction violates our rules, or would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy. That policy is, of course, shaped by Congress and deeply rooted in a preference for competitive processes and outcomes. Ultimately, we must determine whether AT&T/BT has demonstrated that the proposed transaction, on balance, serves the public interest, considering both its competitive effects and other public interest benefits and harms.[24] Where necessary, the Commission may attach conditions to the approval of a transfer of licenses in order to ensure that the public interest is served by the transaction. Section 214(c) of the Act also authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."[25] Similarly, Section 303(r) of the Act authorizes the Commission to prescribe such restrictions or conditions, not inconsistent with law, as may be necessary to carry out the provisions of the Act.[26] In addition, the Submarine Cable Landing Act[27] and Executive Order No. 10530[28] authorize the Commission to grant, withhold, or condition cable landing licenses, *inter alia,* "upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so

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[23] *MCI WorldCom Order*, 13 FCC Rcd at 18,030, ¶ 9, *citing Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19,987, ¶ 2.

[24] *See MCI WorldCom Order*, 13 FCC Rcd at 18,031-32, ¶ 10; *AT&T/TCG Order*, 13 FCC Rcd at 15,243-44, ¶ 12; *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20,001, 20007, ¶ 29, 36; *BT/MCI Order,* 12 FCC Rcd at 15,367, ¶ 33.

[25] 47 U.S.C. § 214(c). *See, e.g., MCI WorldCom Order*, 13 FCC Rcd at 18,032, ¶ 10; *MCI Communications Corp*, 9 FCC Rcd 3960, 3968, ¶ 39 (1994); *Sprint Corp.*, File No. I-S-P-95-002, Declaratory Ruling and Order, 11 FCC Rcd 1850, 1867-1872, ¶ 100-33 (1996) (*Sprint Declaratory Ruling*); *GTE Corp.*, 72 FCC 2d 111, 135, ¶ 76 (1979).

[26] 47 U.S.C. § 303(r). *See, e.g., FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (*Nat'l Citizens)* (broadcast-newspaper cross-ownership rules properly adopted pursuant to section 303(r)); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) powers).

[27] 47 U.S.C. §§ 34–39.

[28] Exec. Ord. No. 10,530, *reprinted as amended in* 3 U.S.C. § 301 *et seq.*

licensed."[29] In assessing the potential public interest effects of this transaction between AT&T and BT, we limit our analysis to those issues that have been raised by the parties to the proceeding and those additional issues that may significantly affect the public interest.[30]

### B. Analytical Framework for Assessing Competitive Effects

16. Although the proposed transaction before us is a joint venture and not a merger, we generally follow the analytical framework adopted by the Commission in the *Bell Atlantic/NYNEX Order* and the *BT/MCI Order* in conducting our public interest analysis of the competitive effects of the proposed joint venture.[31] As the Commission noted in the *BT/MCI Order*, this analytical framework is based not only on prior Commission analyses of market power,[32] but is also embodied in the antitrust laws, including the DOJ and Federal Trade Commission *1992 Horizontal Merger Guidelines* and the April 8, 1997 revisions of those guidelines.[33]

17. Consistent with the *1992 Horizontal Merger Guidelines*, the Commission, as part of its competitive effects analysis, seeks to define the relevant markets and those firms

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[29] 47 U.S.C. § 35. See *Rules and Policies on Foreign Participation in the U.S.Telecommunications Market,* 12 FCC Rcd 23891, 23,933–35 ¶¶ 93–96 (1997) *(Foreign Participation Order)* (discussing Commission's authority to impose conditions on submarine cable licenses).

[30] For this reason, we do not describe or analyze markets in which the merger is not likely to produce public interest harms or benefits.

[31] *See Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20,008, ¶ 37; *BT/MCI Order,* 12 FCC Rcd at 15,367, ¶ 33. *See also MCI WorldCom Order*, 13 FCC Rcd at 18,035, ¶ 15. In both instances our focus is on whether the proposed transaction harms or benefits consumers. None of the parties argued that we should apply a different legal standard in reviewing a joint venture. Thus, we conclude that we should apply the same public interest analysis in reviewing a joint venture that we apply in reviewing a merger.

[32] *See, e.g., Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15,756 (1997) (*LEC Regulatory Treatment Order*); *Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee,* Memorandum Opinion and Order, 12 FCC Rcd 2624 (1997); *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, Order, 11 FCC Rcd 17,963 (1996) (*AT&T International Non-Dominance Order*) *recon. denied* 12 FCC Rcd 21,501 (1998); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995) (*AT&T Domestic Non-Dominance Order*).

[33] *BT/MCI Order*, 12 FCC Rcd at 15,368, ¶ 34, *citing* United States Dept. of Justice Antitrust Div., and Federal Trade Comm'n, *1992 Horizontal Merger Guidelines,* 57 Fed. Reg. 41,552 (1992) (*1992 Horizontal Merger Guidelines*); United States Dept. of Justice and the Federal Trade Comm'n, *Revision to Horizontal Merger Guidelines* (Apr. 8, 1997) (1997*Revision to Horizontal Merger Guidelines*).

participating in those markets.[34] The Commission then analyzes whether the proposed merger will increase the likelihood that firms participating in those markets could exercise market power through either unilateral or coordinated anticompetitive behavior.[35] Finally, if the Commission concludes that the merger will increase the potential for the exercise of market power (through either unilateral or coordinated activity), the Commission attempts to determine if entry of new firms or construction of new capacity by existing firms in response to price increases will constrain any attempted exercise of market power.[36]

18. The *1992 Horizontal Merger Guidelines* suggest that, in assessing whether a merger involving firms currently competing in a market will result in anticompetitive effects, market shares should be assigned to each firm currently participating in the market. Then the pre-merger and post-merger levels of concentration should be calculated, using the Herfindahl-Hirschman Index (HHI). The merger guidelines also explicitly recognize, however, that "recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance."[37]

19. The Commission also seeks to determine if market entry is unconstrained so that an attempted exercise of market power can be prevented, *i.e.*, if rivals and new entrants have the capabilities and incentives to expand output in response to any anticompetitive practices by the merging entities.[38]

20. Finally, we must balance against the potential public interest harms the extent to which the joint venture may enhance efficiency.[39] As we noted in the *MCI WorldCom Order*, the Commission defined these efficiency benefits as "the pro-competitive benefits of a merger that improve market performance," thereby benefiting consumers through, for

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[34] *MCI WorldCom Order*, 13 FCC Rcd at 18,036, ¶ 16; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,008-09, ¶ 37.

[35] *MCI WorldCom Order*, 13 FCC Rcd at 18,036, ¶ 16.

[36] *Id.*

[37] *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41,558, § 1.521.

[38] *MCI WorldCom Order*, 13 FCC Rcd at 18,099, at ¶¶ 131-132; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,049, ¶ 128, n. 244.

[39] *MCI WorldCom Order*, 13 FCC Rcd at 18,134, ¶ 194.

example, "lower prices, improved quality, enhanced service or new products."[40] 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.[41]

## IV. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS

21. We consider in this section the competitive effects of the proposed joint venture in the global seamless services market, the U.S.-U.K route, third country routes, and in the transit market. We also analyze the possible public interest benefits, including potential efficiencies, and national security concerns.

### A. Global Seamless Services

22. Based on our review of the evidence, we find it is unlikely that the proposed joint venture will have an anticompetitive effect in the market for global seamless services. We find that the global seamless services market has several significant participants, including large global alliances and numerous smaller carriers with a global or regional presence that have emerged as potentially significant rivals. We find that, given the changing alliances among carriers, the proposed joint venture will not eliminate a significant competitor. We also find that, although the proposed joint venture may increase concentration in the global seamless services market, the JV will not be able to exercise market power because there are no barriers to entry in this market.

#### 1. Definition of Global Seamless Services

23. In 1996, the Commission defined global seamless services as:

> a combination of voice, data, video, and other telecommunications services that are offered by a single source over an integrated international network of owned or leased facilities, and that have the same quality, characteristics, features and capabilities wherever they are provided.[42]

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[40] *MCI WorldCom Order*, 13 FCC Rcd at 18,134, ¶ 194. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,063, ¶¶ 157-158 (citing *1997 Horizontal Merger Guidelines Revisions*).

[41] *See generally 1997 Revision to Horizontal Merger Guidelines* (the revision updates "Efficiencies," Section 4 of the *1992 Horizontal Merger Guidelines*).

[42] *Sprint Declaratory Ruling*, 11 FCC Rcd at 1864.

24. The Commission noted that end-to-end seamless service offers the advantage to customers of "one-stop shopping" and "single-source billing."[43] The Commission also noted that global seamless services include global virtual private networks, high-speed data offerings, packet-switched networks, bandwidth management products, store-and-forward fax, and e-mail. Depending on the needs of users, the services may employ advanced technologies such as frame relay, asynchronous transfer mode (ATM) and synchronous digital hierarchy technologies, and may be classified as telecommunications or information services.[44] Of course, today an IP network is a critical feature for many global seamless services customers.

25. We believe that this definition should be updated to reflect current market conditions. We conclude that three modifications are necessary. First, global MNCs often "multi-source" (i.e., seek multiple providers) rather than rely on a single source to provide global seamless services.[45] Global MNCs have in-house communications experts or hire consultants to advise them about their multi-million dollar telecommunications purchases, and are often willing to change their suppliers when they can obtain better terms or to ensure they get the services that best meet their needs.[46] Multi-sourcing is also attractive to these global MNCs because it offers them a benchmark against which to measure their suppliers' performance and enables them to switch their traffic to other suppliers if one supplier experiences technical problems on its network.[47] Thus, for example, as AT&T/BT note: (1) Boeing purchases some global network services from AT&T, but uses SITA (now Equant) and Sprint as its primary international services providers; (2) Compaq buys some global network services from AT&T and C&W, but uses MCI as its major supplier; and (3) Exxon purchases global network services from AT&T, but uses Global One as its primary international carrier.[48] Thus, we clarify that global seamless services can be offered by a single source or multiple sources.

26. Second, we clarify that an "integrated international network," as that phrase is used in the definition of global seamless services, includes a network with either global or regional coverage. We make this modification because global MNCs are increasingly using

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[43] *Id.*

[44] *Id.*

[45] *See e.g.*, Affidavit of John Finnegan at 2-5 (Finnegan affidavit), attached to the AT&T/BT reply.

[46] *Id.* at 2-3.

[47] *Id.* at 2-3.

[48] *Id.* at 2-3.

multiple vendors, with each providing service in a particular geographic region, when purchasing telecommunications services.[49] We reject C&W's argument that we should define global seamless services more narrowly. C&W argues that global MNCs have no financial incentive to purchase global seamless services from any carrier that does not have a global facilities-based network or offer "one stop shopping."[50] We find there is no evidence in the record to support this view. In fact, the record shows that, contrary to C&W's claim, several large global MNCs are purchasing global seamless services from carriers that do not own facilities-based global networks or offer "one stop shopping."[51] Thus, we conclude that a carrier may be a provider of global seamless services even if it does not own a facilities-based global network or offer "one stop shopping" on a global scale.

27. Third, because not every carrier that offers seamless service in fact has the capability to offer such services without network to network interfacing, we amend the definition of global seamless services to require that the international network have equivalent (though not necessarily identical) quality, characteristics, features, and capabilities.

28. In analyzing the global seamless services market, therefore, we define global seamless services as:

> a combination of voice, data, video, and other telecommunications services that are offered by a single source or multiple sources over an integrated global or regional international network of owned or leased facilities, and that have equivalent (though not identical) quality, characteristics, features and capabilities wherever they are provided.

### 2. Significant Providers of Global Seamless Services

29. We find that the significant providers of global seamless services include the largest carriers with global networks and established customer bases, emerging providers who are building advanced IP-based networks and forming alliances with smaller carriers, regional providers who serve particular geographic regions, and the in-house self-provisioning operations of numerous global MNCs. We briefly describe each of these significant providers of global seamless services.

