

route-specific, except in the case where an entrant is affiliated with an incumbent carrier on the foreign end of a particular route. For example, foreign carriers are likely market participants, particularly for services to their own countries. Once granted section 271 authority, the BOCs are also likely to be major participants for in-region international larger business services. As a result, we find that entry by new carriers would be timely, likely, and sufficient to deter or counteract any competitive concerns.³⁶⁶ Accordingly, we find that the merger is unlikely to affect competition adversely in the larger business market.

3. GTE's Argument Regarding IMTS and Private Line Services

133. As explained above, we do not believe that the IMTS/non-IMTS (primarily private line) distinction is the most appropriate framework for analyzing the effects of the proposed merger. Nonetheless, we take this opportunity to evaluate GTE's evidence regarding whether the combined entity would possess market power in IMTS and international private line service.

134. GTE argues that the proposed merger would result in anticompetitive effects on 65 of the routes on which WorldCom and MCI provide IMTS.³⁶⁷ GTE cites HHI concentration levels to allege that on 41 routes the merger would likely create or enhance market power, and on 24 other routes the merger would raise significant competitive concerns. GTE also asserts that the combined entity would be the largest provider of U.S. international private line services, noting that in 1996 WorldCom and MCI together had a 44.53 percent share of U.S. international private line revenues.³⁶⁸ GTE argues that based on HHI calculations, the merger "will likely create or enhance market power" on 73 U.S. international private line routes.³⁶⁹ Furthermore, GTE asserts that the combined entity would have a 100 percent share of the private line market on nine of these routes.³⁷⁰

135. We disagree with GTE that the existence of high HHIs for either IMTS or private line service on particular routes demonstrates that the combined entity would possess market power over each of these services on these routes. As we noted previously, a HHI analysis is intended to provide guidance regarding the potential anticompetitive effects of a

³⁶⁶ See *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. at 41561-62, § 3.

³⁶⁷ GTE Mar. 13 Comments at 54-55.

³⁶⁸ See *id.* at 56; see also Telstra Jan. 5 Comments at 2, 7.

³⁶⁹ GTE Mar. 13 Comments at 54; GTE June 11 Renewed Motion at 46.

³⁷⁰ The routes cited by GTE are: Albania, Angola, Cameroon, Congo, Hungary, Kazakhstan, Kenya, Paraguay, and Saint Helena. See GTE Mar. 13 Comments at 54 n.136.

merger, but is not meant to be conclusive. Indeed, an HHI analysis alone is not determinative and does not substitute for our more detailed examination of the competitiveness in a given market. Despite the high HHI numbers presented by GTE, we find here that the proposed merger is not likely to have anticompetitive effects in the provision of IMTS or private line service on any U.S. international route.

136. As discussed above, we do not believe that the IMTS/private line distinction is the most useful analytical tool given today's marketplace, but this finding ultimately is not relevant to our conclusion that GTE's claims are unfounded. The only way a carrier can exercise market power for a particular service on a particular route is if it controls essential inputs or has special retail assets and capabilities for the provision of service to end users. As we have shown above, the combined entity would not possess control over transport capacity in any region or on any thin route. Therefore, we must conclude that the combined entity would not be able to exercise market power over transport capacity for any particular route, including the routes for which GTE has calculated high HHIs. Also, as we have explained above, control over final service to end users depends on possession of special retail assets and capabilities with respect to the mass market or larger business markets, and such retail assets and capabilities generally are not route-specific. We have shown that the combined entity would not possess retail assets and capabilities that would allow it to exercise market power in either the mass market or larger business markets. Therefore, we must conclude that the combined entity would not be able to exercise market power for any service on any route through the possession of special retail assets and capabilities. The combined entity's lack of special retail assets and capabilities and its lack of control over inputs indicates that there are no barriers to entry that would enable the combined entity to exercise market power over the provision of any final service to end users, including IMTS or private line service, on any route.

137. We acknowledge that the market shares cited by GTE appear, on their face, to be a cause of concern. A high market share in itself, however, is not conclusive evidence of market power. For example, GTE asserts that the combined entity would have 100 percent of the international private line revenues to Paraguay. The merger, however, would not result in any increase in concentration in the provision of transport capacity to Paraguay, which is served only by satellite.³⁷¹ Nor would the combined entity have control over any other assets or capabilities that would enable it to exclude entry by other carriers and allow it to exercise market power on the U.S.-Paraguay route.

138. Moreover, there are many reasons other than the possession of market power that may explain why the combined entity would have such high numbers on particular IMTS

³⁷¹ As noted above, the merger would not increase concentration in ownership of satellite systems or satellite transponder capacity. See *supra* para. 83.

or private line routes. For example, in the case of Albania, GTE asserts that the combined entity would have a 100 percent share of private line service revenues. We note, however, that U.S. carrier private line service revenue to Albania totalled only \$87,723 (consisting of three 64 Kbps circuits) in 1996.³⁷² Thus, the combined entity's 100 percent revenue share would likely result not from any market power of the combined entity but from the fact that few U.S. end users require service to Albania. With regard to the IMTS routes for which GTE asserts the merger would create or enhance market power, or otherwise raise significant competitive concerns, we note that the combined entity's 1996 revenues would account for over 50 percent of IMTS revenues on only four routes.³⁷³ Three of these routes are "thin" markets served only by satellites.³⁷⁴ As discussed above, the proposed merger would not increase concentration in transport capacity on these routes, and the combined entity would not have control over any other assets or capabilities that would enable it to exclude entry or exercise market power on these routes. The fourth route, U.S.-Bhutan, had 31,426 U.S.-billed switched telephone minutes resulting in only \$65,638 of revenue in 1996.³⁷⁵ As in the case of private line service to Albania, discussed above, the combined entity's high market share likely results not from any market power but from the fact that few U.S. end users make calls to Bhutan. In sum, even though the combined entity may have a significant presence in the provision of IMTS or private line service on an individual route, we find no evidence in the record to substantiate that the merger would enable the combined entity to exercise market power on U.S. international routes.

139. As a final matter, we are not persuaded by GTE's assertion that the proposed merger would decrease competition in the provision of IMTS by removing one of the most significant competitors to AT&T and, that as a result of the proposed merger, the provision of IMTS "would be fertile ground for coordinated pricing among the top players."³⁷⁶ We

³⁷² See *1996 Section 43.61 Report* at Table B1 (examining U.S.-billed private line service on a route by route basis).

³⁷³ As we recently noted in the *Foreign Participation Order*, "[c]ourts virtually never find monopoly power when market share is less than about 50 percent." *Foreign Participation Order* 12 FCC Rcd at 23959-23960, para. 161 (quoting *Antitrust Law Developments* at 235-236).

³⁷⁴ Somalia, French Polynesia, and Azerbaijan are thin routes. See *Comsat Non-Dominance Order* at Appendix A.

³⁷⁵ See *1996 Section 43.61 Report* at Table A1 (examining U.S.-billed IMTS traffic on a route by route basis).

³⁷⁶ GTE Mar. 13 Comments at 57. According to GTE, currently AT&T is the largest provider of IMTS with about 60.13 percent of U.S.-billed revenues. MCI is the second largest with 24.94 percent U.S.-billed revenues, whereas Sprint has 10.49 percent U.S.-billed revenues. WorldCom, according to GTE, has about 2.55 percent of the U.S.-billed revenues.

acknowledge that the proposed merger of WorldCom and MCI will decrease the number of carriers providing IMTS. As we explained above, however, the merger is unlikely to have an anticompetitive effect in the end user market, because WorldCom and MCI do not have market power over inputs and it is likely that new entrants with retail assets and capabilities that are important for the provision of IMTS are poised to enter the market. Thus, we believe that the proposed merger is unlikely to result in any anticompetitive effects in the provision of IMTS.

