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

In the Matter of	)	
	)	
Application of WorldCom, Inc. and	)	CC Docket No. 97-211
MCI Communications Corporation for	)	
Transfer of Control of MCI Communications	)	
Corporation to WorldCom, Inc.	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 14, 1998 **Released: September 14, 1998**

By the Commission: Chairman Kennard, Commissioners Ness, Powell, and Tristani with Commissioner Furchtgott-Roth concurring, Commissioner Tristani dissenting in part, and Commissioners Furchtgott-Roth, Powell, and Tristani issuing separate statements.

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I. INTRODUCTION

1. In this Order, the Commission considers the applications filed by WorldCom, Inc. (WorldCom) and MCI Communications Corporation (MCI) pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended (Communications Act),[1] for approval to transfer control of certain licenses and authorizations from MCI to WorldCom in connection with their proposed merger. In accordance with the terms of sections 214(a) and 310(d), WorldCom and MCI (collectively, Applicants) must persuade us that their proposed transaction will serve the public interest, convenience, and necessity before we can grant their

[1] 47 U.S.C. §§ 214(a), 310(d).

applications.[2] For the reasons set forth below, we conclude that WorldCom and MCI have demonstrated that the transfer of the subject licenses and authorizations will serve the public interest, convenience, and necessity. Accordingly, we grant their applications for transfer of control. In so doing, however, we condition our approval on MCI's divesture of its Internet assets to Cable & Wireless plc (C&W) prior to the close of its merger with WorldCom. Further, although this Order permits the transfer to WorldCom of MCI's direct broadcast satellite (DBS) license, such transfer is subject to whatever action the Commission may take pursuant to the pending application for review of the initial license grant to MCI.

II. BACKGROUND

A. The Applicants

2. MCI is one of the largest telecommunications companies in the United States (U.S.), with 1997 revenues of $19.6 billion.[3] MCI is the second largest U.S. provider of long distance and international telecommunications services.[4] It also provides local exchange service in 62 U.S. cities through its MCImetro subsidiary.[5] At the time the instant merger application was filed, MCI was a major provider of Internet backbone and access services, which it provided over its national fiber network.[6]

3. WorldCom is also among the largest U.S. telecommunications companies, with 1997 revenues of $7.35 billion.[7] It is the fourth largest U.S. provider of long distance and

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[2] *See 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 19985, 19987 at paras. 29-36 (1997) (*Bell Atlantic/NYNEX Order*); *In the Matter of the Merger of MCI Communications Corp. and British Telecommunications PLC,* GN Docket No. 96-245, Memorandum Opinion and Order, 12 FCC Rcd 15351, 15353 at para. 2 (1997) (*BT/MCI Order*).

[3] MCI SEC Form 10-K, Annual Report (filed Apr. 15, 1998) (MCI Apr. 15, 1998 10-K).

[4] FCC, *Trends in Telephone Service* (Com. Car. Bur. July 1998) at 26, 53 (*1998 Trends in Telephone Service Report*).

[5] Letter from Andrew D. Lipman, Counsel for WorldCom, Swidler & Berlin, to Magalie Roman Salas, Secretary, FCC at Ex. 2 (filed June 24, 1998) (WorldCom June 24 *Ex Parte*).

[6] As discussed in section IV.C below, MCI has agreed to sell its Internet business to C&W in order to address competitive concerns raised in the review of the merger by European and U.S. antitrust authorities.

[7] WorldCom SEC Form 10-K, Annual Report (filed Mar. 27, 1998) (WorldCom Mar. 27, 1998 10-K).

international telecommunications services[8] and provides local exchange service in 111 U.S. cities through its subsidiaries Brooks Fiber Properties (Brooks Fiber) and Metropolitan Fiber Systems (MFS).[9] WorldCom is also a major provider of Internet backbone and access services, which it provides over its national fiber network.

B. The Merger Applications

4. The Applicants request the Commission's consent to the transfer of control of MCI's numerous Title II authorizations and cable landing licenses and Title III radio licenses to WorldCom.[10] WorldCom's first application was filed on October 1, 1997, in conjunction with its initial tender offer for MCI.[11] Following WorldCom and MCI's November 9, 1997 merger agreement, the companies jointly filed an amended application for transfer of control of MCI's licenses and authorizations to WorldCom on November 21, 1997.[12] On July 31, 1998, Applicants filed a minor amendment listing additional private land mobile radio licenses held by MCI, but not included in the initial application.[13]

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[8] *1998 Trends in Telephone Service Report* at 26, 53.

[9] WorldCom June 24 *Ex Parte*, Ex. 2.

[10] *See* Applications and Request for Special Temporary Authority, Vol. III at Tab I (listing the licenses and authorizations held by MCI) (filed Oct. 1, 1997) (WorldCom Oct. 1 Application). According to the Applicants, MCI holds authorizations for international wireline facilities, and a variety of wireless facilities, including point-to-point microwave stations, earth station licenses, private telephone maintenance radio service licenses, private business radio licenses, private aircraft station licenses, and an 800 MHZ air-ground radiotelephone license used to provide voice and video services as well as submarine cable landing licenses and a DBS license. Amendment to Applications of WorldCom, Inc. for Transfer of Control of MCI Communications Corporation at 3, n.3 (filed Nov. 21, 1997) (WorldCom/MCI Nov. 21 Amended Application); *see also* Minor Amendment to Applications of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation (filed July 31, 1998) (listing additional licenses held by MCI) (WorldCom/MCI July 31 Minor Amendment).

[11] WorldCom Oct. 1 Application. This application sought Special Temporary Authority (STA) for the interim transfer of MCI's licenses and authorizations to a voting trustee pursuant to the Commission's Policy Statement on Tender Offers and Proxy Contests. *See Tender Offers and Proxy Contests*, Policy Statement, 59 Rad. Reg. 2d. (P&F) 1536, 1584 (1986), *appeal dismissed sub. nom. Office of Communication of the United Church of Christ v. FCC*, 826 F.2d 101 (D.C. Cir. 1987). In its Amended Application WorldCom withdrew its request for an STA and for approval to transfer MCI Shares to a voting trustee. *See* WorldCom/MCI Nov. 21 Amended Application at 5-6.

[12] WorldCom/MCI Nov. 21 Amended Application.

[13] WorldCom/MCI July 31 Minor Amendment.

5. Under the terms of the merger agreement, MCI will become a wholly-owned subsidiary of WorldCom[14] and the combined company will be renamed MCI WorldCom.[15] Holders of MCI Common Stock will receive shares of WorldCom Common Stock according to an agreed upon exchange ratio.[16] Following the merger, current holders of MCI Common Stock will own approximately 45 percent of the combined company.[17]

6. The proposed merger was reviewed by European and U.S. Federal antitrust authorities. On July 8, 1998, the European Commission (EC) cleared the merger subject to the condition that MCI sell its entire Internet business.[18] The proposed merger was reviewed by the U. S. Department of Justice pursuant to the Hart-Scott-Rodino amendment to the Clayton Act.[19] On July 15, 1998, the U.S. Department of Justice (DOJ) issued a press release concluding that the merger of WorldCom and MCI may proceed after MCI sells its Internet business.[20] The instant Order represents the Commission's independent review of the merger based on its public interest standard.