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[49] *Id.* at 3.

[50] C&W opposition at 10-13, C&W reply at 7 (global seamless services are only those services provided "on a facilities basis through a meshed network architecture, and [...] in a single bid.").

[51] Finnegan affidavit at 3.

30. *Global alliances:* Several of the world's largest telecommunications carriers have formed global alliances to provide global seamless services.[52] We describe below the most significant global alliances, as they are constituted at present. We note, however, that there have been, and will continue to be, changes in the membership of these global alliances as they review their strategic options and as new investment opportunities arise. The major alliances are:

31. *AT&T and its global partners*: AT&T provides global seamless services through its AT&T-Unisource Communications Services (AUCS) joint venture with Unisource (which is owned by PTT Telecom Netherlands (KPN), Telia, and Swisscom) and WorldPartners (consisting of Unisource, KDD, Telstra, and Singapore Telecom). AT&T is the exclusive distributor of AUCS and Worldpartners services in the United States.[53] AT&T also acquired IBM's global data networks in December 1998. AT&T states that approximately two-thirds of the assets it acquired from IBM relate to switching and related facilities located in the United States. AT&T also states that, in contrast to the large global MNC accounts that it serves through Unisource and WorldPartners, IBM's customers are primarily small and mid-sized corporate customers that purchase on average only tens of thousands of dollars of service annually.[54]

32. *BT and its global partners:* BT is a significant provider of global seamless services in Europe and the rest of the world and, through its Concert alliance, in the United States. From January 1995 to September 1998, MCI was BT's partner in Concert and the exclusive distributor of Concert services in the United States. Concert also developed global seamless services products which BT, MCI, and their global partners distributed throughout the world. After September 1998, when BT bought MCI's shares in Concert and WorldCom bought BT's shares in MCI, MCI continued to distribute Concert services as a non-exclusive distributor.

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[52] *See, e.g.,* C&W reply at 12; Equant reply at 3; AT&T/BT reply at 12-13.

[53] AT&T and Unisource recently announced they had signed an agreement defining the terms under which AT&T will withdraw from AUCS. *Ex parte* letter from Betsy Brady, AT&T, to Magalie Roman Salas, Secretary, FCC (June 11, 1999) (AT&T/BT June 11, 1999 *ex parte* letter). Infonet Services Corporation of the USA (Infonet) recently announced it had signed a memorandum of understanding to buy AUCS. Infonet is owned by Computer Sciences Corporation, Telia, KPN, Swisscom and Telstra. Infonet will replace AUCS in the WorldPartners alliance. Vanessa Clark, *Infonet Buys AT&T-Unisource for a European Reach,* at 1 (Apr. 19, 1999) < http://www.totaltele.com >.

[54] *Ex parte* letter from Mark Schneider, counsel for AT&T, to Magalie Roman Salas, Secretary, FCC, Jan. 19, 1999 at 1-2 (AT&T Jan. 19, 1999 *ex parte* letter).

33. *MCI WorldCom:* The combined MCI WorldCom owns and operates a global platform that enables business customers to combine voice and data traffic from local and international locations onto one seamless end-to-end network that serves 81 major markets and over 50 countries. MCI WorldCom claims that it offers the first and only communications platform that eliminates boundaries between local and long-distance, voice and data, and Internet services. MCI WorldCom offers frame relay and ATM global services, and states that its seamless network eliminates the need for network to network interfaces that may create bottlenecks, traffic delays, and reduced efficiencies.[55]

34. *Global One:* This alliance among Sprint, Deutsche Telecom, and France Telecom has 1,400 points of presence in over 65 countries. Global One claims to have one of the world's largest and most advanced ATM-based networks, which delivers a high speed service -- 1.5 Mbps to 155 Mbps -- that simultaneously supports voice, data, Internet, and multimedia in a self-healing network.[56]

35. *Cable and Wireless*: C&W states that it operates in over 70 countries and is building an IP-based global network that includes an Internet backbone in Europe and the Asia-Pacific region.[57] With the purchase of MCI's Internet backbones, C&W states that it now offers integrated voice, data, and Internet services in the United States and throughout the world.[58]

36. *Equant:* Formerly known as SITA, the global data network for major airlines, Equant states that it operates an advanced IP-based network that offers global wide area network (WAN)-to-local area network (LAN)-to-Desktop connectivity over the world's largest commercial data network, which extends to over 220 countries and territories. Equant claims that it offers commercial customers fully managed end-to-end services over an integrated global network.[59]

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[55] MCI WorldCom press release, *MCI WorldCom Unveils New 'On-Net' Communications Services for Businesses*, (Sept. 28, 1998) < http://www.mciworldcom.com >.

[56] Global One press release, *Global One Expands Global ATM Service to 40 countries*, (Apr. 29, 1999) < http://www.global-one.com >. A self-healing network is one that uses a ring configuration to permit instantaneous self-restoration. *See MCI WorldCom Order*, 13 FCC Rcd at 18076, ¶ 89.

[57] C&W press release, *Cable and Wireless USA to Build Next Generation, High Capacity Internet Network* (Apr. 13, 1999) < http://www.cwusa.com./press > (C&W press release).

[58] *See* id.

[59] *See* Lisa Levenson, *Equant Launches ATM Service in 42 countries* (May 11, 1999) < http://www.totaltele.com >.

37. *Potential emerging providers*: We also find that several new carriers and alliances are emerging as potentially significant providers of global seamless services. Many of these carriers are fast-growing due to their ability to provide global services over "state-of-the-art" IP-based global networks.[60] For instance, Teleglobe, the largest Canadian international services carrier, announced plans to build an IP-protocol network that will reach 400,000 route miles on several continents.[61] Qwest and KPN, a Dutch carrier, recently completed the first of six fiber optic rings across Europe that will provide IP-based services to large corporate customers.[62] Global Crossing, which recently acquired Frontier, is building a global IP network that may be the first to be completed.[63] GTS, which merged with Esprit to provide service over its pan-European network in 12 countries and 20 cities, also is building a global IP-based network to carry traffic at speeds up to 1.28 terabits per second.[64] Level 3, which is building a global IP network with transatlantic and transpacific undersea cables joining the continental networks, plans to offer an innovative bandwidth package to corporate customers that includes free voice services.[65] Viatel is a facilities-based international services provider building the Circe network in Europe and has operations in the United States, Latin

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[60] *See, e.g.*, Christopher J. Chipelo & Stephanie N. Mehta, *Teleglobe to Spend $5 Billion to Expand its Global Telecommunications Network*, Wall Str. J., May 10, 1999, at B-10 (*WSJ* May 10, 1999 article) (noting that newcomers such as Global Crossing and Qwest are building massive pipelines to transmit voice and data traffic across the United States and the world); David Maloney, *Vendors Poised for Global Operations Role* at Communications Week Int'l (May 10, 1999) < http://www.totaltele.com > (noting that major telecoms equipment vendors are taking decisive steps towards becoming principal operators of global networks they have built for service providers).

[61] *WSJ* May 10, 1999 article at B-10.

[62] Qwest press release, *KPN Qwest Joint Venture Completes First 'EuroRing' Network* (Aug. 3, 1998) < http://www.qwest.com/press >.

[63] *See Global Crossing Ltd. and Frontier Corporation, Application for Transfer of Control Pursuant to Sections 214 and 310(d) of the Communications Act, as amended,* Memorandum Opinion and Order, CC Docket No. 99-264, DA-1930 (rel. Sept. 21, 1999).

[64] GTS press release, *GTS and FLAG Telecom Sign Agreement for Transoceanic Cable Venture* (Jan. 13, 1999) < http://www.gtsgroup.com/news >; GTS press release, *GTS and Esprit Telecom Announce Proposed $4.1 Billion Combination* (Dec. 8, 1998) < http://www.gtsgroup.com/news >.

[65] *See, e.g.*, Vanessa Clark, *Level 3 and Colt Team Up for Network Construction* (May 4, 1999) < http://www.totaltele.com >.

America, and the Pacific Rim.[66]

38. *Regional providers*: In addition, we find that several carriers that provide only limited services or serve only limited geographic regions could become significant participants in this market. These regional providers offer global seamless services using a variety of different strategies. IDT, a U.S. carrier, is serving South America, the Caribbean, and Asia; Primus operates a global network with digital gateway switches in the U.S., Canada, Australia, the U.K., and Mexico; Star has a proprietary network that extends to 40 countries; Pacific Gateway Exchange has gateway facilities in the U.S., U.K., Russia, and New Zealand; and COLT is a London-based carrier that owns networks throughout Europe.[67]

39. *Self-provisioning:* As an alternative to purchasing a package of global corporate communications from a global seamless service provider, corporate customers can (and do) purchase and manage, through their own telecommunications departments, the component piece-parts of those services from various facilities-based providers.[68] In-house provisioning continues to be a significant source of supply of global seamless services for MNCs. One study found that 80 percent of Fortune 500 companies, for instance, spent up-to half their total telecommunications budgets for in-house provisioning, although the companies expected to reduce these expenditures in the future in favor of outsourcing (*i.e.*, retaining carriers to provide managed voice and data services).[69]

### 3. Competitive Analysis of the Global Seamless Services Market

40. A merger can have an anticompetitive effect in a given market if it increases concentration in the market to such an extent that the exercise of market power becomes more likely and the ability of competitors to enter the market and constrain the exercise of market power is impeded by barriers to entry. As noted above, concerns that arise in a merger context are also applicable in reviewing a proposed joint venture.[70] Thus, we need to evaluate whether the proposed transaction (1) increases significantly concentration in the market, and,

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[66] *See* News release, *Viatel Receives Final Nod for Circe* (July 14, 1998) < http://www.totaltele.com >; Viatel press release, *Viatel Announces Intention to Build Pan-European Fiber Network* (Feb. 3, 1998) < http://www.sternco.com >.

[67] *See* AT&T/BT application at 20-21.

[68] AT&T Jan. 19, 1999 *ex parte* letter at 4.

[69] CIT Research Ltd, *The Global Market for Corporate Networks, 1998* (1998) at 59-60, 71, 146.

[70] *Supra* ¶ 16.

if so (2) whether there are significant barriers to entry into the market. Even if the proposed transaction increases significantly concentration in a market, free entry into the market will prevent the ability of the newly-formed entities to act anti-competitively.[71]

a. Market Concentration Analysis

41. We first examine the extent to which the joint venture between AT&T and BT will increase concentration in the market for global seamless services and whether the joint venture will facilitate the exercise of market power. Although we typically examine market share data as the starting point of our analysis, we find that accurate and reliable market share data are not available for this market. Neither C&W nor GTE, both of whom assert that the proposed JV will have market power in the global seamless services market, provide any market share data to support their claims. AT&T/BT estimate that the combined market share of AT&T and BT in the global seamless services market is less than 10 percent.[72] AT&T/BT further state that their combined market share rises to no more than 13.5 percent if IBM's global assets that AT&T acquired are included.[73] We also note that the European Commission estimates that AT&T's and BT's combined market share for global telecommunications services is between 30 percent and 50 percent.[74] As discussed below, however, we find that all these estimates have limitations for purposes of determining market share in the global seamless services market.

42. AT&T/BTs' estimate is derived from two reports that probably overstate the size of the market and understate AT&T/BTs' market share.[75] We note that AT&T acknowledges that its own records show that the CIT report understates its earnings from providing global seamless services.[76] In addition, the CIT study further understates AT&T/BTs' market share by excluding "the MN&S [managed network and support services]

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[71] *See supra* ¶ 19.

[72] AT&T/BT application at 21.

[73] *See* AT&T/BT April 13, 1999 *ex parte* letter at 9-10, n.18.

[74] European Commission press release, "Commission clears BT/AT&T joint venture with conditions in the U.K. market," March 30, 1999, attached to AT&T/BT April 13, 1999 *ex parte* letter.