4. Analysis of Transfer of Control of MCI's DBS License

140. The Applicants have requested authority to transfer control of MCI's direct broadcast satellite (DBS) license. The International Bureau, on delegated authority, granted MCI this license following MCI's successful participation in the Commission's DBS auctions.³⁷⁷ Parties have filed applications for review of the Bureau's grant of this license. In the present proceeding, one party filed requesting the Commission to dismiss or deny the transfer of control of MCI's DBS license.³⁷⁸

141. The transfer of control of MCI's DBS license raises issues similar to those raised in the applications for review of the Bureau's order in the MCI DBS licensing proceeding. We defer consideration of these issues for resolution in connection with pending applications for review of the MCI DBS licensing orders. In the interim, MCI WorldCom will be permitted to acquire control of MCI's DBS license. That license, however, will remain subject to further review, and this approval of the transfer of control is specifically conditioned on whatever action the Commission may conclude is appropriate in connection with the pending applications for review.

C. Internet Backbone Services

142. We consider in this section the competitive effects of the proposed merger on Internet backbone services. Our primary intent in reviewing the potential effects of this merger on Internet backbone services is to ensure that the dynamism that has characterized the Internet will not be undermined. We seek not to regulate the Internet, but rather to ensure that Internet services, which rely on telecommunications transmission capacity, remain

³⁷⁷ See *MCI Telecommunications Corporation*, Order, 11 FCC Rcd 16275 (Int'l Bur., 1996) (*MCI DBS Order I*); Order, 12 FCC Rcd 12538 (Int'l Bur., 1996) (*MCI DBS Order II*), *app. for review pending*.

³⁷⁸ United Church of Christ Jan. 5 Petition.

competitive, accessible, and devoid of entry barriers.³⁷⁹ In response to the Applicants' original application, many commenters argued that, because the merger would have combined two of the largest providers of Internet backbone services, the resulting increase in concentration would impair competition. Since the filing of its original application, MCI agreed to sell its entire Internet business to C&W. Although both the DOJ and the EC have now approved the merger, subject to the condition that MCI sell its Internet business,³⁸⁰ we must independently determine that this sale addresses the concerns raised regarding the Internet.³⁸¹ As discussed below, we find that all MCI Internet assets are being divested to C&W, and therefore the merger will not have anticompetitive effects on any Internet services, as long as the proposed divestiture is in fact carried out.

1. Background

143. The Internet is an interconnected network of packet-switched networks.³⁸² There are three classes of participants in the Internet: end users, Internet service providers (ISPs), and Internet backbone providers (IBPs).³⁸³ End users send and receive information;

³⁷⁹ We note that no party, including the Applicants, has suggested that the Commission should not consider the competitive effects of the WorldCom and MCI merger on any Internet services.

³⁸⁰ See DOJ Press Release; EC Press Release.

³⁸¹ MCI and C&W contend that they do not need Commission approval to consummate their proposed transaction, because Internet services are unregulated and no transfer of any Commission licenses is involved. See C&W June 16 Reply Comments at 3-5; MCI July 15 Reply Comments at 9. Although we agree that Commission "approval" of the proposed transaction itself is not required, we nevertheless find it necessary to review this agreement insofar as MCI asserts that the divestiture addresses the anticompetitive concerns raised in the record with respect to the Internet. See MCI July 15 Reply Comments at 2 (stating that the "complete divestiture of MCI's entire Internet business removes any issues that the merger will give WorldCom market power in the provision of Internet backbone services or other Internet services at the wholesale or retail level").

³⁸² Kevin Werbach, "Digital Tornado: the Internet and Telecommunications Policy" (OPP Working Paper Series No. 29, 1997) (Digital Tornado) at 10. A packet-switched network is one that transmits information by breaking it into small packets that are independently routed through the network from source to destination according to a destination address that is included in each packet. Packet switching differs from the circuit switching used in Plain Old Telephone Service (POTS): in a circuit-switched network, a dedicated circuit between the parties is established and reserved for the exclusive use of those parties. See Newton's at 527.

³⁸³ Digital Tornado at 10. An Internet backbone consists of routers connected together by high-speed data lines. Routers are switching devices that direct packet traffic by examining the address contained in each packet and forwarding it according to directions stored in routing tables. Routers are connected by high-speed data lines that typically consist of fiber optic cables running at DS-3 speeds or higher. (The Digital Service or Digital Signal hierarchy refers to the transmission speed or capacity of a network; DS-3 runs at a speed of 44.736 million bits per second (Mbps), which is the equivalent of 672 standard voice channels. Newton's at 241.) IBPs

ISPs allow end users to access Internet backbone networks; and IBPs route traffic between ISPs and interconnect with other IBPs.³⁸⁴ Many IBPs are vertically integrated and thus are also ISPs.³⁸⁵ Prior to the divestiture of its Internet business, MCI acted both as an IBP and an ISP. WorldCom owns three IBPs - UUNet, ANS, and CNS - and a majority share of a fourth, GridNet;³⁸⁶ it also owns a number of network access points (NAPs) where IBPs interconnect, most notably MAE-East (Washington DC), MAE-West (San Jose), MAE-Dallas, MAE-Los Angeles, and MAE-Chicago.³⁸⁷

144. The essential service provided by IBPs is transmission of information between all users of the Internet. Although IBPs compete with one another for ISP customers, they must also cooperate with one another, by interconnecting, to offer their end users access to the full range of content and to other end users that are connected to the Internet. As a result of this interconnection among IBP networks, the Internet is often described as a "network of networks."

145. IBPs interconnect with one another through either a peering arrangement or a transiting arrangement. In a peering arrangement, two IBPs agree to exchange traffic that originates from an end user connected to one IBP and terminates with an end user connected to another IBP. A peering arrangement has two main characteristics. First, in general,

sell backbone transit services to independent ISPs. The IBP may also provide Internet Protocol (IP) addresses to the ISP. (The Internet Protocol governs addressing of the packets that are transmitted over the Internet. This protocol, together with the Transmission Control Protocol (TCP) that governs the routing and transmission of packets, forms the TCP/IP standard that characterizes the Internet. *See* Digital Tornado at 10, n.11.)

³⁸⁴ Digital Tornado at 10-12. ISPs provide two different types of Internet access to end users: dial-up access and dedicated access. With dial-up access, an end user places a call with a computer modem over the POTS lines of a LEC to the user's ISP's modem. Dial-up access is generally used by residential end users and small businesses using personal computers, who generally pay their ISP a flat monthly fee for Internet access. With dedicated access, an end-user leases a high-speed line that connects directly to an ISP. Dedicated access is generally used by larger businesses, government organizations, and universities that pay a flat monthly fee that increases with the capacity of the leased line. The ISP aggregates all dial-up and dedicated traffic and routes it to the IBP via a line that is leased from a carrier for a flat monthly fee. The ISP also pays the IBP a flat fee for access to the Internet. Both of these fees increase with the capacity of the leased access line. In order to ensure greater reliability, an ISP may connect with more than one IBP, a practice known as "multi-homing." *See* Digital Tornado at 12.

³⁸⁵ Digital Tornado at 12.

³⁸⁶ WorldCom acquired a minority stake in another IBP, Verio, when it purchased Brooks Fiber.