7. Numerous parties filed timely comments opposing the application or petitions to deny the application. These parties assert that the transfer of control of MCI's licenses and

[14] WorldCom/MCI Nov. 21 Amended Application at 1-2.

[15] *Id.* at 5.

[16] *Id.* "The actual number of shares of WorldCom stock to be exchanged for each MCI share owned by investors in MCI other than BT will be determined by dividing $51 by the 20-day average of the high and low sales prices for WorldCom common stock prior to closing, but will not be less than 1.2439 shares (if WorldCom's average stock price exceeds $41) or more than 1.7586 (if WorldCom's average stock price is less than $29). In addition, under the Merger Agreement, BT will receive $51 per share in cash for each of its shares of MCI Class A Common Stock upon consummation of the merger." *Id.* at 5 n. 9.

[17] *Id.* at 5.

[18] *See* MCI July 15 Reply Comments, Attach. 2 (European Commission Press Release, "Commission Clears WorldCom and MCI Merger Subject to Conditions," rel. July 8, 1998) (EC Press Release).

[19] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18.

[20] MCI July 15 Reply Comments, Attach. 1 (DOJ Press Release, "Justice Department Clears WorldCom/MCI Merger After MCI Agrees to Sell its Internet Business," rel. July 15, 1998) (DOJ Press Release).

authorizations to WorldCom is not in the public interest.[21] In addition, parties filed numerous procedural and related motions.[22]

III. PUBLIC INTEREST FRAMEWORK

A. Legal Standards

8. Pursuant to sections 214(a) and 310(d) of the Communications Act, the Commission must determine whether Applicants have demonstrated that granting a transfer of control of licenses and authorizations from MCI to WorldCom would serve the "public interest."[23] More specifically, under section 214(a) of the Communications Act, the Commission must find that the "present or future public convenience and necessity require or will require" WorldCom to operate the acquired telecommunications lines, and that "neither the present nor future public convenience and necessity will be adversely affected" by the discontinue of service from MCI.[24] Under section 310(d) the Commission must determine that the proposed transfer of wireless licenses "serves the public interest, convenience, and necessity" before it can approve the transaction.[25]

9. The public interest standard of sections 214(a) and 310(d) is a flexible one that encompasses the "broad aims of the Communications Act."[26] These broad aims include, among other things, the implementation of Congress' "pro-competitive, de-regulatory national

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[21] Parties filing comments are listed in the Appendix.

[22] These motions are addressed below. *See infra* section VI.B.

[23] 47 U.S.C. §§ 214(a), 303(r), 310(d) (1994). *See Teleport Communications Group Inc., Transferor, and AT&T Corp. Transferee,* CC Docket No. 98-24, Memorandum Opinion and Order, FCC 98-169 at para. 11 (rel. July 23, 1998) (*AT&T/TCG Order*); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20000, para. 29; *BT/MCI Order*, 12 FCC Rcd at 15364, para. 28. The Commission also shares jurisdiction with DOJ 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; 15 U.S.C. § 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").

[24] 47 U.S.C. § 214(a).

[25] 47 U.S.C. § 310(d).

[26] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19987, para. 2 & n.2 (and cases cited therein); *BT/MCI Order*, 12 FCC Rcd at 15353, para. 3.

policy framework designed to . . . open[] all telecommunications markets to competition,"[27] "preserving and advancing" universal service,[28] and "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services."[29] The public interest analysis may also include an assessment of whether the merger will affect the quality of telecommunications services provided to consumers or will result in the provision of new or additional services to consumers.[30] In evaluating whether the proposed transaction furthers the aims of the Communications 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 Communications Act, and the nature, complexity, and rapidity of change in the telecommunications industry.[31] Of course, we note that this list of considerations is not exhaustive, and an assessment of other factors may be appropriate in the future.

10. The statutory standards that the Commission must apply in this case necessarily involve a balancing process that weighs the potential public interest harms against public interest benefits[32] and, under both standards, Applicants bear the burden of proof.[33] Ultimately, we must determine whether the Applicants have demonstrated, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public

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

[28] *See* 47 U.S.C. § 254.

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

[30] *See, e.g., AT&T/TCG Order* at para. 11; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 158; *BT/MCI Order*, 12 FCC Rcd at 15430, para. 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).

[31] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20003, para. 32; *BT/MCI Order*, 12 FCC Rcd at 15365, para. 29.

[32] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157.

[33] *See, e.g.*, 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant); *American Telephone and Telegraph Co. and MCI Communications Corporation Petitions for the Waiver of the International Settlements Policy*, File No. USP-89-(N)-086, Memorandum Opinion and Order, 5 FCC Rcd 4618, 4621, para. 19 (1990) (applicant seeking a waiver of an existing rate bears the burden of proof to establish that the public interest would be better served by the grant rather than the denial of the waiver request); *LeFlore Broadcasting Co., Inc.*, Docket No. 20026, Initial Decision, 66 FCC 2d 734, 736-37, paras. 2-3 (1975) (on the ultimate issue of whether the applicants have the requisite qualifications to be or to remain Commission licensees, and whether a grant of the applications would serve the public interest, convenience and necessity, as on all issues, the burden of proof is on the licensees).

interest, considering both its competitive effects and other public interest benefits and harms.[34] 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 Communications 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."[35] Similarly, section 303(r) of the Communications Act authorizes the Commission to prescribe such restrictions or conditions, not inconsistent with law, as may be necessary to carry out the provision of the Act.[36]

11. The Commission shares concurrent antitrust jurisdiction with the DOJ with respect to this merger.[37] We acknowledge this shared responsibility and respect the expertise that DOJ brings to bear in analyzing the competitive effects of proposed transactions. We also acknowledge that the DOJ and the Commission's competitive effects analysis may, in certain respects, overlap. Our reliance in this Order on the analytical framework contained in the *1992 Horizontal Merger Guidelines* is an example. Thus, we believe it is appropriate for us to take this shared responsibility and analytical overlap into consideration in carrying out our obligations under the Communications Act.[38]

12. Because our public interest authority under the Communications Act is sufficient to address the competitive issues raised by the proposed merger, we decline to

[34] *AT&T/TCG Order* at para 12; *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20001, 20007, paras. 29, 36; *BT/MCI Order,* 12 FCC Rcd at 15367, para. 33.