[75] AT&T identified the two reports as: (1) CIT Research, *The Global Market for Managed Network Services, 1998* (1998) (CIT report); and (2) McGraw Hill, *Global VANS Market: 1995 edition* (1996) (McGraw Hill report). AT&T January 19, 1999 *ex parte* letter at 3-5.

[76] *See* AT&T/BT April 13, 1999 *ex parte* letter at 9, n.18 (AT&T's proprietary internal estimate of its own sales is higher than the CIT estimate).

revenues of the parent companies from their respective home countries."[77] The CIT report, thus, does not include AT&T's revenues from providing global network services to U.S.-based MNCs and BT's revenues from providing global network services to U.K.-based MNCs.[78] In addition, we note that these reports define two different markets (i.e., "network management & support services" and "global VANS") that do not correspond exactly with the market for global seamless services.[79] Both reports probably overstate the size of the market, and understate the combined AT&T/BT share, by including revenues from companies that provide various network support, facilities management and VSAT management services that are beyond the scope of global seamless services.[80] Finally, even on the basis of the two reports AT&T/BT identified, AT&T/BT have understated the market share contribution from AT&T's acquisition of IBM's global networks. While AT&T/BT cite the CIT report to support their claim that the IBM network will increase the combined AT&T/BT share from 10 percent to 13.5 percent of the global seamless services market,[81] we find that the McGraw Hill report states that, in each year from 1994-1999, IBM's market share alone is approximately 10 percent, AT&T's share is 6-7 percent, and BT/MCI's share is 3-4 percent.[82] For these reasons, we conclude that the two reports do not support AT&T/BTs' contention that the combined AT&T/BT market share is less than 10 percent without including IBM's global network or 13.5 percent including IBM's global network.

43. We also note that, although the EC stated in a press release that it estimated that AT&T/BT had a combined market share of 30 percent to 50 percent. AT&T/BT argue that the EC's estimate is a "worst-case" estimate based on two sources of information: revenue

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[77] *See* CIT report, Ch. 2, at 2.

[78] *See id.*

[79] Network Management & Support Services (NM&S) is a term describing a range of telecommunications services for business that are outsourced to a specialist supplier. NM&S encompasses customized services for network support, management of voice services, and the management of VSAT and customer owned telecommunications facilities. *See* CIT report, Ch. 1, at 3-4. A VAN (Value Added Network) is a communications network that provides features such as data transport, protocol conversion, alternate routing and network management. *See* McGraw Hill report § 7.4. *See also supra* ¶ 28.

[80] C&W reply comments at 5-6 (managed network services are not a substitute for global seamless services). *See also* CIT report, Ch. 7, at 7 (1997 revenues); McGraw Hill report at 433 (1997 revenues).

[81] AT&T/BT April 13, 1999 *ex parte* letter at 9-10, n.18.

[82] We also note that the McGraw Hill report states that the total market size as $22.9 billion, while the CIT report states that the total market revenues are $13.9 billion. *See* McGraw Hill report at 434; CIT report at Chapter 2, at 2.

data submitted by six carriers (AT&T, BT, MCI WorldCom, Global One, Equant, and C&W) and a third-party analysis of the expenditures of 200 global MNCs.[83] AT&T/BT assert that the EC significantly understated the size of the market, and overstated the AT&T/BT share, by including revenues from only six carriers. As noted above, we believe that several emerging carriers, regional providers, and global MNC self-provisioning operations should also be included in our analysis as significant providers of global seamless services. Thus, to the extent that the EC based its estimate on only six carriers, we conclude that for purposes of our analysis the EC estimate may overstate the combined AT&T/BT share of the market.

44. Despite the lack of accurate market share data, however, we find there is substantial evidence that the joint venture will combine the international assets of two significant providers of global seamless services. For instance, GTE states, and AT&T/BT do not dispute, that AT&T and BT will contribute assets worth billions to the JV, including: services to, and facilities in, 237 countries; operating agreements with over 400 carriers; traffic amounting to 25 billion minutes; 200,000 private line circuits; more than 6,000 nodes in 52 countries, covering 1,000 cities; undersea cable systems throughout the world; and customer service and network management operations on four continents.[84] We also note that AT&T/BT estimate that the JV will have 6,500 large global MNC and carrier accounts and earn over $10 billion in annual revenues.[85] Thus, we conclude that the proposed joint venture is likely to increase concentration in the global seamless services market.

45. We are not persuaded, however, by C&W's argument that the proposed joint venture will eliminate a significant provider of global seamless services in the United States. C&W claims that, based on its own experience in bidding for contracts with global MNCs, BT and AT&T are always included among the top three to five potential suppliers and "one or the other will usually win the bid."[86] C&W claims that the proposed JV will eliminate competition between AT&T and BT.[87] C&W, however, offers no evidence to support these claims and AT&T/BT deny them. AT&T/BT argue that, for the most part, AT&T is a U.S

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[83] AT&T/BT April 13, 1999 *ex parte* letter at 10, n.19.

[84] GTE opposition at 7. *See also* C&W opposition at 12.

[85] *See e.g.,* GTE opposition at 3, *citing* AT&T news release (July 26, 1998). *See also* AT&T/BT application at 2 ("AT&T and BT have concluded that combining and enhancing their international networks and assets will enable each to compete more effectively in [providing] international telecommunications services ...").

[86] C&W opposition at 12.

[87] C&W opposition at 11-13.

distributor, and BT is a European distributor, of global seamless services.[88] AT&T/BT also state that Concert, which BT and MCI jointly owned from January 1995 to September 1998, always had a strong U.S. distributor: MCI was the exclusive distributor until it was acquired by WorldCom and AT&T and MCI then became non-exclusive distributors.[89] BT did not market Concert services in the U.S. except to customers who contacted BT directly.[90] BT's U.S. revenue from these walk-in customers since September 1998, which amounts to less than 5 percent of Concert's new U.S.-based customers,[91] is not sufficient to make BT a significant competitor in this market. Thus, we find that, in fact, AT&T and BT do not provide "head to head competition" to provide global seamless services to U.S.-based MNCs.[92] Accordingly, we conclude that a joint venture between AT&T and BT would not result in the loss of a significant competitor in the United States. Instead, because AT&T is replacing MCI as BT's U.S. partner and MCI has merged with WorldCom, AT&T and MCI WorldCom will continue to compete in this market.[93] There is insufficient information in the record to find that the joint venture will not result in the loss of a significant competitor in non-U.S. markets. However, we note that, even if the joint venture results in the loss of a significant competitor in those markets, the joint venture will not have an anticompetitive effect because there are no significant barriers to entry.[94]

46. We further note that there is no certainty whether the AT&T/BT JV will be able to "migrate" their current customers onto their planned IP platform. An IP platform differs fundamentally from the circuit-switched technology by which global seamless services are currently provided by AT&T and BT. The services provided by the JV over the IP platform will likely differ substantially in quality, price, and kind from the status quo.[95] MNC customers will doubtlessly evaluate carefully whether to take service under the new terms and

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[88] AT&T/BT April 13, 1999 *ex parte* letter at 2.

[89] *Id.* at 3, n. 2.

[90] *Id.*

[91] *Id.* at 3.

[92] *Id.* at 2.

[93] AT&T/BT reply at 18 (the joint venture represents no more than a reshuffling of the preexisting relationships among US and foreign carriers).

[94] *See infra* ¶¶ 47-51.

[95] For instance, the IP platform may allow customers to choose different grades of voice quality, priced accordingly, or different kinds of employee access and security arrangements.

conditions that the JV offers or whether to acquire service elsewhere.[96]

b. Barriers to Entry

47. As noted above, a transaction that increases concentration in a market will not have an anti-competitive impact if the ability of competitors to enter that market is unconstrained.[97] The ability of competitors to enter freely depends on their ability to obtain, at reasonable terms and prices, inputs, as well as firm-specific assets and capabilities, necessary for the provision of service in that market. Further, as we stated in *MCI WorldCom*, the provision of services to larger business customers depends in large part on the ability to obtain critical inputs such as international transport capacity and operating agreements with carriers on the foreign end, as well as the technical ability to provide the services demanded by larger business customers.[98] Although we concluded that the proposed joint venture will increase concentration in the global seamless services market, we now find that, because competitors can freely obtain the necessary inputs and they have the technical assets and capabilities to provide global seamless services, the JV is unlikely to have the ability to act anticompetitively in this market.

48. First, we must determine if AT&T/BT has the ability to act anticompetitively in the international transport capacity market. In the *MCI WorldCom Order*,[99] we examined in great detail the international transport capacity market, reviewing the Atlantic, Pacific, and Latin American/Caribbean markets. On the trans-Atlantic route, we found that, by the end of 1999, AT&T and BT would own 7.8 percent, and 3.7 percent, respectively, of international transport capacity.[100] By contrast, we found that Global Crossing (with 40 percent), MCI WorldCom (with 23.3 percent) and C&W (with 15.9 percent) would have larger market shares for capacity on this route.[101] We note that there have been no changes in the ownership of existing cables since September 1998. Thus, we find that the numbers quoted above are

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[96] According to the Finnegan affidavit, MNC customers are "quite willing" to change their global communications suppliers if they can obtain better terms or services from another supplier. Finnegan affidavit at 1-5.

[97] *See supra* at ¶ 40.

[98] *MCI WorldCom Order,* 13 FCC Rcd at 18,099, ¶¶ 131-132.

[99] *Id.*, 13 FCC Rcd at 18,072-91, ¶¶ 82-114.

[100] *Id.*, 13 FCC Rcd at 18,077, ¶ 92.

[101] *Id.*, 13 FCC Rcd at 18,077, ¶ 94.

reasonably accurate market share descriptions of U.S.-U.K. international transport capacity at present. Using these numbers, we calculate that AT&T/BTs' combined ownership of U.S.-U.K. international transport capacity is 11.5 percent. We also determine that the proposed joint venture would increase the HHI concentration, calculated on the basis of ownership of cable capacity, by 60 points, from 2,480 to 2,560.[102] As we noted in *MCI WorldCom,* however, "using only ownership shares is likely to increase the level of concentration in the transport market compared to the level if IRU's were taken into account."[103] Thus, we also calculate market shares and HHI based on IRU leasehold interests. By this measure, we find the market share distribution of the largest IRU leaseholders is as follows: MCI WorldCom 26.6 percent; C&W 12.2 percent; AT&T 8.1 percent; Teleglobe 5.6 percent; Level 3 5.0 percent, DT 4.6 percent, and BT 3.8 percent. In addition, Global Crossing holds 16.4 percent of IRUs. We also determine that the proposed joint venture would increase the HHI concentration, calculated on the basis of IRU leaseholds of U.S.-U.K. cable capacity, by 60 points, from 1,290 to 1,350.[104] We note that according to the 1992 *Horizontal Merger*

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[102] *See 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41,558, § 1.51 (a)-(c). A market's HHI is calculated by summing the squares of the individual market shares of all the participants. Market concentration and the increase in market concentration resulting from a merger can be an indicator of the likely competitive effects of a merger. Under the *1992 Horizontal Merger Guidelines*, if the post-merger HHI is below 1000, the market is considered unconcentrated and the merger requires no further analysis; if the post-merger HHI is between 1000 and 1800, the market is considered moderately concentrated and an increase in HHI of more than 100 signals potential significant competitive concerns; and if the post-merger HHI is above 1800, the market is considered highly concentrated and an increase in HHI of more than 50 signals potential significant competitive concerns. We have used HHI analysis in numerous contexts as an initial means of measuring the significance of changes in market concentration. *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 FCC Rcd 4358, 4419-20, ¶¶ 120-21 (1997); *Amendment of Parts 20 & 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, 11 FCC Rcd 7824, 7869-73, 7899-904 (1996). The HHI has also been used by antitrust courts as a basic tool and has been called "a standard measure of market concentration," *Western Resources, Inc. v. Surface Trans. Board*, 109 F.3d 782, 785 (D.C. Cir. 1997), and "[t]he most prominent method of measuring market concentration." *FTC v. University Health, Inc.*, 938 F.2d 1206, 1211, n.12.