³⁸⁷ *See generally Boardwatch Magazine's Directory of Internet Service Providers* (Fall 1997). WorldCom acquired these NAPs when it purchased MFS in 1996. MAE stands for Metropolitan Area Exchange.

peering is settlements-free, *i.e.*, the IBPs do not charge each other for terminating traffic.³⁸⁸ Second, one peer will not allow traffic from another peer to transit its network to a third IBP. For example, if IBP A only has a peering arrangement with IBP B, and IBP B also has a peering arrangement with IBP C, then IBP B will not allow customers of IBP A to send traffic to or receive traffic from customers of IBP C. In order to provide access to the customers of IBP C, IBP A must either peer with IBP C or enter a transit agreement, as described below, with either IBP B or IBP C.

146. The alternative to peering is a paying transit relationship. A transit arrangement differs from peering in two respects. First, in contrast to a peering arrangement in which IBPs generally exchange traffic without charge, in a transit arrangement one IBP pays the other IBP to carry its traffic. The amount of this charge depends upon the capacity of the connection. Second, in contrast to a peering arrangement in which IBPs only terminate each other's traffic, in a transit arrangement an IBP agrees to deliver all Internet traffic that originates or terminates on the paying IBP regardless of the destination or source of that traffic. In the above example, if IBP A becomes a transit customer of IBP B, then as a paying customer of IBP B, IBP A is able to send traffic to and receive traffic from IBP C via IBP B's network.

2. Analysis of Competitive Effects

147. Commenters' allegations of any anticompetitive effects that may have resulted from the merger in its original form focused on the merged entity's provision of Internet backbone services. We first discuss the Internet backbone services that may have been affected by the merger, then describe the asserted harms raised by commenters, and finally show that the divestiture fully alleviates these harms.

148. Because the proposed divestiture of MCI's Internet assets means that the merger of WorldCom and MCI will result in no increased concentration of assets, we need not decide which market is the relevant market for purposes of evaluating the competitive effects of the merger on any Internet services. Nevertheless, based on the record before us, we are inclined to agree with GTE and other commenters that Internet backbone services, which we define to be the transporting and routing of packets between and among ISPs and

³⁸⁸ At least one industry expert, Hal Varian, Dean of the School of Information Management and Systems at the University of California, Berkeley, has called for an end to settlements-free interconnections as the industry norm. Hal Varian, *How to Strengthen the Internet's Backbone*, Wall St. J., June 8, 1998 at A22.

regional backbone networks, constitutes a separate relevant product market.³⁸⁹ These Internet backbone services can ensure the delivery of information from any source to any destination on the Internet. The facilities used to provide such Internet backbone services are routers and the high-speed transmission lines that connect these routers. We agree with GTE that there do not appear to be good demand substitutes for ISPs and regional backbone service providers to obtain national Internet access without access to IBPs.³⁹⁰ We also disagree with Applicants' argument that the fact that transmission facilities are fungible between Internet services and other circuit- and packet-switched services precludes finding an independent and distinct market for Internet backbone services.³⁹¹ Finally, because all parties appear to agree that the appropriate geographic market is nationwide, we will assume the market is nationwide for purposes of the analysis below.³⁹²

149. In response to the Applicants' original application, commenters argued in general that, if WorldCom and MCI's Internet backbones were combined, the size of the resulting backbone network would outweigh any rival's network. As a result, commenters contended that the benefits the Applicants derived from interconnecting with rivals would have been far less than the benefits rivals derived from interconnecting with the Applicants. According to these commenters, therefore, the Applicants, after the merger, would have had less incentive to interconnect on favorable terms with other IBPs and ISPs.³⁹³ Some commenters argued that the merged entity, taking advantage of its increased size, would increase the costs of interconnection, by either charging for peering, or eliminating peering

³⁸⁹ GTE Mar. 13 Comments, Harris Internet Aff. at 7. See AFL-CIO Jan. 5 Comments at 3; CUIISP Mar. 20 Reply Comments at 2, CWA Jan. 5 Comments at 5-7; CWA Jan. 26 Reply Comments at 4; CWA Mar. 20 Reply Comments at 18-20; GTE Mar. 13 Comments at 66-68; GTE June 11 Comments at 10-11; ICP Jan. 5 Comments at 10; Simply Internet Jan. 5 Petition at 6; Sprint Mar. 13 Comments at 7-9; Letter from Michael B. Fingerhut, General Attorney, Sprint, to Magalie Roman Salas, Secretary, FCC, Attach. Charles River Assocs. Inc. Report at 7-9 (filed June 1, 1998) (Sprint June 1 *Ex Parte*).

³⁹⁰ GTE Mar. 13 Comments, Harris Internet Aff. at 7. See AFL-CIO Jan. 5 Comments at 3; CWA Jan. 5 Comments at 5-7; CWA Jan. 26 Reply Comments at 4; CWA Mar. 20 Reply Comments at 18; GTE Mar. 13 Comments at 67-68; and Simply Internet Jan. 5 Petition at 6.

³⁹¹ WorldCom/MCI Jan. 26 Reply Comments at 69-70, 72.

³⁹² WorldCom/MCI Mar. 20 Reply Comments at 67-68. Because a number of national IBPs offer interconnection in major metropolitan areas, GTE assumes that the geographic market is national; it suggests, however, without specificity, that "there are probably some geographic areas where the separate MCI/WorldCom backbones provide a much higher share of backbone service" such that its assumption of a national market is "conservative." GTE Mar. 13 Comments, Harris Internet Aff. at 8-9; GTE Mar. 13 Comments at 71.

³⁹³ GTE Jan. 26 Reply Comments at 5-7; GTE Mar. 13 Comments at 81, Harris Internet Aff. at 26; Sprint Mar. 13 Comments at 14-16.

altogether and converting peers into transit customers, which would ultimately increase end users' prices.³⁹⁴ In addition, commenters claimed that the Applicants would degrade the quality of interconnection with rivals in order to induce their rivals' customers to migrate to the Applicants' network.³⁹⁵ Finally, commenters suggested that the Applicants could have exploited their ISP customers without fear of reprisal because of the difficulty of changing IBPs.³⁹⁶

150. Many commenters further contend that difficulties in obtaining settlements-free peering from IBPs constitutes a substantial barrier to entry.³⁹⁷ IBPs that are unable to secure settlements-free peering agreements must use transiting arrangements, which, commenters contend, increase the costs of providing Internet services to end users and may result in poorer quality transport than that associated with peering.³⁹⁸ Commenters argue that, for those reasons, IBPs without peering arrangements are unable to attract the large customer base they need to obtain peering. These firms claim that they are caught in a classic Catch 22 situation

³⁹⁴ CWA Mar. 20 Reply Comments at 25-26; Fiber Network Solutions Mar. 20 Reply Comments at 4-5; GTE Jan. 26 Reply Comments at 7; Simply Internet Mar. 13 Comments at 12-13; Sprint Mar. 13 Comments at 13; Reply Comments of NetSet Internet Services, Inc. at 4-5 (filed May 26, 1998) (NetSet May 26 *Ex Parte*).

³⁹⁵ GTE Jan. 26 Reply Comments at 7; GTE Mar. 13 Comments at 83, Harris Internet Aff. at 26-27; GTE June 11 Comments at 22-27, Harris Internet Reply Aff. at 6; Sprint Mar. 13 Comments at 15; Sprint June 1 *Ex Parte*, Charles River Assocs. Report at 13-14. Some commenters also argued that the Applicants could decrease the quality of interconnection between third-party IBPs through WorldCom's control of several of the major NAPs, and thereby induce these IBPs' customers to shift to WorldCom's network. CWA Mar. 20 Reply Comments at 27-28; GTE Mar. 13 Comments at 83-84. Applicants countered that MCI does not own any NAPs, and therefore the merger will not increase the concentration among NAP owners. WorldCom/MCI Mar. 20 Reply Comments at 71.