[35] 47 U.S.C. § 214(c). *See, e.g., MCI Communications Corp*, File No. I-S-P-93-013, Declaratory Ruling and Order, 9 FCC Rcd 3960, 3968, para. 39 (1994); *Sprint Corp.*, File No. I-S-P-95-002, Declaratory Ruling and Order, 11 FCC Rcd 1850, 1867-72, paras. 100-33 (1996); *GTE Corp.*, File No. W-P-C-2486, Memorandum Opinion and Order, 72 FCC 2d 111, 135, para. 76 (1979).

[36] 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).

[37] *See supra* at note 23.

[38] Given this shared responsibility, it is appropriate for the Commission to take note of the DOJ's merger investigation. For example, issuing a Commission decision denying a transfer of licenses or authorizations may prove unnecessary if the DOJ investigation ultimately leads to a divestiture, consent decree, or other changes in material facts. In such a circumstance, DOJ's actions may cause the Commission to reach a different outcome.

exercise our Clayton Act authority in this case.[39] Pursuant to our authority under the Communications Act,[40] we are required to make an independent determination whether a proposed merger will serve the public interest. Moreover, our public interest evaluation is distinct from, and broader than, the competitive analyses conducted by antitrust authorities. First, although the Communications Act requires us to consider public interest benefits or harms other than the merger's competitive effects, to make an overall assessment, the Commission itself must consider the effect of the transfer on competition -- "there can be no doubt that competition is a relevant factor in weighing the public interest."[41]

13. Second, while the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence,[42] it is not governed by them. Therefore, it is possible for the Commission to arrive at a different assessment of the size or nature of the likely competitive benefits or harms of a proposed merger when assessing

[39] *See, e.g., Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20005, para. 33; *BT/MCI Order,* 12 FCC Rcd at 15364, para. 28; *see also United States v. FCC,* 652 F.2d 72, 88 (D.C. Cir. 1980) (*en banc*).

[40] That the standard for reviewing mergers under the Communications Act differs somewhat from the standard under the antitrust laws is not a new development. Since the 1930s, the Commission has had the authority and responsibility to review such mergers under both the Communications Act and the antitrust laws. Until passage of the 1996 Act, however, the Commission's public interest determination under the Communications Act with respect to mergers between common carriers took precedence over any determination by DOJ pursuant to the antitrust laws. *See* 47 U.S.C. § 221(a) (1995 ed.). Section 601 of the 1996 Act, by amending the Communications Act to remove the Commission's ability to prevent DOJ from challenging mergers between common carriers under the antitrust laws, contemplated that both agencies would be reviewing such mergers and, potentially, be reaching disparate results. *See* 47 U.S.C. § 152nt. Indeed, Congress did not eliminate the Commission's Clayton Act authority, or in any way diminish our authority -- and responsibility -- under sections 214 and 310 to determine whether a transfer of licenses and authorizations serves the public interest.

[41] *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953) (*RCA Communications*); *US v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (quoting *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968)); *see Nat'l Citizens*, 436 U.S. at 795.

[42] *RCA Communications*, 346 U.S. at 94; *United States v. FCC*, 652 F.2d at 81-82, 88 (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.*, 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger, even though the DOJ had also reviewed the merger and found the proposed transaction would not violate the antitrust laws); *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 1197, 1201 (D.C. Cir. 1987). *Cf. Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply.").

competitive effects under its public interest standard than the antitrust agencies arrive at based on antitrust law. As the Supreme Court stated in *FCC v. RCA Communications Inc.*:

> To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast . . . .[43]

As we explain in greater detail in section II.B below, the need for the Commission to make expert predictions of future market conditions and the likelihood of success of individual competitors is particularly acute in the period of great change following the passage of the Telecommunications Act of 1996 (1996 Act).[44]

14. A third and related reason that the Commission's merger analysis is distinct from and broader than antitrust analysis is that the Commission must implement and enforce the 1996 Act, in which Congress established a clear national policy that competition leading to deregulation, rather than continued regulation of dominant firms, shall be the preferred means for protecting consumers.[45] The antitrust agencies, on the other hand, are required to approve mergers unless they substantially lessen competition. Depending upon how one interprets the antitrust agencies' mandate, it is possible that the antitrust agencies might well approve a merger that does not decrease the current level of competition but that does impede the development of future competition, leading the Commission to conclude that the merger does not serve the public interest. Finally, because of its regulatory and enforcement

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

[44] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* The 1996 Act amended the Communications Act of 1934.

[45] Joint Statement of Managers, S. Conf. Rep. No. 104-230, at 1 (1996).

institutions and experience, the Commission in some cases may well have a comparative advantage in imposing and enforcing certain types of conditions that result in the merger yielding over-all positive public interest benefits.[46]

B. Analytical Framework for Assessing Competitive Effects

15. In conducting our public interest analysis of the competitive effects of the proposed merger, we generally follow the analytical framework adopted by the Commission in the *Bell Atlantic/NYNEX Order* and the *BT/MCI Order*.[47] As the Commission noted in the *BT/MCI Order*, this analytical framework is based not only on prior Commission analyses of market power,[48] 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."[49]

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[46] We note that there are other differences between the Commission's and the DOJ's merger review activities. For example, the Commission issues a final appealable decision, while any decision the DOJ may make to challenge a merger must then be prosecuted before a federal court. In addition, the Commission is held judicially accountable for its decision to grant or deny a transaction, while a DOJ decision to not challenge a transaction is not judicially reviewable. As a result, the Commission is required in all events to explain its reasoning in an order on the merits, while a DOJ decision not to challenge a transaction is ordinarily accompanied by no publicly available explanation of its analysis. Moreover, the Commission must apply the "public interest" standard spelled out in sections 214 and 310 of the Communications Act (assuming it does not exercise its Clayton Act authority), while the DOJ may ground a decision not to challenge a transaction on resource constraints or other issues of prosecutorial discretion.

[47] *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20008, para. 37; *BT/MCI Order*, 12 FCC Rcd at 15367, para. 33.