[103] *MCI WorldCom Order*, 13 FCC Rcd at 18,082-84, ¶ 104.

[104] This calculation is based on the data in the *MCI WorldCom Order,* 13 FCC Rcd at 18,082-84, ¶ 104 & n.296, with adjustments to take into consideration the following exceptions:

*For the Gemini cable*

(i) In response to AT&T's assertion that it has not purchased any capacity from Gemini, we reduced the number of circuits allocated to AT&T by 1,008 E-1 circuits. *See* AT&T/BT January 19, 1999 *ex parte* letter.

(ii) Based on news reports, we assigned these 1,008 E-1 (or 16 STM-1) circuits to Teleglobe. *See JANET press release, CANTAT3 Outage- Feb 21/22 1999* (Mar. 1999).
< http://www.ja.net/press_release/break_update.html>.

*For the AC-1 cable*

(iii) In response to information provided by AT&T/BT, we assigned 126 E-1 circuits to AT&T, instead of 2,646 E-1 circuits, and removed 63 E-1 circuits from BT. *See* AT&T/BT January 19, 1999 *ex parte* letter.

(iv) We also assigned 1,638 E-1 circuits to MCI WorldCom, instead of 2,898 E-1 circuits. Based on a Global Crossing press release, we also assigned 1,260 E-1 circuits to Teleglobe. *See* Global Crossing press release, *Teleglobe Purchases Capacity on Global Crossing AC-1 Network* (Mar. 24, 1998) < http://www.globalcrossing.com/pressreleases/pr_032498.asp>.

(v) We also assigned 1,134 E-1 circuits to DTAG, instead of 63 E-1 circuits as assigned in the *MCI WorldCom Order,* based on two additional Global Crossing press releases. *See* Global Crossing press release, *Global Crossing and Deutsche Telekom Announce Package Agreement* (Dec. 22, 1997) < http://www.globalcrossing.com/pressreleases/pr_12298.asp>; Global Crossing press release, *Global Crossing Announces Second Agreement with Deutsche Telekom for Atlantic Capacity* (Sept. 9, 1998) < http://www.globalcrossing.com/pressreleases/pr_090998.asp>; *MCI WorldCom Order,* 13 FCC Rcd at 18,082-84, ¶ 104 & n.296. The news releases indicate that DTAG has signed two contracts with Global Crossing for approximately $90 million. We used Global Crossing's pricing information to convert this dollar amount to capacity amounts (assuming the lowest rate of $5 million per STM-1).

(vi) We also assigned an equal share of 315 E-1 circuits to the three Unisource shareholders - KPN, Telia, and Swisscom, based on a Global Crossing press release. *See* Global Crossing press release, *Global Crossing Signs $100 Million Dollar Agreement with Unisource Shareholders* (Dec. 19, 1997) < http://www.globalcrossing.com/pressreleases/pr_121998.asp>. The press release announces a $100 million purchase agreement between the three shareholders to purchase substantial transatlantic capacity for voice, high-speed data and video transmission; therefore, we converted that to 15 STM-1s (945 E-1s, or 315 per partner).

(vii) We also assigned 4 STM-1s (252 E-1s) to Qwest, based on a Global Crossing press release. *See* Global Crossing press release, *Qwest and Global Crossing to Swap Transatlantic High Capacity Fiber between U.S. Cities and Europe* (Apr. 7, 1998) < http://www.globalcrossing.com/pressreleases/pr_040798.asp>.

(viii) Based on Level 3's Affidavit filed in the Japan-US Cable application, we assigned 32 STM-1s (2,016 E-1s) to Level 3 Communications, Inc. *See* SC-LIB-19981117-00025, Exhibit 5, Declaration of Donald H. Gips (Mar. 8, 1999).

(ix) We also assigned 1 STM-1 (63 E-1) each to Viatel and PSINet Inc based on their Affidavits filed in the Japan-US Cable application. *See* SC-LIB-19981117-00025, Exhibit 4, Declaration of Michael J. Mahoney, Viatel, Inc.; Exhibit 6, Affidavit of John B. Muleta, PSINet (Mar. 8, 1999).

(x) As we did in the *MCI WorldCom Order,* we assigned the remaining 29 STM-1s to 10 unknown carriers. *See MCI WorldCom Order,* 13 FCC Rcd at 18,082-84, ¶ 104 & n.296. This is because, after counting the newly identified customers from above, we found there were 10 more carriers needed to match the information we received from Global Grossing.

(xi) Finally, we assigned the unsold capacity of 105 STM-1s or 6,615 E-1 circuits to Global Crossing. This was calculated by subtracting 32 STM-1s (the sale to Level 3) and 12 STM-1s (the sale to DTAG) from our previously identified unsold capacity of 149 STM-1s or 9,387 E-1 circuits in our *MCI WorldCom Order.* We note here that, just as in the calculation we performed in the *MCI WorldCom Order,* we still do not have the full information on all IRU accounts; thus we consider our HHI value to be a conservative one (i.e., the actual HHI value could be lower than that which is shown here). *See MCI WorldCom Order,* 13 FCC Rcd at 18,082-84, ¶ 104 & n.296.

*Guidelines,* a transaction that increases HHI concentration by 60 points on the U.S.-U.K route would not raise significant competitive concerns. Although we do not include them in our analysis of market concentration, we also note that several additional transatlantic cables are in the planning stages and are scheduled to be in service between late 1999 and late 2001.[105] Thus, we conclude that AT&T/BT does not have the ability to act anticompetitively in the U.S.-U.K. international transport capacity market.

49. We also find that AT&T/BT do not have the ability to act anticompetitively on the Pacific and Latin/American/Caribbean routes. In the Pacific, AT&T owns 12.1 percent and BT owns 0.4 percent, for a combined share of 12.5 percent of capacity. Other owners of capacity on the Pacific route include: MCI WorldCom 9.6 percent, KDD 7.4 percent, Sprint 6.0 percent, and 10 other carriers each with 5 percent. Similarly, in the Caribbean, AT&T owns 20.8 percent, BT owns 0.1 percent, MCI WorldCom (including Embratel) owns 42.3 percent and Sprint owns 14.4 percent. Because BT's ownership of cable capacity amounts to 0.4 percent on the Pacific route and 0.1 percent on the Latin American/Caribbean route, and there is no evidence that BT's share of cable capacity will be significantly greater if measured on an IRU basis, we do not further analyze AT&T/BTs' ability to act anticompetitively on these routes.[106] Thus, we conclude that the JV will not have sufficient capacity on any route to exercise market power over international transport capacity. Accordingly, we do not agree with Equant that we should require the JV provide unbundled access to international transmission circuits.[107]

50. Second, we also conclude that the JV's competitors have the ability to obtain operating agreements from foreign carriers. As we have noted previously, carriers are generally able to obtain operating agreements to terminate traffic or use alternative arrangements to provide international services.[108] Furthermore, as countries implement their

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[105] *See MCI WorldCom Order,* 13 FCC Rcd at 18,085-86, ¶ 106 (Project OXYGEN is building a private cable system with standard capacity of 640 Gbps in various segments to link 78 countries in all continents; a consortium of carriers has applied to build a cable, TAT-14, with capacity of 640 Gbps to connect the U.S., U.K., France, Germany, the Netherlands, and Denmark by the end of 2000).

[106] We thus do not calculate increases in concentration, as measured by the HHI, on the Pacific and Caribbean/Latin American routes.

[107] *See* Equant reply at 5-6.

[108] *See MCI WorldCom Order*, 13 FCC Rcd at 18,093, ¶¶ 117, 131. *See also See AT&T International Non-Dominance Order*, 12 FCC Rcd at 17,981-82, ¶¶ 50-51 (finding that multiple U.S. carriers have operating agreements to nearly all foreign countries for the provision of IMTS); *International Competitive Carrier Policies*, 102 F.C.C.2d 812, 835, ¶ 56 (1985) (*International Competitive Carrier*) (finding that foreign carriers are likely to enter into operating agreements for the provision of non-IMTS services).

market access commitments made as part of the WTO Basic Telecom Agreement, U.S. carriers will be able to obtain operating agreements from new entrants as well as incumbent carriers in these countries. In addition, carriers have been successful in providing international service through alternative arrangements such as switched hubbing through a third country.[109] Thus, we conclude that the ability to obtain operating agreements is not a barrier to entry into the global seamless services market for the JV's competitors.

51. Finally, we conclude that many carriers have the technical know-how to provide global seamless services. As we stated in the *MCI WorldCom Order*, the special assets and capabilities that are important attributes in serving residential customers are less important in the larger business market.[110] Particularly for sophisticated customers like global MNCs, retail assets and capabilities are far less important than price and service factors. Thus, we do not agree with C&W that barriers to entry to this market are high or that the JV will have the ability to lock-in its customers.[111] C&W does not submit any evidence to support this claim. To the contrary, global MNC customers are increasingly using multiple vendors to supply their global seamless services needs.[112] Furthermore, we note that global MNCs have multimillion-dollar budgets for purchasing global seamless services and are staffed by in-house experts able aggressively to seek out competing providers.[113] Thus, we conclude that the possession of technical assets and capabilities is not a barrier to entry into the global seamless services market for the JV's competitors.

c. Application Program Interfaces

52. We consider in this section GTE's and Equant's allegations that the JV will be able to monopolize the global seamless services market through the adoption of proprietary application program interfaces (APIs), described below.[114] GTE claims that AT&T/BT have

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[109] *See AT&T International Non-Dominance Order*, 12 FCC Rcd at 17,982, ¶ 51.

[110] *See MCI WorldCom Order*, 13 FCC Rcd at 18,099-100, ¶ 132.

[111] C&W opposition at 12.

[112] *See supra* ¶ 25.

[113] *See, e.g.*, Finnegan affidavit at 2.

[114] GTE opposition at 3-4, 10-17. Equant Reply at 8-10. GTE argues that the merger should not be approved because of the likelihood that it will result in substantial competitive harm not outweighed by any corresponding pro-competitive justification. GTE opposition at 2. Equant agrees with GTE's analysis and urges the Commission to impose non-discrimination and disclosure requirements on AT&T's and the JV's use of APIs. Equant reply at 10. Because Equant's analysis is similar to GTE's, our discussion refers to GTE's analysis only.

an initial advantage in the global seamless services market and, because of this, will be able to establish their proprietary APIs as the industry standard, allowing the JV to dominate the global seamless services market.[115] We find that AT&T/BT do not have an initial advantage in the global seamless services market that would allow them to establish their APIs as the industry standard. Distinguishing between API calls and API programs, as described below, we find that the JV is unlikely to adopt proprietary API calls and would be unable to use proprietary API calls to lessen competition even if it did adopt them. We also find that, although the JV is likely to adopt proprietary API programs, such programs will not enable the JV to lessen competition. As a result of these findings, we are not persuaded by GTE's and Equant's allegations.

53. An IP telecommunications network can be conceived of as having three layers: applications programs, APIs, and an IP platform. The top layer consists of applications programs, which are software packages that provide desired telecommunications services to customers.[116] The middle layer consists of APIs, which generally consist of software providing a set of functions necessary for the operation of applications programs on the IP platform.[117] The bottom layer is the IP platform, which consists of software and hardware that

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[115] GTE opposition at 3-4, 12-14. GTE also claims that AT&T and BT would be able to achieve dominance in the market for APIs and as a wholesale provider of "voice over IP" services. GTE opposition at 16-17.