³⁹⁶ Commenters explain that due to the scarcity of addresses, the American Registry for Internet Numbers (ARIN) assigns addresses only to the largest IBPs, and, as a result, only 10 percent of ISPs "own" their addresses while the vast majority of ISPs must obtain their IP addresses from their IBP. If such an ISP wishes to change its IBP, it must obtain new addresses from its new IBP, and then must renumber its entire network and that of its customers as well. This, according to commenters, can be an expensive and time-consuming process for many ISPs, with attendant risks of network disruptions and customer losses. Bell Atlantic Jan. 5 Comments at 10-11; Bell Atlantic Mar. 13 Comments at 2-3; CUIISP Mar. 20 Comments at 4; CWA Mar. 20 Reply Comments at 29; Simply Internet Mar. 13 Comments at 9-12.

³⁹⁷ BellSouth Mar. 13 Comments at 14-15; CWA Jan. 26 Comments at 9-10; Consumer Project on Technology Jan. 26 Reply Comments at 2-3; GTE Jan. 26 Reply Comments at 8-9; GTE Mar. 13 Comments at 77-78; GTE Mar. 13 Comments, Harris Internet Aff. at 9; GTE June 11 Comments at 18-19; Sprint Mar. 13 Comments at 17-18; Sprint June 1 *Ex Parte*, Charles River Assocs. Report at 21-22. See Level 3 May 29 *Ex Parte*.

³⁹⁸ Fiber Network Solutions Mar. 20 Reply Comments at 4-5; GTE Jan. 26 Reply Comments at 7; NetSet May 26 *Ex Parte* at 5; Simply Internet Mar. 13 Comments at 12-13; Sprint Mar. 13 Comments at 16, n.8.

-- they need more traffic to qualify for peering, but cannot get that traffic without peering. We agree with commenters that peering may be a substantial barrier to entry to those firms that intend to provide Internet services. It was this and related concerns that led to the proposed divestiture of MCI's Internet assets.³⁹⁹ As explained below, however, we find this divestiture alleviates any competitive effects that may have arisen from the merger in its original form.

3. MCI's Divestiture

151. As a result of discussions with the DOJ and the EC, MCI announced, on July 15, 1998, that it had agreed to sell all of its Internet business to C&W for \$1.75 billion.⁴⁰⁰ According to MCI, "[a]fter the divestiture, MCI WorldCom will have only those Internet assets, including the backbone network and customer relationships, that WorldCom has at the time of closing. The merger will not produce any increase in WorldCom's Internet market share, capacity, or customer base."⁴⁰¹ The complete divestiture will have the following components:⁴⁰²

- *Transfer of Assets and Employees.* MCI will transfer to C&W all of the physical assets that constitute its Internet backbone: 22 nodes (or hubs); over 15,000 interconnection ports; and all the routers, switches, and other equipment dedicated to

³⁹⁹ See DOJ Press Release; EC Press Release.

⁴⁰⁰ See MCI July 15 Reply Comments. Originally, on June 3, 1998, MCI informed the Commission of the proposed partial divestiture of its Internet assets whereby it agreed to sell its Internet backbone business to C&W, while retaining its Internet retail business. See Letter from Mary L. Brown, Senior Policy Counsel, MCI, to Magalie Roman Salas, Secretary, FCC (filed June 3, 1998) (MCI June 3 *Ex Parte*).

⁴⁰¹ MCI July 15 Reply Comments at 9. This divestiture is subject to the condition that MCI is not obliged to proceed if WorldCom and MCI do not merge.

⁴⁰² A redacted copy of the term sheet pertaining to the divestiture agreement between MCI and C&W has been placed in the record. See Letter from Larry A. Blosser, Senior Counsel, MCI to Magalie Roman Salas, Secretary, FCC (filed Aug. 25, 1998) (MCI Aug. 25 *Ex Parte* I). This confidential document is available for review pursuant to the terms and conditions of the protective order adopted in this proceeding. We are satisfied that MCI has submitted all the relevant portions of its divestiture agreement. We therefore reject claims by commenters that more information concerning the divestiture is necessary in order for the Commission to complete its public interest analysis. See Telstra June 11 Comments at 3 (arguing that the public interest requires disclosure of the contract and/or tariff terms which would govern MCI's lease of Internet backbone facilities to C&W); Letter from Gregory C. Staple, Koteen & Naftalin, Counsel to Telstra, to Chairman Kennard, FCC, at 5 (filed July 22, 1998) (Telstra July 22 *Ex Parte*); GTE's Motion for Expedited Consideration of GTE's Motion for Establishment of a Procedural Schedule and Production of Related Materials at 4 (filed July 22, 1998) (requesting the Commission to seek production of the sales contracts and other documents regarding the proposed divestiture) (GTE July 22 Motion). See also section IV.C.4 for discussion of Telstra's tariffing claims.

the backbone.⁴⁰³ MCI will lease to C&W the transmission capacity it needs to operate the network, including projected growth requirements, on "competitive commercial terms" for two years, with an option for C&W to extend the term for an additional three years.⁴⁰⁴ MCI will also provide C&W the right to use all associated dedicated software and OSS, will assign to C&W all Internet addresses used in the transferred business, and will allow C&W to collocate equipment in MCI facilities.⁴⁰⁵ MCI will transfer all employees necessary to operate the Internet business by allowing C&W to identify those individual employees that it wishes to be transferred from a list of approximately 1,000 MCI employees.⁴⁰⁶ In addition, MCI will transfer to C&W all of its more than 40 peering agreements.⁴⁰⁷ Finally, MCI WorldCom and C&W are prohibited from terminating their peering agreement for five years.⁴⁰⁸

⁴⁰³ MCI July 15 Reply Comments at 5. We do not agree with those commenters that suggest that a more detailed description of MCI's transferred Internet assets is necessary. See CWA July 24 *Ex Parte* at 6; GTE July 22 Motion at 2-3; GTE's Reply to MCI's Opposition to GTE's July 22 Motion (filed July 28, 1998) at 4 (GTE July 28 Reply). Rather, we find it sufficient that MCI is transferring *all* of its Internet assets. See MCI's Opposition to GTE's July 22 Motion at 2 (filed July 24, 1998) (MCI July 24 Opposition).

⁴⁰⁴ C&W is free to use transmission capacity from sources other than MCI. MCI July 15 Reply Comments at 6.

⁴⁰⁵ *Id.* at 5-6. C&W has a right to collocate certain routers and modems purchased from MCI for two years, with the right to extend this agreement for an additional three years. C&W will have a nonexclusive, royalty-free, perpetual license to utilize the MCI-owned software necessary to run the transferred Internet business, with the ability to obtain updates for two years. C&W will also be able to use MCI's order entry system for a short period of time to allow a normal transition of the business. MCI Aug. 25 *Ex Parte* II at 2.

⁴⁰⁶ MCI July 15 Reply Comments at 6. MCI elaborates that it "will transfer to C&W all engineering, sales, customer service/telemarketing, and managerial, financial, and administrative employees necessary to operate the business, alone or in combination with the personnel in C&W's existing Internet organization" and that it "has identified all of the positions and will shortly provide C&W with a list of approximately 1,000 employees, and C&W will identify those individual employees that it wishes to be transferred." MCI July 15 Reply Comments at 6. Although some commenters ask for a detailed list of employees being transferred, (see CWA July 24 *Ex Parte* at 6; GTE July 22 Motion at 4; and GTE July 28 Reply at 5) we find the above description to be sufficient. See MCI July 24 Opposition at 3 (stating it is "hard to imagine a role less appropriate for the Commission than to serve as a supervisory human resources department for C&W"). In response to GTE's request for more information regarding the incentives MCI plans to make available to its employees to move to C&W, (see GTE July 22 Motion at 4; GTE July 28 Reply at 5) MCI asserts that it will contribute cash to an employee retention fund for C&W. MCI Aug. 25 *Ex Parte* II at 2-3.