[48] *See, e.g., Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Dockets No. 96-149 & 96-61, Second Report and Order & Third Report and Order, 12 FCC Rcd 15756 (1997) (*LEC Regulatory Treatment Order*); *Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, Memorandum Opinion and Order*, Report No. LB-96-32, Memorandum Opinion and Order, 12 FCC Rcd 2624 (1997); *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, Order, 12 FCC Rcd 17963 (1996) (*AT&T International Non-Dominance Order*) *recon. pending*; *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995) (*AT&T Domestic Non-Dominance Order*); *Craig O. McCaw, Transferor and AT&T Co., Transferee*, File No. ENF-93-44, Memorandum Opinion and Order, 9 FCC Rcd 5836 (1994) (*AT&T/McCaw Order*), Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11786 (1995), *aff'd sub nom. SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

[49] *BT/MCI Order*, 12 FCC Rcd at 15368, para. 34. In that order, the Commission noted that the analytical framework we apply is closely related to the "actual potential competition" doctrine applied by lower courts in evaluating certain non-horizontal mergers. *Id.* at nn.57-58. *See* United States Dept. of Justice Antitrust Div., and Federal Trade Comm'n, *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. 41552 (1992); United States Dept. of Justice and the Federal Trade Comm'n, *Revision to the Horizontal Merger Guidelines* (Apr. 8, 1997) (*1992*

16. Consistent with the *1992 Horizontal Merger Guidelines*, the *Bell Atlantic/NYNEX* competitive effects analysis seeks to define the relevant markets and those firms participating in those markets.[50] It then attempts to determine whether the proposed merger will allow firms participating in those markets to exercise increased market power through either unilateral or coordinated anticompetitive behavior.[51] Finally, if it appears that the merger will result in increased market power (through either unilateral or coordinated activity), it 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.[52]

17. In assessing whether a merger involving firms currently competing in a market will result in anticompetitive effects, the *1992 Horizontal Merger Guidelines* suggest that market shares should be assigned to each firm currently participating in the market and 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."[53]

18. The *1992 Horizontal Merger Guidelines* focus on static markets perhaps because the most typical case is that of a market that has not undergone a recent major change which will substantially affect its subsequent structure. As a result, the *1992 Horizontal Merger Guidelines* do not detail any specific methodology for assessing the effect of mergers in markets that have experienced significant recent, or ongoing, changes. The passage of the 1996 Act, however, has resulted in precisely such a major change in a number of telecommunications markets. Specifically, many markets, such as those for local exchange telephony services, that historically have been regulated as monopolies, are now in transition to becoming competitive as envisioned by the 1996 Act. In such markets, where competition is still in its infancy, analysis of post-merger increases in concentration based on current market shares may well provide an insufficient predictor of the likelihood of the merger's potential effects on competition. In the *Bell Atlantic/NYNEX Order*, the Commission created an explicit analytic framework to assess the potential competitive effects of mergers involving

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Horizontal Merger Guidelines).

50 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20008-09, para. 37.

51 *Id.*

52 *Id.* at 20049, para. 128.

53 *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41558, § 1.521.

carriers that had been prevented or deterred from entering the relevant market because of the legal, regulatory, economic and operational barriers that the 1996 Act seeks to lower.[54] It used the term "transitional markets" to refer to such markets and set forth an analytical framework that should be used to analyze the potential competitive effects of mergers in such markets. We believe that this framework is an appropriate analytical tool for assessing potential competitive effects where the relevant market is a transitional market *and* at least one of the merging firms is a precluded competitor in the relevant market.[55]

19. Under the analysis laid out in the *Bell Atlantic/NYNEX Order*, the Commission seeks to determine whether either or both of the merging parties are among a small number of "most significant market participants" that could most quickly foster competition in the relevant market.[56] If a firm, whether presently active in the market or currently precluded, is among a small number of "most significant market participants," then its absorption by the merger will, in most cases, create a competitive harm. Of course, almost any antitrust analysis of mergers could be generally characterized as attempting to identify the most significant participants in a market and then determine if one or both of the merging parties are among them. The important distinction in transitional markets is that firms that have been precluded from entering the market by recently removed barriers to entry may potentially be considered significant participants. Furthermore, depending upon the circumstances, firms may be included as significant competitors even though they may have yet to manifest a firm intention to enter or to invest substantially in preparation for entry.[57]

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[54] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20020, para. 60.

[55] "Precluded competitors" are those firms "that are most likely to enter but have until recently been prevented or deterred from market participation by barriers to entry the 1996 Act seeks to lower." *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20020, para. 60.

[56] As we stated in the *AT&T/TCG Order*, when analyzing a merger in a market that is rapidly changing, the best way to assess the likely effect of the merger is to isolate the effect of the merger from all other factors affecting the development of the relevant market over time. This is achieved by framing the analysis in a way that holds constant the effects of all changes in the market conditions other than those directly caused by the merger. To do this, we also identify as market participants those firms that have been effectively precluded from the market -- that is, those firms that are most likely to enter (or are just beginning to enter) the market but have until recently been prevented or deterred from participating in the market by the barriers that the 1996 Act seeks to eradicate. We then identify the most significant participants based on an assessment of capabilities and incentives to compete effectively in the relevant market. *AT&T/TCG Order* at para. 17.

[57] Of course, the case for including a firm as a significant potential competitor will generally be stronger to the extent that it can be established that the firm has made plans to enter or has already made investments in preparation for entry.

20. The analytical framework set forth in the *Bell Atlantic/NYNEX Order* reflects the values of, and builds upon, the "actual potential competition" doctrine established in antitrust case law. Under the actual potential competition doctrine, a merger between an existing market participant and a firm that is not currently a market participant, but would have entered the market but for the merger, violates antitrust laws if the market is concentrated and entry by the nonparticipant would have resulted in deconcentration of the market or other pro-competitive effects.[58] As the case law indicates, one obstacle facing parties bringing an actual potential competition case is to demonstrate that the acquired firm would have entered the relevant market absent the merger. In particular, the fact that the firm has not entered up until the current period may be considered by some to create a presumption that it would not have entered in the near future either. The *Bell Atlantic/NYNEX* framework differs from the actual potential competition doctrine in that it is only meant to apply to situations where this presumption is inappropriate because there is a clear and strong reason to explain why a firm that has yet to enter a market may nonetheless be likely to enter in the near future. The reason is simply that the passage of the 1996 Act resulted in a lowering of entry barriers that will make entry attractive that was previously impossible.

21. Rightly understood, then, the analytical framework set forth in the *Bell Atlantic/NYNEX Order* is a natural extension of the principles, contained in the merger guidelines and existing antitrust case law, to transitional markets.[59] That framework, which is well-tailored to the Commission's unique role as an expert agency with regulatory authority over these transitional markets, explains how and why the Commission will treat as "most significant market participants" not only firms that already dominate transitional markets, but also those that are most likely to enter soon, effectively, and on a large scale once a more competitive environment is established.

22. In this Order, we examine the potential competitive effects of WorldCom's acquisition of MCI on the provision of domestic long distance, international long distance, Internet backbone, and local exchange and exchange access services.[60] Because neither

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[58] *See United States v. Marine Bancorporation*, 418 U.S. 602 (1974). *See also* ABA Section of Antitrust Law, *Antitrust Law Developments* (4th ed. 1997) at 346-50 (*Antitrust Law Developments*).

[59] As explained above, however, it may be that the Commission is better able to enforce this forward-looking standard that requires expert judgment about future events than are the antitrust agencies.