[116] Upon implementation of an IP telecommunications network, application programs will enable customers to obtain such services as voice over IP, advanced messaging services, customizable service quality and security, e-commerce, and global roaming. AT&T/BT, *Technical White Paper* at 5 (1998) < http://att-bt-globalventure.com/technology/whitepaper.doc> (*Technical White Paper*). Application programs may be developed by customers, carriers, or third parties. *Id.* at 5; AT&T/BT reply at 21-22.

[117] According to *whatis.com*, a world wide web site which contains definitions of Internet terminology, an API is "the specific method prescribed by a computer operating system or by another application program by which a programmer writing an application program can make requests of the operating system or another application." *See* < http://www.whatis.com >. According to the *CyberDictionary*, an API is "software that enables an applications program to communicate with another program or the operating system." David Morse, ed., *CyberDictionary*, Knowledge Exchange, LLC, Santa Monica, California, 1996, p. 16. According to *Newton's Telecom Dictionary*, an API is "software that an application program uses to request and carry out lower-level services performed by the computer's or a telephone system's operating system." Harry Newton, *Newton's Telecom Dictionary*, Flatiron Publishing, New York, March 1998, p. 55. For instance, APIs are used by application programs to accomplish tasks such as retrieving a file or querying a database. APIs are used on personal computers as well as IP platforms. For instance, the Windows operating system has over a thousand APIs. Each API performs a different function (*e.g.*, opening a window or managing icons and menus). Each application program (*e.g.*, WordPerfect for Windows or EXCEL) uses the same API to perform a given task (*e.g.*, opening a window). Peter Norton *et al.*, *The Peter Norton PC Programmer's Bible*, Microsoft Press, Third Ed., 1993, pp. 440-441 and *Newton's Telecom Dictionary*.

support the higher layers and provides transmission and routing of messages.

54. GTE claims that AT&T/BT will adopt proprietary APIs.[118] By the term "proprietary," GTE means that AT&T/BT will not develop APIs that are operable on rival networks[119] or that AT&T/BT will not make their APIs available to rival carriers on reasonable terms and prices[120] or at all.[121] According to GTE, AT&T/BT's large actual and potential base of customers will motivate software developers to write application programs specially tailored to AT&T/BTs' proprietary APIs[122] and incompatible with the IP systems of competitors. According to GTE, the existence of a "rich array" of application programs compatible only with the JV's system will draw ever more customers to the JV's system,[123] ultimately leading to a phenomenon called "tipping."[124] "Tipping" is defined as the tendency for a system with an initial edge over incompatible, rival systems to become an industry standard and thus achieve market dominance.[125] The end result, according to GTE, will be that the JV will attain a monopoly position, with their rivals relegated to a fringe position."[126]

55. Because APIs permit the application programs to interact with the network, APIs are a crucial input in the provision of communications services over an IP platform. In essence, GTE argues that AT&T/BTs' initial advantage in the global seamless services market will allow them to establish their proprietary APIs as the industry standard, thus giving AT&T/BT control over this input market and allowing AT&T/BT to extend their market power into the global seamless services market, which relies on APIs as an input.

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[118] GTE opposition at 4 and 11-12.

[119] *Id.* at 11.

[120] *Id.* at 16.

[121] *Id.* at 4.

[122] *Id.* at 12.

[123] Certain systems, such as computer or telephone systems, become more attractive to customers as more customers use them, a phenomenon called "network effects" in the economics literature. *See* Michael Katz and Carl Shapiro, *Systems Competition and Network Effects,* Journal of Economic Perspectives, Vol. 8, No. 2, pp. 93-115. Network effects may be self-reinforcing, *i.e.,* a system's increased attractiveness may cause subscribership to increase, which, in turn, may cause a further increase in the attractiveness of the system.

[124] GTE opposition at 4 and 12.

[125] *Id.* at 12. *See also* Katz and Shapiro, *Systems Competition and Network Effects*, pp. 105-106.

[126] *Id.* at 4.

56. We are not persuaded by GTE that AT&T/BT have an initial advantage that will allow them to tip the global seamless services market through the use of proprietary APIs. AT&T/BT are not alone in developing a global IP telecommunications network[127] and there is no evidence in the record that they are the current leaders.[128] Also, although AT&T and BT are significant competitors in the global seamless services market, it is not at all clear that the JV will be able to "migrate" customers onto its planned IP telecommunications network or that it has more favorable access to important MNC accounts than that afforded to other major market participants.[129] Even though the JV will have considerable size and resources, this is no guarantee of success in the rapidly changing global seamless services market.

57. Neither are we persuaded by GTE that AT&T/BT will use proprietary APIs to lessen competition, as we explain in detail below. Although there is no industry consensus on terminology regarding APIs, it is useful to distinguish between API calls and API programs.[130] An API call is a request by the applications program for a needed task to be performed over the IP platform.[131] An API program is a computer program that actually performs the requested task over the IP platform. Different API programs can support the same API call. GTE does not distinguish between API calls and programs. AT&T/BT distinguish between APIs (what we describe here as API calls) and API source code or interface programs (what

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[127] *See WSJ* May 10, 1999 article at B10. According to this article, Teleglobe aims to build a "next generation" global network based on Internet technology. *See also* C&W April 13, 1999 press release (Cable and Wireless announced investment of $670 million to develop a next generation high-capacity Internet network that will fully integrate Internet, data, voice, and messaging communications).

[128] AT&T/BT claims that "[a]lthough AT&T and BT *plan* to roll out an IP-based network in the year 2000, MCI WorldCom, Sprint and others already have deployed such facilities." AT&T/BT reply at 25-26. In his affidavit on behalf of AT&T/BT, Tom London lists MCI WorldCom, C&W, Global One, and GTE as having significant head starts. Affidavit of Tom London at 3 (London affidavit), attached to AT&T/BT reply. We make no finding regarding these claims because of insufficient supporting information in the record.

[129] *Supra* ¶ 46.

[130] *See e.g.*, Jonathan Band and Masanobu Katoh, *Interfaces on Trial: Intellectual Property and Interoperability in the Global Software Industry* at 8 (1995) (Band and Katoh) ("[I]nterfaces should be thought of as possessing two dimensions. On the one hand is the interface *specification*, the technical description of the permissible input or output. On the other hand is the interface *implementation*, the actual means by which the [operating system] program receives the inputs and produces the outputs.").

[131] Every API call must be precisely specified and formatted, *i.e.*, standardized, in order to be intelligible to the IP platform.

we describe here as API programs).[132] AT&T/BT claim that their API calls will not be proprietary[133] but acknowledge that their API programs may be proprietary.[134] We consider first the issue of proprietary API calls and then proprietary API programs.

58. AT&T/BT indicate that they will use non-proprietary API calls, *i.e.*, that they will use API calls developed by open industry standards-setting bodies in so far as possible[135] and that they will not limit access to the API calls supported by their IP platform.[136] AT&T/BT state that they will adopt open standards that will "facilitate interoperability between the Global Venture's network and the networks of others, including both distributors and competitors."[137] Furthermore, AT&T/BT give a number of persuasive reasons why adoption of proprietary API calls would be counterproductive to their efforts to compete in the global seamless services market. According to AT&T/BT, use of proprietary API calls would delay the roll-out of the JV's services;[138] drive away MNCs that fear being locked into

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[132] *Ex parte* letter from James E. Graf II, BT North America, Inc. and Lawrence J. Lafaro, AT&T Corp., to Magalie Roman Salas, Secretary, FCC, at 5, n. 10 (May 28, 1999) (AT&T/BT May 28 *ex parte* letter).

[133] AT&T/BT reply at 21-22; London affidavit at 2.

[134] AT&T/BT May 28, 1999 *ex parte* letter at 5 and n. 10.

[135] "[W]herever possible, the Global Venture's plans to use existing and developing public domain, IP-based standards sanctioned by the Internet Engineering Task Force ("IETF") and other standards-setting bodies." London affidavit at 2. *See also* numerous statements in *Joint Technical White Paper*, and AT&T/BT May 28, 1999 *ex parte* letter at 4-5.

[136] London affidavit at 2. Copyright protection is not generally extended to interface specifications (*e.g.*, API calls). *See* Band and Katoh at 126, 132. Hence, in most cases, API calls can be "proprietary" only in the sense of being secret (and thus unpublished) or not widely accepted (*i.e.*, not approved by an open industry standard-setting body).

[137] London affidavit at 3.

[138] Proprietary standards would greatly delay the JV's offering of services demanded by MNCs. AT&T/BT reply at 23. An open standards approach, in contrast, would build on the enormous body of open, public domain IP standards and would allow the JV to get its services to market faster and at a lower cost. *Id.* at 22-23. Delay would have a crippling effect on the JV because MCI WorldCom, GTE, and C&W have a significant head start through their control of most Internet backbone facilities, customers, and traffic. AT&T/BT reply at 23-24. Open standards facilitate the JV's ability to get "off-the-shelf" equipment and software, which would be less expensive and easier to procure than non-standard equipment and software. *Id.* at 24; London affidavit at 4.

a system reliant on proprietary API calls;[139] limit the JV's ability to attract partners and distributors;[140] limit the JV's ability to access the industry-wide pool of innovations;[141] and incur significant risk that JV's proprietary API calls will be forced out by open standards.[142] Based on these considerations, we are convinced that AT&T/BT are not likely to use proprietary APIs in an anti-competitive manner successfully.

59. AT&T/BT acknowledge that, due to rapidly developing and highly competitive markets, they may choose to deploy a new service or feature even before the industry standards-setting process has concluded and that they wish to "shape the competitive landscape" by getting industry standards-setting bodies to adopt innovative API calls originated by AT&T/BT.[143] AT&T/BT state, however, that such non-standard API calls will be published and so will be no less open than those endorsed by a standards-setting body.[144] Prior to adoption by an industry standards-setting body, API calls may be open in the sense of

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[139] The global seamless services market is comprised of sophisticated corporate clients who would not consent to be "locked in" to systems that did not use open standards, which could limit their ability to use "multi-sourcing," and short-term contracts, *i.e.*, obtain competitive sources of supply. AT&T/BT reply at 26-27.

[140] AT&T/BT state that open standards maximize the ability of the JV to attract distributors and partners. *Id.* at 23. "It is a lot easier for worldwide distributors and partners to tap into the venture's network and services through open standard software and interfaces than it is for these distributors to have to adapt their hardware and software to another carrier's proprietary network and system." *Technical White Paper* at 4.

[141] AT&T/BT state that open standards is the only approach that would enable the JV to obtain the benefits of innovations produced by the entire industry. AT&T/BT reply at 23. "Instead of just one or two companies working on improvements to a proprietary set of standards, many different companies and literally millions of people push the open IP-based standards forward...[w]ith proprietary standards, the rate of innovation on the Global Venture's network almost surely would lag the innovation rates on open IP-based networks." London affidavit at 4-5.

[142] AT&T/BT state that adoption of proprietary standards will lead to failure, especially given the recent history of the IP marketplace, where market forces have rewarded open standards and driven out proprietary standards and are likely to continue to do so. AT&T/BT reply at 20. For a review of recent instances in which open standards have prevailed over proprietary standards in the Internet marketplace, *see* London Affidavit at 5-6. Adoption of proprietary standards is very risky because of the winner-take-all tendency in markets prone to tipping. Affidavit of Janusz Ordover & Robert Willig at 14 (Ordover and Willig affidavit), attached to AT&T/BT reply. Neither AT&T nor BT have advantages that would allow them to overcome market forces disposed to open standards, *e.g.*, a first mover ("first-to-market") advantage in the global seamless services market, control of significant Internet technologies, or control of applications software, which are being developed primarily by third parties. Ordover and Willig affidavit at 23.

[143] AT&T/BT May 28 1999 *ex parte* letter at 5 and London affidavit at 6.