⁴⁰⁷ MCI July 15 Reply Comments at 6.

⁴⁰⁸ MCI Aug. 25 *Ex Parte* II at 3.

- *Transfer of ISP Customers.* MCI will transfer to C&W MCI's contracts with ISPs, such that C&W will replace MCI as the IBP to more than 1,300 domestic and international ISP customers that now obtain Internet access from MCI.⁴⁰⁹ According to the terms of the agreement, MCI WorldCom cannot contract with or solicit any of the transferred ISP customers to provide dedicated Internet access service for two years, unless the ISP customer already purchases Internet services from WorldCom at the closing of the agreement.⁴¹⁰
- *Transfer of Retail Customers.* MCI will transfer to C&W its contracts with retail customers not only for Internet service, but also for web-hosting, managed firewall, and Real Broadcast Network services.⁴¹¹ According to the terms of the agreement, MCI WorldCom cannot contract with or solicit transferred retail dedicated access customers to provide dedicated access services for eighteen months, and cannot solicit web-hosting and managed firewall services for six months, unless the customers already purchase these services from WorldCom at closing.⁴¹² MCI will also allow C&W to use the MCI name for one year.⁴¹³

152. We agree with MCI that its current divestiture will adequately address any potentially legitimate objections commenters raised to its original divestiture. Commenters on the original divestiture argued that, because MCI would retain its retail and web-hosting customers, it would retain market power, and C&W would not be as viable a competitor as MCI.⁴¹⁴ The current divestiture, however, includes the transfer of MCI's contracts with retail and web-hosting customers. In addition, commenters contended that, because MCI was transferring only about 50 employees, it would continue to have an undue concentration of Internet expertise and would not provide C&W sufficient technical support to compete

⁴⁰⁹ MCI July 15 Reply Comments at 7.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 7-8.

⁴¹² *Id.* at 8.

⁴¹³ C&W is authorized, for one year, to identify the transferred Internet business as "formerly the internetMCI backbone network" and/or "formerly the iMCI business." MCI Aug. 25 *Ex Parte* II at 1.

⁴¹⁴ AT&T June 11 Comments at 3-4; BellSouth June 11 Comments at 3; CWA June 11 Comments at 9; GTE June 11 Comments at 33-34; Simply Internet June 11 Comments at 4; Sprint June 11 Comments at 7-8, 13. AT&T also argued that MCI attempted to avoid effective competition by excluding buyers such as AT&T from consideration. AT&T June 11 Comments at 5.

successfully.⁴¹⁵ We note that the current divestiture now includes the transfer of as many as 1,000 employees. Sprint contended that, because C&W is not known as a provider of Internet services, it might not be able to retain the customers transferred to it, or obtain new ones.⁴¹⁶ Accordingly, Sprint asserted that MCI should license C&W to use its brand name. MCI has now licensed C&W to use its brand name for one year. Finally, although Simply Internet questioned the number of IP addresses MCI would retain,⁴¹⁷ MCI states that ". . . the new transaction includes all Internet addresses used in the Internet business that C&W is acquiring, whether or not a current customer utilizes a particular address. . . ."⁴¹⁸

153. We find that the remaining objections raised by commenters do not articulate legitimate anticompetitive harms. With respect to the non-compete clauses contained in the divestiture agreement, some commenters suggest that the time limitations (two years with respect to ISP customers) render them inadequate.⁴¹⁹ We find that C&W's newly acquired retail customer base, coupled with the dynamism of the Internet marketplace,⁴²⁰ offsets any concern that after two years the transferred customers might migrate to WorldCom in sufficient numbers to give MCI WorldCom market power.⁴²¹ Another commenter argues, on the other hand, that the non-compete clause, exempting certain customers from competitive bids by MCI WorldCom, reduces competition.⁴²² We find that the non-compete clause is

⁴¹⁵ AT&T June 11 Comments at 4; BellSouth June 11 Comments at 3; CWA June 11 Comments at 8; GTE June 11 Comments at 35; Simply Internet June 11 Comments at 5-6; Sprint June 11 Comments at 10-11.

⁴¹⁶ Sprint June 11 Comments at 8-9.

⁴¹⁷ Simply Internet June 11 Comments at 4-5.

⁴¹⁸ MCI July 15 Reply Comments at 6.

⁴¹⁹ CWA June 11 Comments at 9-10; Letter from Debbie Goldman, Research Economist, CWA, to Magalie Roman Salas, Secretary, FCC at 8-9 (filed July 24, 1998) (CWA July 24 *Ex Parte*); CWA June 11 Comments at 34-35.

⁴²⁰ *See, e.g.*, WorldCom/MCI Jan. 26 Reply Comments at 65 (noting that, based on the experience of the Applicants, the demand for Internet services more than doubles every year); GTE Jan. 26 Reply Comments at 4 (stating that the growth in Internet traffic is currently doubling approximately every six months).

⁴²¹ C&W itself states that it intends to use the assets purchased to expand its Internet business significantly -- "not sit and watch it wither and return to MCI." C&W June 16 Reply Comments at 6.

⁴²² Bell Atlantic June 11 Comments at 2-3. Similarly, Telstra asserts that the non-compete provision may be unlawful to the extent it bars Telstra from contracting with the merged entity for new international private line or backhaul facilities during the next two years. Telstra July 22 *Ex Parte* at 4-5. We conclude that it is clear from MCI's description of the divestiture agreement that the provisions of the agreement, including the non-compete clause, pertain only to the provision of Internet services and do not preclude the merged entity from

appropriate in that it protects against what could otherwise be a "sham" divestiture, *i.e.*, the possibility that MCI WorldCom would immediately win back customer accounts purchased by C&W.⁴²³ Some commenters also argue that the non-compete clause is inadequate, because it exempts customers that were connected to both WorldCom and MCI pre-merger (what the industry refers to as "multi-homed"). Although there is some dispute in the record concerning the percentage of MCI's ISP customers that are multi-homed to UUNet,⁴²⁴ we find that the exemption of these customers from the non-compete clause poses little risk to competition. Specifically, we find that customers that choose to multi-home do so for purposes of redundancy.⁴²⁵ Thus, if a customer was multi-homed to both MCI and UUNet prior to the divestiture, these customers are likely to remain multi-homed for purposes of redundancy, and therefore are unlikely to switch all their business to UUNet after the divestiture.

154. Moreover, a few commenters contend that the divestiture will leave C&W overly dependent on MCI. For example, some commenters asserted that, unless MCI also

competing with respect to provision of common carrier services. MCI July 15 Reply Comments at 10 (stating that C&W will be protected from competition in the "*provision of dedicated Internet access service by MCI WorldCom for the transferred customers during the specified periods after closing.*") (emphasis added).

⁴²³ We note that the non-compete clause does not apply to retail dial-up end user customers of Internet access services. Rather than considering this a deficiency, however, we find that it will allow the combined entity to be a stronger local competitor by enabling it to sell local, long distance, Internet access, and other services to retail end user customers in competition with other providers of these services.