[60] Although we have determined that these four services are the only services relevant to the instant proceeding, we expect that bundled service may, in the future, become a distinct and relevant product market. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20015-16, para. 52 (noting that to the extent consumer demand for bundled service packages force carriers to offer such bundles, the bundling of local exchange and exchange access services with long distance services may well become a relevant product market even if, today, it is still

WorldCom nor MCI are precluded competitors in the provision of domestic long distance, international long distance, or Internet backbone services -- and indeed are major current participants in the provision of these types of services -- we need not evaluate the potential competitive effects of the merger in those areas using the "transitional markets" analytical framework of the *Bell Atlantic/NYNEX Order*. Instead, we evaluate the merger's potential competitive effects on those services under traditional horizontal merger analysis. We conclude that it is appropriate, however, to utilize the "transitional markets" analytical framework of the *Bell Atlantic/NYNEX Order* to analyze the potential competitive effects of this merger on local exchange markets because those markets are transitional markets, and WorldCom and MCI, until recently, have been, and to an extent still are, effectively precluded from competing in those markets.

IV. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS

A. Domestic Long Distance Services

23. This section considers the competitive effects of the proposed merger on domestic long distance services. Although this merger, which combines the second and fourth largest long distance carriers, will increase market concentration significantly in the near term, we conclude that the merger will not likely have anticompetitive effects on domestic long distance services, because of recent and expected, significant increases in the essential input of transmission capacity. As discussed in greater detail below, we find particularly significant the fact that four firms are currently constructing new national fiber networks. We conclude that these firms and others will be able to utilize this new transmission capacity to compete with incumbent long distance carriers in retail markets, and therefore, that the merger likely will not impair competition in markets for long distance services. We also examine the primary claim of commenters opposing the application -- that the merger will injure competition by eliminating WorldCom as a "maverick" supplier of wholesale long distance services. We conclude that the four new firms, each with a high-capacity national fiber network, should more than replace the potential loss of WorldCom as a "maverick" supplier to resellers of long distance services. Finally, in section IV.E below, we address allegations by commenters that the merged entity will abandon its residential long distance customers.

nascent in most markets and nonexistent in many others); GTE Jan. 5 Petition at 47 (acknowledging the existence of a "nascent" market for bundled services). We note that, many carriers, including the Applicants, presently offer, to a limited extent, local exchange and exchange access service bundled with long distance service.

1. Relevant Markets

24. *Product Markets.* For purposes of analyzing the competitive effects of this merger on domestic, interstate, interexchange services[61] we identify two distinct product markets, reflecting customers groups with different patterns of demand: (1) residential customers and small business (mass market); and (2) medium-sized and large business customers (larger business market).[62]

25. We note that in previous orders, such as the *Bell Atlantic/NYNEX Order*, the Commission described mass market long distance and larger business long distance as separate market segments within the long distance relevant product market. We previously used the phrase "market segment" to distinguish between customer groups (specifically "mass market" and "larger business" customers), because the Commission used the term "markets" to distinguish broadly among long distance services, local exchange and exchange access services, and international services. We recognize that our choice of terminology may have caused some confusion. We take this opportunity, therefore, to clarify our approach. What we have termed "the long distance product market" is, in fact, comprised of a number of different relevant product markets, as discussed below. Thus the "market segments" identified in the *Bell Atlantic/NYNEX Order* actually constitute, for the purposes of this Order, separate relevant product markets. We emphasize, however, that we are applying the same analytical principles here that we adopted in the *LEC Regulatory Treatment Order*, and applied in the *Bell Atlantic/NYNEX Order*, the *BT/MCI Order*, and the *AT&T/TCG Order*. We note, moreover, that changing our description of mass market long distance and larger business long distance from market segments to separate relevant product markets does not alter any of our findings concerning competitive effects either in our previous orders or here.

26. We distinguish mass market consumers from larger business consumers because the record indicates that larger business users often demand advanced long distance features (advanced features), such as frame relay, virtual private networks (VPN), and enhanced 800 services (E800 services), that differ from the services generally demanded by mass market consumers.[63] Additionally, larger business customers generally demand greater

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[61] Consistent with the Commission's analysis in the *Bell Atlantic/NYNEX Order*, we will examine domestic interstate, interexchange, long distance services separately from local exchange and exchange access services, because consumers wishing to make a long distance call cannot substitute local telephone service. *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20015, para. 51.

[62] *See AT&T/TCG Order* at para. 20; WorldCom/MCI Mar. 20 Reply Comments at 25. *See also Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53. We find nothing in the record that suggests a need to analyze medium-sized businesses as a separate product market. *See AT&T/TCG Order* at para. 20.

[63] WorldCom/MCI Mar. 20 Reply Comments at 25.

volumes of minutes than mass market customers, and thus qualify for volume discounts that are unavailable, as a practical matter, to mass market customers.

27. We recognize that, under the *1992 Horizontal Merger Guidelines*, it may be possible to identify additional and narrower relevant product markets within these two broader end user markets.[64] The record, however, contains insufficient information on cross-elasticities of demand for us to make such a determination. More importantly, we find that, with the possible exception of a few "high-end" advanced business services discussed below,[65] we do not need to make such a determination because owners of transmission capacity provide all the same services, and production substitution among these services is "nearly universal."[66] Accordingly, we conclude that we can analyze adequately the competitive effects of the merger by considering only the mass and larger business markets.

28. In analyzing the competitive effects of the instant merger on domestic long distance services, we will focus on the input of transmission capacity -- a distinct and essential ingredient for providing long distance services to either product market.[67] GTE, on the other hand, argues that, in order to assess adequately the potential competitive effects of this merger, we should define a separate wholesale (input) market.[68] By suggesting that we analyze a wholesale market, GTE proposes that we examine inputs beyond the mere provision of transmission capacity. As explained below, however, we find that once a firm has overcome the barrier of deploying a national fiber network, all the other capabilities necessary

[64] *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41554-55, § 1.11.

[65] *See infra* paras. 72-76.

[66] *Cf. 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41557, § 1.32 n.14 ("If production substitution among a group of products is nearly universal among the firms selling one or more of those products, . . . the Agency may use an aggregate description of those markets as a matter of convenience.").

[67] In order to transport a long distance call, it is necessary to have not only fiber, but certain other facilities and equipment including, but not limited to, electronics and switching equipment.

[68] *See* GTE Jan. 5 Petition at 25-28; GTE Mar. 13 Comments at 12; GTE Jan. 5 Petition at 25 (arguing that the Commission "recognized in the *Bell Atlantic/NYNEX Order* [that] the competitive effects of a proposed merger must be assessed in both wholesale (input) and retail markets") (citing *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20044-46, paras. 115-20). As an initial matter, we disagree with GTE's contention that such a distinction was made in the *Bell Atlantic/NYNEX Order.* We note that the Commission did not define a separate product market for inputs in the paragraphs cited by GTE, but rather simply noted that Bell Atlantic and NYNEX control inputs that are essential for interexchange providers and that should be accounted for in analyzing the effect of the merger on the bundled service market.

to provide wholesale services are readily attainable.[69] We need not, therefore, for purposes of this proceeding, analyze wholesale services as a separate and distinct input market. At the same time, we note that the results of our competitive analysis would be logically equivalent were we to do so.