[144] AT&T/BT May 28 1999 *ex parte* letter at 5, n. 11.

freely accessible yet not open in the sense of widely accepted and operable on rival networks. It is conceivable that if AT&T/BT enjoy early technological and commercial success with their IP network, they may be able to dominate the standards-setting process, making the standards-setting process a ratification of their own corporate decisions and guaranteeing, for example, that they are first-to-market with new services. However, there is no evidence in the record to support the likelihood of such an eventuality. Also, as discussed above, AT&T/BT do not have an initial advantage over their rivals in the provision of global seamless services over an IP network. Therefore, abuse of the standards-setting process is as likely to be caused by any significant competitor in the global seamless service market as by AT&T/BT. We could not guard against such potential abuse by rejecting the proposed transaction, as suggested by GTE, or imposing non-discrimination and disclosure requirements regarding APIs solely on the JV, as suggested by Equant.

60. As mentioned above, AT&T/BT acknowledge that their API programs may be proprietary. We are, however, unpersuaded by GTE's argument that the use of proprietary API programs by AT&T/BT poses a risk to competition in the global seamless services market. In the theory of dynamic competition, the profit motive impels entrepreneurs to develop innovations, such as proprietary API programs, which in turn increase consumer welfare.[145] As long as applications programs rely on non-proprietary API calls, rivals have the option of supporting those API calls on their IP platform by obtaining API programs in the marketplace or developing their own API programs. Thus, along with contributing to technical progress, proprietary API programs create no insurmountable barriers to entry that could lessen or significantly postpone competition in the global seamless services market.[146]

61. In summary, we are not persuaded by GTE's arguments. We find that AT&T/BT do not have an initial advantage in the global seamless services market which would enable them to use APIs to compete unfairly; that AT&T/BT will be unable to use proprietary API calls to exclude competitors from access to desirable applications programs;

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[145] The Supreme Court has recognized this idea in the context of intellectual property law. *See Mazer v. Stein,* 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"). We note that even with open standards, innovative proprietary software may render rivals' systems partly obsolete. This is an inevitable result of competition in a market economy and is not anticompetitive.

[146] As two authors have noted, federal law affords interface implementations (*e.g.,* API programs) greater copyright protection than interface specifications (*e.g.*, API calls). *See* Band and Katoh at 130-31. As Band and Katoh suggest, an important rationale behind the courts' distinction is the same as ours, namely that non-proprietary interface specifications are essential for interoperability, and thus competition, but non-proprietary interface implementations are not.

and that the development of proprietary API programs by AT&T/BT will not create barriers to entry or otherwise impede competition in the global seamless services market. We believe that precluding the proposed transaction, as GTE suggests, or imposing conditions on the development and use of API calls or programs by the JV, as Equant suggests, could interfere with the ability of global seamless services customers to obtain desired services and could reduce innovation, because it would eliminate or handicap a significant market participant. We find, therefore, no basis in GTE's arguments for rejecting the merger or imposing non-discrimination and disclosure requirements on the JV regarding APIs.

### B. U.S.-U.K. Route

62. We consider in this section the competitive effects of the proposed joint venture on the U.S.-U.K. route. In particular, we consider C&W's claim that AT&T and BT will raise rivals' costs on the U.S.-U.K. route by using the joint venture to self-correspond. As the Commission stated in the *BT/MCI Order*, a merger can have an anticompetitive effect if it increases either the incentives or the ability of the integrated firm to raise the costs of its rivals to the detriment of consumer welfare.[147] We are not persuaded here by C&W's claim, however, that AT&T and BT will be able successfully to raise their rivals' costs on the U.S.-U.K. route by using the joint venture to self-correspond. We further find that the joint venture is consistent with Commission policy to encourage the movement away from the traditional accounting rate regime and toward competitive alternatives, including end-to-end provisioning, for the termination of international traffic.

63. C&W argues that, if the proposed joint venture is approved, AT&T and BT would engage in a strategy to raise rivals' costs in order to insulate themselves from accounting rate reductions and to maintain supra-competitive prices in the retail market.[148] C&W contends that AT&T and BT could execute such a strategy by terminating all of AT&T's traffic on the U.S.-U.K. route with BT rather than terminating some AT&T traffic with rivals of BT, including C&W. According to C&W, an exclusive AT&T/BT arrangement would force C&W to incur higher settlement outpayment because its U.K.-U.S. traffic flows would not be offset by AT&T return minutes from the United States.[149] In order for such a

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[147] *BT/MCI Order*, 12 FCC Rcd at 15,410, ¶156.

[148] C&W opposition at 7-8. C&W states that "the result of the joint venture's strategy will be to erect a price umbrella over the joint venture and permit it to charge above-cost prices to consumers over the long term." *Id.*

[149] C&W states that AT&T currently accounts for nearly 57 percent of the minutes C&W receives from U.S. carriers for termination in the U.K. Given this high percentage, C&W contends that it 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.

strategy to be successful, AT&T and BT would have to ensure that C&W and other rivals could not terminate their traffic in the United States at low rates or offset lost revenues in the U.K. termination market by replacing AT&T inbound-minutes with minutes from other U.S. carriers. Market conditions on the U.S.-U.K. route, however, make it highly unlikely that AT&T and BT could successfully engage in a strategy to raise rivals' costs.

64. The U.S.-U.K. route is one of the most competitive in the world, and there are many alternatives to AT&T for termination of traffic in the United States. C&W may terminate traffic with many facilities-based carriers in the U.S.; it may terminate traffic via ISR at very low rates; and it may build its own facilities in the U.S. and self-correspond. Given the level of competition on the U.S.-U.K. route and the availability of ISR, it is highly unlikely that the joint venture could successfully maintain prices to terminate traffic in the United States that are above-cost, as C&W argues. Contrary to C&W's claim,[150] we expect that AT&T's competitors in the U.S. market for termination of international traffic would respond to any strategy to raise rivals' costs by undercutting AT&T's price to terminate traffic in the United States.

65. On the U.K. end of the route, there are buyers of U.K. termination service other than AT&T. We are not convinced, however, by C&W's argument that "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."[151] Given the level of competition on the U.S.-U.K. route, we expect that U.S. carriers will seek the lowest cost alternative for terminating traffic in the United Kingdom. Thus, if C&W offers low cost termination, it should be able to attract traffic from U.S. carriers. Moreover, we note that the U.S.-U.K. market has been growing at a rapid pace, approximately 14 percent annually, since 1991.[152] As a result, there is increasing opportunity for C&W and other rivals of BT to terminate non-AT&T minutes in the United Kingdom.[153]

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C&W opposition at 5.

[150] C&W opposition at 3. C&W contends that AT&T's rivals in the U.S. market are unlikely to cut their termination rates to incremental cost in response to an AT&T price increase to BT's competitors, and instead are more likely to charge the same price as AT&T or some lower price that still exceeds incremental cost.

[151] C&W reply at 3.

[152] *See* Linda Blake & Jim Lande, FCC, *1997 Section 43.61 International Telecommunications Data* (1998); Linda Blake & Jim Lande, FCC, *International Communications Traffic Data for 1991* (1992).

[153] We also note that, contrary to C&W's claim, the terms of the Framework Agreement do not require the joint venture to purchase all of its termination services from AT&T or BT. As AT&T/BT note, the joint venture "is free to purchase termination services at better prices, quality or standards of service" than those offered by its

66. C&W urges the Commission to impose the proportionate return requirement of the International Settlement Policy (ISP)[154] between AT&T and the joint venture in their dealings with BT for some period of time in order to prevent AT&T and BT from engaging in a strategy to raise rivals' costs. In light of our conclusion that C&W has not shown that AT&T and BT will be able successfully to engage in a strategy to raise rivals' costs on the U.S.-U.K. route through self-correspondence, we decline to impose a proportionate return requirement that would limit the ability of AT&T and the joint venture to self-correspond.

67. We also note that the proportionate return condition urged by C&W would be contrary to recent Commission policies lifting regulations on U.S. carrier accounting rate negotiations. The Commission recently concluded in its *ISP Reform Order*[155] that, on routes where there are competitive alternatives to terminate traffic, the Commission should not impose regulatory burdens on the settlement of international traffic and instead should let market forces dictate what arrangements U.S. carriers enter into with their foreign correspondents. Specifically, the Commission found that there is no reason to require continued compliance by U.S. carriers with the ISP, including the proportionate return requirement, on routes where rates to terminate international traffic are at least 25 percent below the benchmark rates adopted by the Commission.[156] The Commission concluded that the ISP is not necessary to prevent anticompetitive behavior on routes where there are competitive alternatives to terminate traffic and, in fact, the ISP could hinder the further development of competition on such routes.[157] In addition, the Commission has found that competition is best promoted by breaking the link between the markets for outbound and

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parents. AT&T/BT reply at 29; *see also Framework Agreement* at Article 10.1(b). Thus, C&W and other rivals are not prohibited by the terms of the Framework Agreement from continuing to compete to terminate AT&T's traffic in the United Kingdom.

[154] The ISP requires uniform accounting rates, uniform terms for the sharing of tolls, and uniform settlement rates among U.S. carriers providing the same service to the same foreign point. The ISP also requires that U.S. carriers accept only their proportionate share of return traffic. *See Implementation of Uniform Settlements Policy for Parallel International Communications Routes,* 51 Fed. Reg. 4736 (1986) (*1986 ISP Order); Reconsideration,* 2 FCC Rcd 1118 (1987); *Further Reconsideration,* 3 FCC Rcd 1614 (1988). *See also* 47 C.F.R. § 43.51(e) (1998).

[155] *1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements,* IB Docket No. 98-148 and CC Docket No. 90-337, Report and Order on Reconsideration, FCC 99-73 (rel. May 6, 1999) (*ISP Reform Order*).

[156] *See ISP Reform Order,* FCC 99-73 at ¶¶ 55-58.

[157] *Id.*, FCC 99-73 at ¶¶ 18, 52-58.

inbound calls that is required by the ISP's proportionate return requirement. To that end, Commission policy has sought to foster separate competitive markets for termination and origination of international minutes in the United States.[158]

68. C&W has provided no reason to question the application of these policies to the U.S.-U.K. route, where there are many alternatives to AT&T for termination of traffic in the United States and to BT for termination of traffic in the United Kingdom. As noted above, there are several facilities-based carriers to terminate traffic on both ends of the U.S.-U.K. route and, in both the United States and the United Kingdom, carriers may provide end-to-end service by purchasing or leasing facilities to terminate their own traffic.[159] In addition, both the United States and United Kingdom permit carriers to terminate international traffic via International Simple Resale (ISR) arrangements.[160]

69. C&W also urges the Commission to require AT&T and BT to divest, at cost, the half-circuits they maintain with other correspondent carriers, upon election of the correspondent carriers.[161] C&W states that divestiture is necessary because, if AT&T and BT self-correspond on the U.S.-U.K. route, they can force their other correspondents to strand the half-circuits that currently are used to carry AT&T and BT traffic. In a subsequent *ex parte* filing, C&W modified its request, urging the Commission to require divestiture, "at market prices," "to the extent that actual stranding (or significant idling) of half-circuits occurs."[162]

70. We are not convinced that a condition mandating divestiture, either at cost or "reasonable rates," is necessary. AT&T has committed to "divest, at prevailing market rates and terms . . . [its] existing US-end half circuits with a competitor's UK-end half circuits that the global venture determines . . . are unlikely to be used to deliver significant volumes of

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[158] *See, e.g., Policy Statement on International Accounting Rate Reform*, 11 FCC Rcd 3146 (1996) (*Policy Statement*); *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20,063 (1996).

[159] *See supra* ¶ 64-66.

[160] ISR allows carriers to route switched traffic over international private lines interconnected to the public switched network. Such traffic is not subject to the international accounting rate system. *See Regulation of International Accounting Rates,* Phase II, First Report and Order, 7 FCC Rcd 559, 561-62, ¶¶ 17-24 (1991).

[161] C&W reply at 20-22.