⁴²⁴ GTE asserts that MCI should be required to reveal how many customers are connected to both WorldCom and MCI pre-merger. GTE July 22 Motion at 3; GTE July 28 Reply at 3. Using the *Boardwatch Magazine Internet Service Provider Directory*, CWA calculates that 36.8% of MCI's ISP customers also connect to UUNet's network. CWA June 11 Comments at 10; *see* Letter from Debbie Goldman, Research Economist, CWA, to Magalie Roman Salas, Secretary, FCC (filed Aug. 7, 1998) (submitting excerpted quote from Bernard J. Ebberts, WorldCom CEO, at investor presentation stating that the existence of multi-homing between WorldCom and MCI Internet customers is "more common than not"). Although MCI claims that it does not know exactly how many of its customers are also WorldCom customers, it states that an unnamed Washington, D.C. law firm has evaluated a list of MCI's ISP customers and UUNet's thirty largest customers and determined that only several of these UUNet customers also purchase Internet access from MCI. *See* Letter from Larry A. Blosser, Senior Counsel, MCI, to Magalie Roman Salas, Secretary, FCC (filed July 31, 1998); Letter from Larry A. Blosser, Senior Counsel, MCI, to Magalie Roman Salas, Secretary, FCC (filed July 28, 1998). *See also* MCI Aug. 25 *Ex Parte* II at 3.

⁴²⁵ *See, e.g.*, Randy Barrett, *Small ISPs Decry IP Address Shutout*, Inter@ctive Week, July 14, 1997 <<http://www4.zdnet.com/intweek/daily/970714a.html>>.

transferred the fiber underlying its backbone, C&W would be too dependent on MCI.⁴²⁶ We agree with MCI that ". . . to the extent C&W purchases capacity on MCI's long-distance network (at negotiated competitive rates), it is no more dependent on MCI than numerous other backbone providers are on long-distance companies from which they buy long-haul fiber capacity."⁴²⁷ Similarly, a few commenters assert that, given the integration of MCI's Internet and telecommunications facilities and C&W's dependence on these facilities, C&W is unlikely to be an independent and effective IBP.⁴²⁸ In addition, at least one commenter maintains that, because MCI will continue to provide a host of non-Internet services to the transferred retail dedicated access customers, C&W will be, in effect, "sharing" its Internet customers with MCI.⁴²⁹ We are not persuaded by arguments that the integration of MCI's Internet and non-Internet business and facilities will prevent C&W from becoming an effective competitor.⁴³⁰ We find, for instance, that, given the non-compete clause, MCI will have no undue influence over C&W's newly acquired customers. In addition, we find that C&W is a sophisticated player that has both the ability and the incentive to protect its interests. Significantly, C&W itself rejects the claim that it will be too dependent on MCI or otherwise not a viable competitor.⁴³¹ Finally, we note that the DOJ and EC approvals support this conclusion.⁴³²

⁴²⁶ GTE June 11 Comments at 34; Internet Service Provider's Consortium June 11 Comments at 2-3. See BellSouth June 11 Comments at 3-4 (noting that MCI will retain software and OSS, and that physical assets transferred to C&W will remain in MCI facilities and connected to MCI's transmission facilities); Simply Internet June 11 Comments at 3 (noting that MCI will retain fiber, "the heart of any Internet backbone"). Cf. Sprint June 11 Comments at 11, 16 (noting that C&W will be dependent on MCI to provide systems support and postulating that MCI is not transferring enough nodes).

⁴²⁷ MCI July 15 Reply Comments at 13.

⁴²⁸ CWA June 11 Comments at 11; GTE June 11 Comments at 29-30; GTE July 22 Motion at 4 (asserting that the "more ties C&W has to the WorldCom/MCI network, the less likely it is that the divestiture will result in the creation of an effective independent competitor in Internet backbone market").

⁴²⁹ GTE June 11 Comments at 31-32.

⁴³⁰ See GTE July 28 Reply at 4 (arguing that MCI's practice of "main streaming" Internet operations with other services makes the status of multi-use facilities unclear). MCI acknowledges that the divestiture agreement contemplates that MCI and C&W will be sharing certain facilities as well as office space pursuant to a collocation agreement, and that the two companies will be providing one another certain services and sharing certain systems on a "arm's length contractual basis." MCI Aug. 25 *Ex Parte* II at 1-2. We are satisfied that these arrangements will in no way diminish C&W's viability as an independent competitor.

⁴³¹ C&W June 16 Reply Comments at 5-8.

⁴³² See DOJ Press Release; EC Press Release.

155. AT&T, Level 3, and several other commenters suggest that any divestiture would be inadequate unless the Applicants commit to peer with eligible companies on a nondiscriminatory (and impliedly settlements-free) basis.⁴³³ As discussed above, many commenters contend that, by denying peering, the Applicants erect a barrier to the entry of IBPs such as Level 3. We find that, given MCI's complete divestiture of its Internet business, any interconnection difficulties are not exacerbated by the instant merger. Thus, although we are concerned about the interconnection difficulties that commenters such as Level 3 articulate, we agree with the Applicants that the instant merger proceeding is not the appropriate forum to address these concerns.⁴³⁴ Accordingly, we refuse to condition the merger by requiring MCI WorldCom to adopt nondiscriminatory peering criteria. We note, however, that the difficulties new entrants have encountered in interconnecting with IBPs, which existed prior to the merger, are likely to continue after the merger. Therefore, we conclude that peering is likely to remain an issue that warrants monitoring.

156. We find, after independently reviewing all relevant portions of the proposed divestiture agreement, that it will result in a full and complete divestiture of MCI's Internet assets. Moreover, we conclude that this divestiture agreement eliminates the potential anticompetitive harms that would have resulted from the merger on the provision of Internet backbone services. We reject commenters' claims that the Commission must solicit comment on MCI's current proposal, or that MCI otherwise has not provided us with sufficient information to reach this conclusion.⁴³⁵ We also reject CWA's suggestion that the Commission adopt a "forward-looking oversight and enforcement mechanism" to ensure that MCI WorldCom complies with the divestiture agreement.⁴³⁶

⁴³³ AT&T June 11 Comments at 6-7; Level 3 May 29 *Ex Parte* at 18. See CWA July 24 *Ex Parte* at 7 (asserting that the Commission should also initiate a proceeding to establish a mechanism to collect statistics on Internet traffic flow, market share and other statistics on the Internet marketplace); Fiber Network Solutions Mar. 19 Reply Comments at 9-10; NetSet May 26 *Ex Parte* at 10; Letter from Terrence J. Ferguson, Senior Vice President and General Counsel, Level 3, to Magalie Roman Salas, Secretary, FCC at 5 (filed Aug. 7, 1998) (Level 3 Aug. 7 *Ex Parte*) (stating that the Commission should condition approval of the merger on the Applicants removing traffic volume or balance requirements from their pre-existing peering guidelines). We note, however, that these parties do not appear to agree about the specific qualities that would make a competitor "eligible" for peering.

⁴³⁴ Response of WorldCom and MCI to *Ex Parte* Presentations by Level 3, and Fiber Network Solutions, and to Reply Comments by NetSet at 3-4 (filed June 19, 1998) (WorldCom/MCI June 19 Response); Letter from Jean L. Kiddoo, Counsel for WorldCom, Swidler & Berlin, to Magalie Roman Salas, Secretary, FCC (filed Aug. 19, 1998) (WorldCom Aug. 19 *Ex Parte*).

⁴³⁵ Bell Atlantic June 11 Comments at 2; BellSouth June 11 Comments at 2; CWA July 24 *Ex Parte* at 7-8; GTE July 22 Motion at 1-2, 6.

⁴³⁶ CWA July 24 *Ex Parte* at 5-7.