29. We find it appropriate to analyze transmission capacity in our examination of the effects on the merger on the two relevant retail markets because transmission capacity is generally fungible between both the mass and larger business markets. As we discuss below, we find that the increase in transmission capacity provided by the four new facilities-based firms should mitigate any increase in concentration resulting from the merger between WorldCom and MCI. In addition, we conclude that these new firms, as well as traditional resellers and those carriers purchasing fiber from these firms, will be able to use this transmission capacity to mitigate any competitive effects of the merger on either retail market.

30. *Geographic Markets.* Continuing the method of analysis we followed in the *LEC Regulatory Treatment Order* and the *Bell Atlantic/NYNEX Order*, we treat the relevant geographic market as a single national market.[70] The geographic market is more accurately defined as a series of point-to-point markets. A telephone call in one point-to-point market usually is a poor substitute for another. For example, if one wants to call a relative or business associate in Denver, it is generally inconsequential if rates to San Francisco are lower. Nevertheless, for purposes of our competitive analysis of this merger, we analyze a single national market for long distance services -- both mass market and advanced business services -- because we believe that geographic rate averaging and rate integration, price regulation of exchange access services, and the availability of interstate transport capacity cause carriers to behave similarly in each domestic point-to-point market. Equally important, most substantial competitors in the long distance services market are national in scope, advertise nationally, and exert the same competitive effect in all regions. There is no credible evidence suggesting that there is, or could be, different competitive conditions in a particular point-to-point market, or groups of point-to-point markets.[71]

31. We are not persuaded by GTE's various arguments for defining more narrow geographic markets.[72] GTE first argues that there are capacity shortages on individual routes

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[69] *See infra* paras. 51-63.

[70] *See LEC Regulatory Treatment Order*, 12 FCC Rcd 15756, 15792-95, paras. 64-69 (1997); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20017, para. 54. *See also AT&T/TCG Order* at paras. 21-22.

[71] *See LEC Regulatory Treatment Order*, 12 FCC Rcd at 15749, para. 67.

[72] GTE June 11 Renewed Motion at 15.

that create different market conditions among different city pairs. GTE does not, however, identify specific routes that suffer from shortages or quantify the effect of any such shortages.[73] GTE next maintains that the geographic rate averaging requirement has no impact on the market definition for retail services, because carriers offer location-specific discounts by lowering intrastate rates in certain states, and by spending significantly more on advertising and marketing of discount plans in larger urban areas than in smaller markets.[74] We reject this argument. The Communications Act's proscription on interexchange carriers charging higher rates to rural customers than to urban customers applies to intrastate calls as well as to interstate calls, and there is no evidence in the record from which we could conclude that carriers' intrastate rates violate geographic rate averaging requirements.[75] Moreover, we have no basis to conclude from the record that market-specific advertising of discount plans available to all customers precludes the geographic rate averaging requirement from mitigating the potential exercise of market power in any particular point-to-point market.[76] In sum, we are not persuaded that there are, or could be, materially different competitive conditions in a particular point-to-point market, or group of point-to-point markets, and therefore, treat the geographic market as a single, national market.[77]

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[73] *Id.*

[74] *Id.* at 16-17.

[75] The Commission has previously concluded that the geographic rate averaging requirement applies to intrastate, interexchange calls, and that Congress intended the states to ensure that rates for intrastate, interexchange calls offered to rural and high-cost customers are no higher than those paid by urban customers. *See Implementation of Section 254(g) of the Communications Act of 1934*, Order, 11 FCC Rcd 9564, 9585, para. 46 (1996) (*Geographic Rate Averaging and Rate Integration Order*).

[76] We note that the only "geographically-specific" discounts that carriers may offer under Commission rules are temporary promotions lasting no more than 90 days. *Geographic Rate Averaging and Rate Integration Order*, 11 FCC Rcd at 9576-8, paras. 24, 29.

[77] GTE also argues that the appropriate geographic market for retail long distance service should not be larger than a local access and transport area (LATA), "because all customers within a LATA generally face the same retail long-distance market conditions." GTE June 11 Renewed Motion at 15, Harris Reply Aff. at 7. We find no reason to depart from the Commission's previous conclusion that geographic rate averaging and rate integration requirements cause carriers to behave similarly in all domestic LATAs. Under the 1996 Act, a "local access and transport area" (LATA) is "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission." 47 U.S.C. § 153(25). LATAs were created as part of the Modification of Final Judgment's (MFJ) "plan of reorganization" under which the BOCs were divested from AT&T. *United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983) (Plan of Reorganization), *aff'd sub nom.*

2. Market Participants

32. The next step in our competitive analysis is to identify the participants in each relevant market.[78] For over a decade, the number of companies providing long distance service has risen every year,[79] reaching more than 600 companies by the end of 1996.[80] Most of this increase in long distance competition has come at the expense of AT&T, whose market share, while still the largest, has fallen below 50 percent of total toll operating revenues.[81]

33. *Mass Market.* WorldCom is not a significant competitor in the provision of long distance services to residential and small business customers, as demonstrated by its small retail market share and its lack of substantial brand recognition, as conceded by both Applicants and commenters.[82] WorldCom states that it has chosen not to market directly to residential end users and, instead, serves these customers indirectly through its wholesale of long distance services.[83] Indeed, as explained below, it is in connection with WorldCom's role as a wholesale supplier to resellers that market to these consumers that allegations of competitive harm are raised.[84] All parties agree that AT&T, MCI, and Sprint are the three largest retail providers of long distance services to the mass market.[85] Non-BOC[86] incumbent

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California v. United States, 464 U.S. 1013 (1983); *see also United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Apr. 11, 1996) (vacating the MFJ). Pursuant to the MFJ, "all BOC territory in the continental United States [was] divided into LATAs, generally centering upon a city or other identifiable community of interest." *United States v. Western Elec. Co.*, 569 F. Supp. 990, 993 (D.D.C. 1983).

[78] *See Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20019, para. 58.

[79] *See 1998 Trends in Telephone Service Report* at 46-48.

[80] *Id.* at 46.

[81] FCC, *Long Distance Market Shares First Quarter* (Com. Car. Bur. June 1998) at 16 (*1998 Long Distance Market Shares Report*).

[82] GTE Jan. 5 Petition at 25-26; WorldCom/MCI Mar. 20 Reply Comments at 26.

[83] Letter from Jean L. Kiddoo, Counsel for WorldCom, Swidler & Berlin, to Magalie Roman Salas, Secretary, FCC, Grillo Aff. at 4 (filed July 8, 1998) (WorldCom July 8 *Ex Parte).*

[84] *See infra* paras. 67-76.