[162] *Ex parte* letter from Keith Bernard, C&W, to Magalie Roman Salas, Secretary, FCC, at 2 (May 20, 1999).

traffic."[163] Moreover, C&W has not shown that AT&T and BT would be willing to incur the costs of stranding their own half of the circuits they maintain with other correspondents. As noted above, C&W may still compete to terminate AT&T traffic in the United Kingdom. There is thus no basis to conclude that C&W's half circuits with AT&T will be idle. Given these considerations, we decline to condition approval of the joint venture on divestiture by AT&T and BT of the half-circuits they maintain with other correspondent carriers. We do note, however, that Commission policy disfavors allowing capacity to remain idle.[164] Therefore, if C&W or any other correspondent that maintains half-circuits with AT&T can demonstrate that AT&T has idled matched half-circuits on the U.S.-U.K. route, without a valid business reason, the Commission will entertain a petition to require the sale of those idled half-circuits at market rates.

### C. Third Country Routes

71. C&W asserts that the proposed joint venture will enable AT&T and BT to raise rivals' costs on third country routes by routing foreign-originated minutes destined for a third country through AT&T in the United States. According to C&W, this strategy would earn AT&T return traffic at the expense of its competitors on the third country route. C&W alleges that, for example, BT could send to a third country only the volume of minutes that matches the volume that country sends to the U.K., leaving BT with no settlement outpayment. BT could then send any additional traffic to the third country through AT&T's network in the United States, thereby earning AT&T return traffic.

72. Consistent with the Commission's holding in the *BT/MCI Order,* we conclude that there is no reason to restrict the ability of AT&T and BT to reoriginate BT third country traffic via AT&T's U.S. network.[165] Least-cost routing mechanisms such as reorigination are an economically rational response to inflated settlement rates and, as such, the Commission has not found that they should be prohibited or limited generally. In fact, the Commission has encouraged the development of least-cost routing mechanisms as a way to put pressure on

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[163] *See* AT&T/BT May 28, 1999 *ex parte* letter at 4.

[164] *See e.g., Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHZ and 24.75 25.25 GHz Frequency Bands for Broadcast Satellite,* IB Docket No. 98-172, Report and Order, FCC 99-18 (rel. Feb. 10, 1999).

[165] *See BT/MCI Order,* 12 FCC Rcd at 15,471, ¶ 312.

above-cost accounting rates.[166] Moreover, as the Commission noted in the *BT/MCI Order*, all carriers have an equal incentive and ability to reoriginate traffic through the United States in order to reduce settlement payments.[167]

### D. Transit Market

73. We consider here the competitive effects of the proposed joint venture on the transit market.[168] In particular, we consider C&W's allegation that the joint venture will result in an increase in concentration on many of what C&W refers to as "thin routes," or routes on which BT and AT&T are the only carriers or on which they control more than 60 percent of traffic. C&W argues that this level of concentration will allow the joint venture to charge above-cost rates to carriers for transit services.[169] To remedy these alleged anticompetitive effects of the joint venture, C&W urges the Commission to require AT&T and BT to divest capacity on individual routes on which they are the only two, or two of the only three, facilities-based carriers. C&W also proposes that the joint venture's contracts to supply international carriage services to other carriers must not have a term of more than 12 months or include onerous termination notice requirements or penalties.[170]

74. We conclude that C&W has not provided sufficient evidence for the Commission to conclude that the joint venture will harm competition in the transit market. While C&W charges that the joint venture will control more than 60 percent of traffic on so-called thin routes, C&W provides no evidence concerning the identity of such routes or the

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[166] *See Policy Statement,* 11 FCC Rcd at 3147, ¶ 12. Least-cost routing allows carriers to circumvent the accounting rate system on routes where accounting rates are high.

[167] *BT/MCI Order*, 12 FCC Rcd at 15,471, ¶ 312.

[168] Transit allows a carrier in one country, the originating carrier, to route traffic to a carrier in another country, the destination carrier, through a carrier in a third country, the transit carrier. The originating carrier pays a transit fee to the transit carrier for delivering the traffic to the destination carrier.

[169] C&W opposition at 9-10.

[170] C&W reply at 22-23.

market shares of rivals on those routes.[171] The Commission does not regulate the transit market and does not have information about foreign carriers' transit routes. Without this information, the Commission can make no determination as to the ability of the joint venture to exercise market power on a particular route. We therefore decline at this time to require the joint venture to divest capacity on certain transit routes or to impose any restrictions on the joint venture's offering of transit services.

75. It is the Commission's understanding that, as a general matter, the global transit market is highly competitive. As AT&T/BT note, there are thousands of routes to the 240 countries of the world.[172] In addition, it is the Commission's understanding that there is no dearth of capacity on most transit routes and that there are no barriers to entry for firms with excess capacity to provide transit services in competition with the joint venture.[173] The Commission is also aware, however, that there are concerns that transit rates are excessive on some routes.[174] There is no agreement, though, on the causes of high transit rates on certain routes. High rates could be caused by a number of factors, including inadequate competition, high underlying accounting rates, low traffic volumes, and inadequate information in the marketplace. Because we have no basis to conclude that the proposed joint venture would exacerbate the concern about high transit rates on some routes, we decline at this time to impose any restrictions on the joint venture. We will, however, continue to monitor the transit market to ensure that the joint venture, as well as other transit providers, are not acting in an anticompetitive manner.

### E. Public Interest Benefits

76. We find that the proposed joint venture is likely to have several possible pro-competitive effects. First, the joint venture will give BT a strong U.S. partner to replace MCI

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[171] We note that in the *AT&T International Non-Dominance Order,* the Commission found that AT&T is the exclusive provider from the U.S. to only four countries: Madagascar, Western Sahara, Chagos Archipelago (now known as Diego Garcia), and Wallis and Futuna. The Commission forbore from regulating AT&T as dominant on these routes because of the *de minimis* traffic volumes, stating that "regulation could impede rather than promote competition." *See AT&T International Non-Dominance Order,* 11 FCC Rcd at 17,998-99, ¶¶ 94, 97.

[172] AT&T/BT reply at 44.

[173] See AT&T/BT reply at 44 (international carrier can use spare capacity to supply transit services with little or no additional investment).

[174] For example, the issue of transit rates has been discussed at the International Telecommunication Union (ITU). *See, e.g.*, Methodological Note on Transit Rates, contribution by the ITU Secretariat to the Telecommunications Standardization Sector Study Group 3 Focus Group on Accounting Rates (Aug. 12, 1998).

as a provider of global seamless services to U.S.-based MNCs. As we noted, BT has been unable to generate significant revenues by selling Concert services in the United States after the break-up of its proposed merger with MCI in September 1998.[175] However, a combined AT&T/BT operation, such as the JV, is more likely to be able to offer U.S. customers increased choices and services by competing with the other alliances and carriers in this market. Second, AT&T, too, may become a more effective competitor in the global seamless services market by replacing its former loosely-formed global alliance with the proposed joint venture with BT. AT&T/BT, for instance, argue that AT&T's former global alliance was "less than maximally effective" in serving global MNCs because it did not offer them a single point of contact or comparable technologies and architectures worldwide.[176] The JV, by contrast, proposes to offer services tailored to the needs of global MNCs and to build an IP-based global network that uses open standards. Third, by building an IP-based global network that will offer high-speed transport capacity to the world's largest cities, the JV will further the development of packet-switched international networks and facilitate the migration from the circuit switched network. The result will be to benefit users of voice, data, and video services who demand increased bandwidth. Finally, the joint venture is likely to benefit consumers by encouraging the movement away from the traditional accounting rate regime and toward competitive alternatives, including end-to-end provisioning, for the termination of international traffic.

### F. National Security Issues

77. The Executive Branch has raised concerns regarding national security and law enforcement in this proceeding, which, pursuant to the public interest analysis articulated in the Commission's Foreign Participation Order[177] we must consider. In comments filed with the Commission, the Department of Defense (DOD) requests that the parties undertake negotiations to ensure that national security and law enforcement issues will be protected should the proposed JV take place.[178] Similarly, in its comments on the proposed JV, the Federal Bureau of Investigation (FBI), through the Department of Justice (DOJ), voices concern regarding national security, public safety, and law enforcement.[179]

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[175] *Supra* ¶ 45.

[176] AT&T/BT application at 13.

[177] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23,891 (1997).

[178] Comments of the Secretary of Defense, filed January 19, 1999, at 2-3.

[179] Comments of the Federal Bureau of Investigation, filed January 8, 1999, at 2.

78. DOD, DOJ, FBI, and AT&T/BT have informed the Commission that they have reached an agreement that resolves the national security, law enforcement, and public safety issues raised in the DOD, DOJ, and FBI comments. The parties have submitted a copy of the executed agreement (DOD/DOJ/FBI Agreement) which conditions the grant of the application to obtain or transfer licenses and authorizations on compliance with the agreement. In brief, the DOD/DOJ/FBI Agreement provides that all domestic telecommunications infrastructure owned directly or indirectly by AT&T/BT will be owned and controlled by VLT and License Co. (collectively, the Company) and will at all times be located in the United States. Further, all telecommunications of United States JV subscribers carried over the Company's facilities shall pass through a facility, from which surveillance can be conducted, that is physically located in the United States and under the control of either the Company or a licensed United States carrier. The Company agrees to take reasonable and appropriate measures to prevent improper use of facilities used in the domestic telecommunications infrastructure, specifically with respect to personnel holding sensitive positions, information storage and access, and disclosure to foreign entities. The parties have also agreed to adopt and maintain certain policies with regard to confidentiality and security of electronic surveillance orders and authorizations, orders, legal process, and statutory authorizations and certifications related to subscriber records and information. Finally, the parties have also agreed to implement certain measures requiring personnel security clearances, secure storage facilities, and the prevention of access by unauthorized personnel to secure or sensitive network facilities and offices.

79. We note that the Agreement, the negotiation of which delayed significantly resolution of this proceeding, reflects a unique situation and contains certain provisions that, if broadly applied, would have significant consequences for the telecommunications industry. These provisions, if viewed as precedent for other service providers and potential investors, would warrant further inquiry on our part. Therefore, this agreement does not establish precedent for future cases. However, notwithstanding these concerns about the broader implications of some provisions of this Agreement, we see no reason to modify or disturb the Agreement of the parties on this matter.

80. In accordance with the request of the DOD/DOJ/FBI and the discussion above, we condition our grant of the application to obtain or transfer certain licenses and authorizations in connection with the proposed JV on compliance with the DOD/DOJ/FBI Agreement, a copy of which is attached hereto as Appendix B.

## V. COMPETITIVE SAFEGUARDS

81 In this section, we review whether, as a result of the proposed transaction, our dominant carrier safeguards should apply to AT&T and the JV entities and whether there is a need for additional regulatory safeguards to prevent anticompetitive harms.

### A. Dominant Carrier Status of AT&T and the JV Entities

82 Under Section 63.10 of our rules, we classify a U.S. carrier as dominant on a U.S. international services route if it is "affiliated" with a foreign carrier that has sufficient market power on the foreign end to affect competition adversely in the U.S. market.[180] The rule further states that, if the U.S. carrier demonstrates that its foreign affiliate possesses less than 50 percent market share in the international transport and local access markets on the foreign end of the route, the U.S. carrier shall presumptively be classified as non-dominant.[181] In addition, in the *Foreign Carrier Entry Order*, the Commission stated that dominant carrier regulation may be warranted if a non-equity alliance such as the proposed joint venture posed a "substantial risk of anticompetitive effects" on a particular route.[182]

83. We clarified the definition of "affiliation" in our recent biennial review of international common carrier regulations.[183] As currently defined, a U.S. carrier is affiliated with a foreign carrier if: (1) the U.S. carrier owns more than 25 percent of, or controls, the foreign carrier; (2) the foreign carrier owns more than 25 percent of, or controls, the U.S. carrier; or (3) the foreign carrier has entered into an alliance or joint venture with a second foreign carrier to provide telecommunications services and the two foreign carriers together own more than 25 percent of, or control, the U.S. carrier.[184]

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[180] The regulatory safeguards imposed on carriers that are classified as dominant on particular routes due to an affiliation or alliance with a foreign carrier with market power are set forth in Section 63.10(c) and differ from the regulatory safeguards imposed on carriers that are dominant for reasons other than a foreign carrier affiliation. Section 63.10(c) requires quarterly reporting of traffic and revenue, provisioning and maintenance, and circuit status; it also imposes limited structural separation, which includes separate corporate affiliates, separate books of account, and no joint ownership of transmission or switching facilities. 47 C.F.R. § 63.10(c).