4. International Internet Issues

157. Telstra asserts that foreign ISPs face restrictive pricing, and that access arrangements would be exacerbated by the merger. In particular, Telstra claims that the Commission should examine the practice of major U.S. IBPs, such as WorldCom and MCI, to require foreign ISPs to pay "bundled" rates for private line facilities with Internet services in order to access the U.S. Internet backbone. Telstra also alleges the rates charged by major U.S. IBPs, including WorldCom and MCI, are not "cost-based" in that foreign ISPs are required to pay for the entire international transmission circuit needed to access the U.S. Internet backbone. According to Telstra, this pricing arrangement is discriminatory because the capacity is used to carry traffic in both directions.⁴³⁷ Telstra further contends that U.S. carriers can therefore subsidize their affiliated U.S. ISPs, which do not pay for international transmission costs. Telstra claims that this requirement is unjust and unreasonable and violates section 201(b) of the Communications Act.⁴³⁸

158. Telstra also argues that the provisions of MCI's divestiture agreement with C&W relating to the lease of international private line and domestic backhaul facilities constitute basic common carrier services subject to the tariffing provisions of Title II of the Communications Act and related regulations.⁴³⁹ Accordingly, Telstra contends, MCI may not lease such facilities to C&W until it has filed a tariff and obtained Commission approval. MCI, on the other hand, asserts that its agreement to sell its Internet business, and, specifically, that portion of the agreement relating to the lease of transmission capacity to C&W, constitutes "private carriage," and thus is not subject to common carrier filing obligations.⁴⁴⁰

159. We conclude that Telstra's claims do not warrant action in this proceeding. First, we find that "bundling" arrangements do not restrict the options available to foreign ISPs seeking to access the U.S. Internet backbone or disadvantage alternative providers of international transport of Internet backbone services. There is no evidence in the record demonstrating that either WorldCom or MCI require foreign ISPs to pay a bundled rate for access to the U.S. Internet. In fact, UUNET materials indicate that foreign ISPs may choose

⁴³⁷ See Telstra Jan. 5 Comments at 7-8.

⁴³⁸ See *id.*; Telstra Mar. 13 Comments and Petition for Reconsideration at 6. See also Inner City Press Jan. 5 Petition at 10 (noting that foreign ISPs are complaining about the high settlement fees they must pay and the requirement that such ISPs pay the price for the full circuit to the United States).

⁴³⁹ Telstra July 22 *Ex Parte* at 2.

⁴⁴⁰ Letter from Larry A. Blosser, Senior Counsel, MCI, to Magalie Roman Salas, Secretary, FCC at 3-4 (filed Aug. 19, 1998) (MCI Aug. 19 *Ex Parte*).

either a bundled offering to access the U.S. Internet backbone or the backbone services alone. Specifically, UUNET's web site maintains that it "can provision the International leased line or satellite connection, or the customer may deliver the circuit to UUNET."⁴⁴¹ Moreover, Telstra itself has entered into arrangements using its own international circuits to interconnect to the U.S. Internet backbone.⁴⁴² In addition, the record does not demonstrate that WorldCom or MCI provides services subject to Title II regulation on rates, terms, and conditions that are unjust or unreasonably discriminatory, in violation of the Communications Act.⁴⁴³ We therefore decline to condition the merger on MCI WorldCom's provision of cost-based unbundled access to the Internet backbone, on tariffed terms, for U.S. and non-U.S. ISPs.⁴⁴⁴ Accordingly, we also deny Telstra's request that we adopt corresponding record-keeping and reporting requirements to ensure these conditions can be monitored.⁴⁴⁵

160. Second, we conclude that this merger is not the appropriate forum to consider Telstra's claim regarding Internet cost-sharing. Telstra itself acknowledges that this matter extends beyond the Applicants to "the current pricing arrangements of U.S. carriers for international Internet access."⁴⁴⁶ As such, we find that Telstra's claim is beyond of the scope of this proceeding.

161. Third, although we find that Telstra raises serious concerns with respect to the terms and conditions under which C&W is leasing transmission facilities from MCI, we need not resolve its tariffing dispute in the instant proceeding. Notably, Telstra does not allege that MCI is currently in violation of the Communications Act or the Commission's tariffing rules.⁴⁴⁷ Indeed, should MCI and C&W effectuate their divestiture agreement, we assume that, to the extent any portions of the agreement involve common carrier services subject to

⁴⁴¹ See UUNET, *US Transit*, <http://www.us.uu.net/products/access_ustrans/>.

⁴⁴² Teleglobe, *Teleglobe, Telstra Launch First High-Speed Internet Link Combining Simplex Satellite and Fiber Cable Facilities*, <<http://www.teleglobe.com/en/inc/press/1998/n980115b.html>> ("The connection uses Telstra's existing transoceanic cable capacity for the inbound link to the United States and a 45 mbps simplex satellite link for the return link to Australia.").

⁴⁴³ 47 U.S.C. §§ 201(b), 202(a).

⁴⁴⁴ See Telstra Jan. 5 Comments at 12-13.

⁴⁴⁵ *Id.* at 13.

⁴⁴⁶ *Id.* at 8.

⁴⁴⁷ Telstra July 22 *Ex Parte* at 2 (stating that "prior to furnishing C&W with a 'favorable' two year lease for [international private line] facilities, MCI would need to file appropriate tariffs and/or contracts with the [Commission] for approval") (emphasis added).

the Commission's tariffing requirements, MCI will adhere to these requirements. If, at that time, Telstra believes that MCI is not in compliance with the Communications Act or our rules, it may press that claim by filing a complaint under section 208. Likewise, should the Commission discover that MCI is not in compliance with our tariffing rules, we have the ability to initiate our own investigation. Although we condition this merger on the sale of MCI's Internet business to C&W, we decline to delay consummation of the instant merger in order to resolve this potential tariffing issue.

D. Local Exchange and Exchange Access Services

162. We consider in this section the competitive effects of the proposed merger in the markets for domestic local exchange and exchange access service. As discussed below, we treat retail local exchange and exchange access service as consisting of two relevant product markets: (1) the mass market; and (2) the larger business market.⁴⁴⁸ We conclude that the relevant geographic market in which to measure the effects of this merger on local exchange and exchange access services consists of the local areas in which both of the merging parties provide service.

163. Applicants contend that the proposed merger can have no anticompetitive effects in local exchange and exchange access markets given the continued domination of an incumbent LEC in each geographic region.⁴⁴⁹ The Applicants further claim that a primary benefit of this merger is that the merged entity will act as an "icebreaker" in the local exchange and exchange access markets, breaking the market domination of the incumbent LECs and clearing a path that other competing LECs may follow.⁴⁵⁰ For the reasons described below, we conclude that the merger likely will not impair competition in the markets for local exchange and exchange access services. We evaluate Applicants' claim that the merger will benefit local exchange and exchange access customers in the potential public interest benefits section of this Order below.⁴⁵¹ We also address below commenters' allegations that MCI WorldCom will retreat from its plans to provide local service to residential customers.⁴⁵²

⁴⁴⁸ See *supra* para. 25.

⁴⁴⁹ WorldCom/MCI Mar. 20 Reply Comments at 11-12.

⁴⁵⁰ WorldCom/MCI Jan. 26 Reply Comments at 17-18.

⁴⁵¹ See section V *infra*.

⁴⁵² See section IV.E *infra*.