[85] AT&T, MCI, and Sprint have a combined 82.7 percent market share of residential direct dial toll minutes. *1998 Long Distance Market Shares Report* at Table 4.3. GTE provides the following estimates of market shares based on retail long distance revenues of "residence and low-volume business facilities-based

local exchange carriers (LECs), such as GTE and Southern New England Telecommunications Corp. (SNET), also are providing retail mass market long distance services, and have been successful in rapidly gaining market share.[87] The success of these incumbent LECs suggests that, upon obtaining approval pursuant to section 271, BOCs are also likely to be successful in the mass market within their own regions. Finally, there are a number of companies reselling long distance services to this product market, and several have gained significant market shares.[88]

34. *Larger Business Market.* AT&T, MCI, and Sprint are also among the largest providers of domestic interstate long distance services to larger business consumers. WorldCom is also a substantial provider of long distance services in this market, at least for some of the services these customers purchase.[89] WorldCom is both a retail provider of these

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carriers": AT&T (66.8 percent); Sprint (12.7 percent); MCI (12.3 percent); Frontier (2.3 percent); LCI (2.1 percent); WorldCom (1.9 percent); Qwest (0.1 percent). GTE Mar. 13 Comments, Schmalensee and Taylor Aff. at Ex. 12, citing Frost & Sullivan. Frost & Sullivan define "low-volume business customers" as those that spend less than $4,170 per month for long distance service. The Applicants state that they cannot comment in detail on the findings or methodologies of the Frost & Sullivan estimates, because they have been advised by Frost and Sullivan that any research conducted for GTE has been done as custom research on a proprietary basis. WorldCom July 8 *Ex Parte* at 1-2.

[86] We define the term "BOC" as that term is defined in 47 U.S.C. § 153(4).

[87] GTE has added 2.2 million customers for its long distance service after just over two years of operation, representing approximately 11 percent of its domestic customer base. *See GTE Profits Flatten With New Data Investment, Competition,* Communications Daily (July 21, 1998)(July 21 Comm. Daily); *FCC Preliminary Statistics of Communications Common Carriers, 1997.* GTE's long distance revenue expanded 83 percent between the second quarter 1997 and second quarter 1998. July 21 Comm. Daily. SNET has also been successful in acquiring long distance customers in its service area and is presently providing long distance service on 41 percent of its access lines. *See FCC Preliminary Statistics of Communications Common Carriers, 1997; SNET First Quarter Normalized Net Income of $56.4 Million Up 12.1 percent Before One-Time Items,* SNET News Release (Apr. 24, 1998).

[88] *See 1998 Long Distance Market Shares Report* at 11, Table 3.1.

[89] GTE provides the following estimates of market shares based on retail long distance revenues of "large-volume business facilities-based carriers": MCI (41.9 percent); AT&T (35.5 percent); WorldCom (13.2 percent); Sprint (6.4 percent); LCI (1.2 percent); Frontier (0.4 percent); Qwest (0.04 percent); others (1.5 percent). GTE Mar. 13 Comments, Schmalansee and Taylor Aff. at Ex. 4 (citing Frost & Sullivan). Frost & Sullivan define "high volume business customers" as those that spend more than $4,170 per month for long distance service. *But see* n. 85, *infra.* (Applicants' complaints about Frost & Sullivan data). The Yankee Group, in a report submitted by Bell Atlantic, estimates the following business long distance market shares for 1996: AT&T (51.4 percent), MCI (23.2 percent), Sprint (11.4 percent), WorldCom (10.2 percent), others (3.9 percent). Letter from Robert H. Griffen, Antitrust Litigation Counsel, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, Attach., The Yankee Group, *Telecommunications White Paper*, Vol. 12, No. 13 (Dec. 1997), "U.S. Long Distance

services and a provider of wholesale services to resellers. The Applicants acknowledge that WorldCom has served a limited number of larger customers with "plain-vanilla" telecommunications services.[90] They further state that MCI's product line is targeted across all customer ranges, with an emphasis on high-end, large business customers.[91] We believe that many other carriers, including Qwest Communications International, Inc. (Qwest),[92] IXC Communications, Inc. (IXC), C&W, and the Frontier Companies (Frontier), have the capabilities to have a significant impact on competition for larger business customers. Each of these carriers owns their own facilities and markets its ability to provide at least one advanced feature such as VPN and E800 features.[93] We also believe that the BOCs will participate in this product market upon obtaining section 271 approval. The record indicates that, as businesses demand ever more sophisticated service offerings, the number of providers diminishes, and that only AT&T, MCI, and Sprint provide high-end services on a retail basis.[94]

35. Four market participants, Qwest, IXC, Williams Communications (Williams), and Level 3 Communications, Inc. (Level 3), are each building a national fiber network. Moreover, several firms, including GTE and Frontier, are purchasing fiber from these firms to use in their own national networks. We consider the operators of these new networks to be market participants, rather than potential entrants, because they committed to enter the market prior to the merger. Their entry, therefore, does not represent a reaction to any anticompetitive effects of the merger.[95] As discussed below, each company plans to complete

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Market: Calm Before the Storm" at 3 (filed Apr. 28, 1998) (Bell Atlantic Apr. 28 *Ex Parte*).

[90] WorldCom July 8 *Ex Parte*, Grillo Aff. at 3. By "plain-vanilla," we understand Applicants to mean transmission capacity for basic voice long distance service.

[91] *Id.* at 4-5. The Applicants state that MCI provides sophisticated service offerings designed to satisfy the needs of these consumers.

[92] We note that LCI merged with Qwest on June 5, 1998. *See* Qwest Press Release, *Qwest and LCI Consummate Merger* (June 5, 1998) <http://www.qwest.net/press/060598.html> (Qwest June 5 Press Release).

[93] Letter from Jean L. Kiddoo, Counsel for WorldCom, Swidler & Berlin, to Magalie Roman Salas, Secretary, FCC, at 4 (filed June 1, 1998)(WorldCom June 1 *Ex Parte*).

[94] *See* WorldCom/MCI Mar. 20 Reply Comments at 25; WorldCom July 8 *Ex Parte*, Grillo Aff. at 4.

[95] According to the *1992 Horizontal Merger Guidelines*, "[f]irms which have committed to entering the market prior to the merger generally will be included in the measurement of the market. Only committed entry or adjustments to pre-existing entry plans that are induced by the merger will be considered as possibly deterring or counteracting the competitive effects of concern." *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. 41552, 41562, § 3.2 n.27.

a national fiber network comparable in size and capacity to WorldCom's present network.[96] Because GTE and other commenters have focused much of their opposition to the merger on concerns that WorldCom would no longer provide, at favorable terms and conditions, wholesale services to resellers that compete in retail markets, the ability of these new networks to use their transmission capacity to provide wholesale services is central to our analysis of competitive effects of the merger.