[181] 47 C.F.R. § 63.10(a)(3). *See Foreign Participation Order*, 12 FCC Rcd at 23,869-99, ¶¶ 177-239.

[182] *Market Entry and Regulation of Foreign Affiliated Entities*, IB Docket 95-22, Report and Order, 11 FCC Rcd 3873, 3924-26, ¶ 253 (*Foreign Carrier Entry Order*). *See also Foreign Participation Order*, 12 FCC Rcd at 23992, ¶ 224.

[183] 1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements, FCC 99-51, Order, at ¶¶ 77-78 (rel. Mar. 23, 1999) (*1999 Streamlining Order*).

[184] *See* Section 63.09(e), 47 C.F.R. § 63.09(e), which provides that:

> Two entities are *affiliated* with each other if one of them, or an entity that controls one of them, directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one. Also, a U.S. carrier is *affiliated* with two or more foreign carriers if the foreign carriers, or entities that control them, together directly or indirectly own more than 25 percent of the capital stock of, or control, the U.S. carrier and those foreign carriers are parties to, or the beneficiaries of, a contractual relation (e.g., a joint

84. *VLT and TLTD.* In this case, we find that the JV entities VLT and TLT[185] are U.S. carriers affiliated with BT within the meaning of our rules because BT owns more than 25 percent of both VLT and TLTD. We also find that, because AT&T/BT did not attempt to demonstrate that BT has less than 50 percent of the U.K. local exchange market, under our rules we presume that BT has market power in the U.K.[186] Thus, we conclude that VLT and TLTD will be regulated as dominant carriers on the U.S.-U.K. route under Section 63.10 of our rules.

85 We note that, as dominant carriers, VLT and TLTD will be required to file quarterly reports on traffic and revenues, provisioning and maintenance of basic services and facilities procured from BT, and circuit status on the U.S.-U.K. route. In addition, VLT and TLTD must maintain limited structural separation from BT, including a prohibition on jointly owning transmission or switching facilities.[187] AT&T/BT state that VLT and TLTD will report, on a quarterly basis, provisioning and maintenance of basic services and facilities procured from BT directly or indirectly.[188] Consistent with our rules, VLT and TLTD must file quarterly reports on provisioning and maintenance procured from BT directly or indirectly, including through Concert. We make AT&T/BTs' compliance with our rules a condition of this order.

86 Although we conclude that VLT and TLTD are dominant because they are affiliated with BT, we also find that neither VLT, TLTD nor Concert, the JV's U.K.-licensed affiliate, has market power with regard to any of the input markets in which they own or control assets, *i.e.*, the markets for international transport and U.K. cable landing stations.[189]

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venture or market alliance) affecting the provision or marketing of international basic telecommunications services in the United States.

[185] VLT and TLTD are JV entities that have applied for Section 214 authorizations to provide international services. *See supra* ¶¶ 5-6.

[186] *See* 47 C.F.R. § 63.10(c)(3). *See also* AT&T/BT reply at 54 ("since Applicants have not attempted to demonstrate in this proceeding that BT lacks market power in the UK, the regulated entities ... initially will be subject to 'dominant carrier' regulation on the US-UK route"). *See also* Level 3 comments at 11; MCI WorldCom comments at 13.

[187] *Supra* n.177.

[188] AT&T/BT June 28, 1999 *ex parte* letter at 2.

[189] As noted above, VLT owns the cable landing stations and international cable facilities within the U.S. territorial limits and TLTD owns the international cable facilities outside the U.S. and U.K. territorial limits. *Supra* ¶¶ 5-6. In addition, Concert, a U.K.-licensed affiliate of the JV, owns the JV's international cable

As noted above, no carrier has market power in the U.S.-U.K. transport capacity market.[190] In addition, a number of international facilities operators, in addition to Concert, provide access to cable landing stations in the United Kingdom. For instance, C&W operates the cable landing stations for Gemini, and Global Crossing operates the cable landing station for AC-1.[191] In 1999, 30 percent of U.S.-U.K. self-healing submarine cable capacity will land at BT cable landing stations and 70 percent at cable landing stations operated by C&W and Global Crossing.[192] Also, as we have previously noted, there are no significant barriers to entry by new firms in this market.[193]

87 C&W asserts that our dominant carrier requirements "will not adequately constrain the ability of the JV to misuse its market power" and urges us to impose a set of "more stringent reporting requirements" on the JV entities than for other carriers affiliated with foreign carriers with market power.[194] However, as discussed above, we find that the JV entities do not have market power on the U.S.-U.K. route.[195] Thus, we conclude that the additional reporting requirements C&W urges us to adopt are not necessary to prevent VLT and TLTD from acting anticompetitively.[196]

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facilities and cable landing stations within the U.K. territorial limits. *Supra* n.5.

[190] *See supra* ¶ 48.

[191] *See* Affidavit of Philip C. Stubbington (Stubbington affidavit) at Table A, attached to *ex parte* letter from Joel Winnick, counsel for BT, to Magalie Roman Salas, Secretary, FCC (Mar. 19, 1999).

[192] Stubbington affidavit at table C, modified by excluding capacity for all cables that are not self-healing.

[193] *See BT/MCI Order*, 12 FCC Rcd at 15,415-16, at ¶¶ 166-68.

[194] C&W reply at 10, 24. The more stringent requirements proposed by C&W are: (1) keep records of all services and facilities provided by BT or AT&T to the JV or by the JV to BT or AT&T; (2) file monthly status reports for circuits between the United States and United Kingdom and publish those reports quarterly; (3) file notifications of all circuits added between the United States and United Kingdom, 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 quarterly reports to the Commission, the volume of traffic that is reoriginated traffic through the United States, and the volumes of third country traffic reoriginated through the United States to the United Kingdom and Europe. C&W reply at 24-25.

[195] *Supra* ¶ 83.

[196] However, we note that Section 63.10(c) requires U.S. international carriers classified as dominant to comply with some of the requirements suggested by C&W. For instance, Section 63.10(c) requires VLT and TLTD to: (1) file quarterly reports of provisioning and maintenance of basic facilities and services procured by the JV entities from BT; (2) file quarterly notifications of all circuits added between the United States and

88. We are not persuaded by C&W's claim that the JV would be able to identify potential customers, and thereby gain an anticompetitive advantage over its U.S. competitors, by using customer and carrier information that BT derives from its local exchange operations in the United Kingdom.[197] Section 63.21(e) of our rules prohibits U.S. carriers from accessing or using specific U.S. customer proprietary network information that is derived from a foreign network, unless the carrier obtains approval from the U.S. customer.[198] Section 63.21(f) prohibits U.S. carriers from receiving from a foreign carrier any proprietary or confidential information pertaining to a competing U.S. carrier, unless the competing U.S. carrier provides written permission.[199] Thus, our rules prohibit AT&T, VLT, and TLTD, all of which are licensed U.S. carriers, from accepting or using any confidential U.S. customer or carrier information without prior approval from the customer or carrier. We also note that, in the *BT/MCI Order,* the Commission concluded that Conditions 38 and 38A of BT's license prohibit BT from using confidential customer information to gain an unfair competitive advantage, and Condition 41A of BT's license prohibits the disclosure of confidential carrier information.[200] C&W states that Oftel has not included similar conditions in the JV's proposed U.K. license and, therefore, urges us to prohibit AT&T/BT from using confidential customer and carrier proprietary information that they obtain from BT.[201] We find, however, that such conditions are not necessary because Oftel's proposed licenses for BT includes prohibitions against the unauthorized disclosure of confidential customer and carrier information.[202] Thus, we reiterate the finding in the *BT/MCI Order* that U.K. regulations

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United Kingdom and whether the circuits are active or idle; and (3) 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.

[197] *See* C&W reply at 17.

[198] 47 C.F.R. § 63.21(e).

[199] 47 C.F.R. § 63.21(f).

[200] *BT/MCI Order,* 12 FCC Rcd at 15,443-45, ¶¶ 235-38.

[201] *Ex parte* letter from Keith Bernard, C&W, to Sherille Ismail, International Bureau, FCC, at 2 (June 16, 1999).

[202] BT's proposed license includes a specific prohibition, similar to Conditions 38 and 38A in BT's current license, against the unauthorized disclosure of confidential customer information. *See ex parte* letter from James E. Graf, II, BTNA, and Lawrence J. Lafaro, AT&T, to Magalie Roman Salas, Secretary, FCC at 1 (June 11, 1999). In addition, Oftel's proposed licenses for BT includes a condition stating that:

> Any information received by Licensee from any person for the purposes of any provision in Part C [i.e., concerning interconnection] shall be used only for the purpose for which it was

protect U.K. customer and carrier proprietary information against unauthorized disclosure.[203] Therefore, we conclude that it is not necessary to adopt a condition prohibiting AT&T, VLT, and TLTD from using in their own marketing efforts customer information that BT derives from its customers or other carriers as a result of providing interconnection in the United Kingdom.

89 *AT&T.* We also examine whether AT&T should be classified as a dominant carrier on the U.S.-U.K. route under Section 63.10 of our rules. Concert, the JV's U.K.-licensed affiliate, is a foreign carrier on the U.S.-U.K. route and, because AT&T holds more than 25 percent of its ownership shares, we find that Concert is affiliated with AT&T under our rules.[204] For the reasons stated above, however, we conclude that Concert does not have market power in any of the input markets in which it owns or control assets, *i.e.*, the markets for international transport and U.K. cable landing stations.[205] We also address whether Concert, because of its affiliation with BT, may derive market power as a result of BT's market power over U.K. local access and termination. We conclude that, while BT has market power that could enable it to favor the JV, our competitive safeguards prevent the U.S.-licensed JV entities from accepting any preferential treatment from BT.[206] However, to ensure that there is no loophole that would permit the JV to accept a special concession from BT through Concert, we adopt as a condition of this order AT&T/BTs' compliance with Section 63.14 of our rules.[207] Accordingly, we conclude that Concert does not have market

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> supplied. The Licensee shall not pass such information on to other departments within the Licensee's organization, subsidiaries, or partners for which such information could provide a competitive advantage.

AT&T/BT June 28, 1999 *ex parte* letter at 1. Moreover, BT's published interconnection agreements include prohibitions against disclosing confidential carrier information, and Oftel requires BT to offer these same terms in all future interconnection agreements. *Id* at 2.

[203] *BT/MCI Order*, 12 FCC Rcd at 15,444-45, ¶ 238. *See Foreign Participation Order*, 12 FCC Rcd at 23,968, ¶ 175 (recognizing that *foreign customer* information derived from a foreign network is within the jurisdiction of foreign administrations).

[204] AT&T/BT June 28, 1999 *ex parte* letter at 2.

[205] *See supra* ¶ 83.

[206] Furthermore, we note that Oftel prohibits BT from offering any favorable rates to AT&T, or to any of the JV entities, that it does not offer to all U.K. carriers. *BT/MCI Order,* 12 FCC Rcd at 15,439-40, ¶ 224.

[207] AT&T, VLT and TLTD, either directly or indirectly through the joint venture's U.K. subsidiary, Concert, will not accept any special concession from BT that would violate Section 63.14. *See ex parte* letter from James E. Graf, II, BTNA, and Lawrence J. Lafaro, AT&T, to Magalie Roman Salas, Secretary, FCC (May