3. Analysis of Competitive Effects

a. Effect of Merger's Increase in Market Concentration

36. In our analysis of the competitive effects of the merger, we consider whether the merger will increase the likelihood of unilateral anticompetitive conduct by the merged entity or coordinated anticompetitive conduct of multiple market participants. We do not believe, and no commenter has alleged, that the merger will likely result in the merged entity's exercising unilateral market power.[97] Several commenters have argued, however, that the merger will further increase concentration in this market, and will therefore increase the likelihood of anticompetitive coordinated interaction among market participants.[98] Although there can be no dispute that the merger will increase concentration in the short run, we disagree that anticompetitive effects are likely to result. Recent market trends indicate that the long distance market has become progressively less concentrated over the past decade. Moreover, the record indicates that there will be significant increases in the amount of long

[96] *See* WorldCom/MCI Jan. 26 Reply Comments at 35 (citing FCC, *Fiber Deployment Update End of Year 1996* (Com. Car. Bur. Aug. 1997) at Table 1); WorldCom/MCI Jan. 26 Reply Comments, Carlton and Sider Decl. at 17-18.

[97] GTE has alleged that "residential and small business customers will suffer because resellers will pay higher prices for wholesale capacity (an anticompetitive unilateral effect of the merger), which they will be forced to pass on through higher end user rates." GTE Jan. 5 Petition at 28. We discuss this claim at paras. 68-71 *infra*.

[98] BellSouth and GTE also suggest that the stock prices of AT&T, MCI, Sprint, and WorldCom relative to the S&P 500 in the period following the announcement of the merger support their theory that the proposed acquisition will result in higher prices and earnings in long distance. BellSouth Jan. 5 Petition at 18; GTE Mar. 13 Comments, Harris Long Distance Aff. at 45-46; *see* GTE June 11 Renewed Motion, Harris Long Distance Reply Aff. at 45-46. WorldCom and MCI dispute this argument noting that a stock market analysis should focus on a short period of time, at most a few days, in order to isolate the announcement effect, and that, over a several month period, many factors can affect a stock's price, so that it would be difficult to attribute the changes to one factor. WorldCom/MCI Mar. 20 Reply Comments, Carlton and Sider Decl. at 36-37. We find that the information on relative changes in the value of stocks in the telecommunications industry submitted by BellSouth and GTE is speculative, does not control for numerous extraneous events, and, therefore, does not provide probative evidence of anticompetitive effects.

distance transmission capacity over the next two years.[99] We further conclude that, once a carrier has access to this fiber capacity, any remaining barriers to deploying this capacity in the retail long distance market are low. As discussed below, we conclude that the merger will not make coordinated action more likely in the market for long distance services.

b. HHI Indices

37. We begin our analysis of the competitive effects of the merger by assessing both the current market concentration and the likely increase in market concentration resulting from the merger, as measured by the Herfindahl-Hirschman Index (HHI).[100] As the *1992 Horizontal Merger Guidelines* make clear, this HHI analysis provides guidance regarding the potential anticompetitive effects of a merger, but is not meant to be conclusive.[101] We also note that, given the unique economic, legal, and technical circumstances that color the telecommunications industry, we will not rigidly adhere to the results of this analysis where our independent expert analysis suggests a different outcome.[102]

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[99] *See infra* paras. 43-50.

[100] *See 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41558, § 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*, CS Docket No. 96-133, Third Annual Report, 12 FCC Rcd 4358, 4419-20, paras. 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*, WB Docket No. 96-59, Report & Order, 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.

[101] The *1992 Horizontal Merger Guidelines* state that, "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger. Before determining whether to challenge a merger, . . . other market factors" must be considered. *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41558, § 2.0. *See also id.* §1.521.

[102] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20053, para. 136.

38. With respect to the concentration in the retail market, GTE maintains that, based on interexchange carrier operating revenues, the pre-merger HHI is 2,823, and the post-merger HHI is 3,038.[103] Commenters further assert that, under the *1992 Horizontal Merger Guidelines*, such an increase in the HHI as a result of the merger indicates that the merger would be presumed to create or facilitate the exercise of market power.[104] These arguments overstate both the importance of the HHI calculations in this case and the assurance with which HHIs can be calculated for these products. A more complete measure of market concentration accounts for changing market conditions brought about by, among other things, new market participants that committed to enter the market before the merger.[105] Commenters' estimates of the increase in HHI, which neglect these competitors, therefore, likely overstate the actual increase in concentration. Indeed, calculating an HHI based on revenue should account for the projected future sales of the firms described below who have committed to enter the market, as well as the adjusted projected revenues of the existing competitors.[106]

39. Although Applicants do not challenge commenters' HHI calculations, they note that neither the DOJ nor the Commission has suggested that mergers falling outside of the

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[103] GTE Jan. 5 Petition at 16. GTE bases its calculations on the Commission's *Long Distance Market Shares* report using 1996 revenues. *See id.* at n.34 (citing FCC, *Long Distance Market Shares Second Quarter* 1997 (Com. Car. Bur. Oct. 1997) at Table 6). The Commission has subsequently released its report for 1997 revenues. *See 1998 Long Distance Market Shares Report* at 13, Table 3.1. Using data from this report, the pre-merger HHI of 2,508 would rise to 2,766 after the merger. BellSouth and Rainbow/PUSH calculate similar estimates for the pre-merger HHI and the HHI increase for the long distance market including both business and residential service. BellSouth Jan. 5 Petition at 9; Rainbow/PUSH Jan. 5 Petition at 16-17. GTE also estimated pre-merger HHI levels and HHI increases using presubscribed lines and points of presence. *See* GTE Mar. 13 Comments, Harris Long Distance Aff., Ex. 13. Because the post-merger HHI appears to be greater than the pre-merger HHI in the short term no matter what measure is used, we do not discuss these other measures. By choosing not to discuss these measures, however, we do not find them irrelevant. Indeed, the *1992 Horizontal Merger Guidelines* suggest that adequate measures of market concentration include dollar sales, unit sales, or physical capacity. *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41557, § 1.41. Nevertheless, we note that these HHIs are not specific to either of the product markets that we define, and therefore represent at best rough approximations. Several of these measures, including the use of interexchange carrier revenues, combine revenues from both the mass and larger business markets. Because we base our analysis of competitive effects on the case of most concern, namely a post-merger HHI greater than 1800, but not over 3500, accompanied by a change in HHI greater than 100, and nevertheless find that the entry of new firms will mitigate any potential anticompetitive effects of the merger, we find it unnecessary to calculate more precise HHIs.

[104] *See 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41558, § 1.51.

[105] *See supra* para. 35.

[106] *Cf. 1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41557, § 1.41. ("Market shares will be calculated using the best indicator of firms' future competitive significance.").