1. Relevant Markets

164. *Product Market.* We identify local exchange and exchange access service as consisting of two distinct product markets: the mass market and the larger business market. We believe it is necessary to distinguish between these two markets because the services offered to one group may not be adequate or feasible substitutes for services offered to the other group,⁴⁵³ and because firms need different assets and capabilities to target these two markets successfully.⁴⁵⁴ We also conclude that local exchange and exchange access service is distinct from long distance service. The Commission has previously identified local exchange and exchange access as a product market separate from long distance.⁴⁵⁵ We reaffirm that determination and adopt it here because, in their purchasers' eyes, each of these services is a distinct product lacking good substitutes.

165. We agree with Applicants that, for purposes of analyzing local markets in this case, there is no need to distinguish between medium-sized business customers and large business/government customers, because both sets of customers share many relevant characteristics. For example, both sets of business customers face contract-type tariffs and typically are served by "face-to-face" sales and customer service representatives. Also, both require switched and dedicated access services.⁴⁵⁶

166. *Geographic Market.* In the *LEC Regulatory Treatment Order*, the Commission found that each point-to-point market constituted a separate geographic market, but further concluded that groups of point-to-point markets could be considered relevant markets where consumers faced the same competitive conditions.⁴⁵⁷ In the *AT&T/TCG Order*, we observed that discrete local areas may constitute separate relevant geographic markets for local

⁴⁵³ For example, residential customers may want local service featuring call waiting, whereas large business/government customers may not need call waiting, but may want or require multiple lines, ISDN, or an extensive voice mail system. See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53.

⁴⁵⁴ See *AT&T/TCG Order* at para. 20. Further, as the Commission recognized in the *Bell Atlantic/NYNEX Order*, residential and small business customers have a "different decision making process" than larger business customers. For example, residential and small businesses are served primarily through mass marketing techniques including regional advertising and telemarketing, while larger businesses tend to be served under individual contracts and marketed through direct sales contracts. *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53.

⁴⁵⁵ *AT&T/TCG Order* at para. 20; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20015, para. 51.

⁴⁵⁶ WorldCom/MCI Mar. 20 Reply Comments at 6-7.

⁴⁵⁷ *LEC Regulatory Treatment Order*, 12 FCC Rcd at 15792-95, at para. 67 n.181. *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-17, para. 54.

exchange and exchange access services.⁴⁵⁸ We affirm that local areas constitute separate geographic markets, because people dissatisfied with their local exchange service cannot substitute a local exchange service from a different area. Consumers of local services in St. Louis, Missouri, for example, cannot substitute the local services offered by carriers in New York City, New York.

167. For purposes of this transaction, we need to analyze those geographic markets for local exchange and exchange access services in which one or both of the merging parties provide service. These markets are ones where both merging parties actually operate or where the potential is greatest that both will operate in the future. We focus on these markets because the merger can have anticompetitive effects only in markets where both firms actually or potentially operate. The arguments in the record, however, are not entirely clear concerning the precise contours of these local geographic markets. GTE, for example, appears to suggest examining the 26 "markets" in which it claims WorldCom and MCI have "overlapping" local facilities in order to evaluate how the merger would affect competition in the local exchange and exchange access market.⁴⁵⁹ Applicants contend in their initial filing, however, that WorldCom and MCI networks in the same city frequently do not traverse the same streets and do not serve the same buildings, and that in such cases there is no "overlap" in the sense of duplicate or redundant facilities.⁴⁶⁰ In a later filing, the Applicants contend that the properly defined area on which to base geographic market definition is the metropolitan area.⁴⁶¹ We note, in contrast to the Applicants' contention, that there may be metropolitan areas where, because of the location of facilities and the cost of expansion, the geographic market unit might be a smaller area.

168. Although we have concluded, in principle, that the appropriate relevant geographic market consists of the local areas where WorldCom and/or MCI have facilities, we find that, for purposes of this transaction, we need not assess each such area separately in order to determine whether there are potential anticompetitive effects. Competition is still in its infancy in the vast majority of local areas. Applicants have submitted information showing that even in the market for business customers in the New York metropolitan area, which they characterize as "probably the most competitive local exchange market in the

⁴⁵⁸ *AT&T/TCG Order* at para. 21.

⁴⁵⁹ GTE Jan. 5 Petition at 44. *See, e.g.*, GTE Mar. 13 Comments, Attach. 1 at 7 (summarizing petitioners' and commenters' submissions regarding local geographic markets as saying they should be defined as "[e]ach city where MCI and WorldCom have overlapping existing or planned facilities").

⁴⁶⁰ WorldCom/MCI Jan. 26 Reply Comments at 16.

⁴⁶¹ WorldCom/MCI Mar. 20 Reply Comments at 6.

country," the incumbent LEC has lost only six percent of the market to competitors.⁴⁶² In many other places, the incumbent LEC's market share is or approaches 100 percent.⁴⁶³ If, as Applicants suggest, incumbent LECs have lost no more than six percent of the market in any local area, then, even assuming that WorldCom and MCI were the only competing LECs, their combined market share could never exceed six percent. These market shares suggest that, even under the worst case of attributing the highest possible local market share to the combined entity, immediate anticompetitive effects are unlikely and, therefore, there is no need to assess each market separately. We now proceed to analyze whether, apart from market share considerations, there are reasons to find the merger anticompetitive in local markets generally.

2. Market Participants

a. Mass Market

169. Having defined relevant markets, we proceed to identify the participants in those markets. Because the local exchange and exchange access markets are in transition, and because both WorldCom and MCI were, until recently, precluded competitors in these market, we identify both actual participants and precluded competitors. We also seek to determine whether, out of the universe of market participants, the merger would eliminate one among a limited number of most significant participants so as to undermine the development of competition as the 1996 Act is being implemented.⁴⁶⁴

170. As we recently noted in the *AT&T/TCG Order*, incumbent LECs are still the sole actual providers of local exchange and exchange access services to the vast majority of mass market customers in most areas of the U.S.⁴⁶⁵ This fact is also borne out in the record in the instant proceeding.⁴⁶⁶ We therefore consider incumbent LECs to be most significant market participants in the mass market for local exchange and exchange access service.

⁴⁶² WorldCom/MCI Jan. 26 Reply Comments at 8-9, 13-14, Attach. A (citing an analysis of Bell Atlantic and competing LEC access lines prepared by the New York Public Service Commission).

⁴⁶³ WorldCom/MCI Mar. 20 Reply Comments at 7.

⁴⁶⁴ See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20022-23, paras. 65-66.

⁴⁶⁵ See *AT&T/TCG Order* at para. 24 & n.80 (noting that incumbent LECs earned 98.6 percent of all the local exchange and exchange access revenues generated nationwide).

⁴⁶⁶ See WorldCom/MCI Jan. 26 Reply Comments at 13, Carlton and Sider Decl. at 5 and Table 1; WorldCom/MCI Mar. 20 Reply Comments at 7-8.

171. As for other significant market participants, the *AT&T/TCG Order* reaffirmed the Commission's finding in the *Bell Atlantic/NYNEX Order* that AT&T, MCI, and Sprint were previously precluded competitors that were among the most significant participants in the mass market for local exchange and exchange access services.⁴⁶⁷ Likewise, we affirm that determination here. The Commission, in the *Bell Atlantic/NYNEX Order*, did not identify WorldCom as among the most significant market participants in the provision of local services to the mass market.⁴⁶⁸ Nor do we find reason now to include WorldCom among the most significant market participants in the instant merger proceeding. Although WorldCom possesses the requisite knowledge, operational infrastructure, and reputation for providing high quality reliable service, all of which are important capabilities to the successful operation of a local telephone company serving residential and small business customers,⁴⁶⁹ we find that it lacks the level of brand name recognition enjoyed by the incumbent LEC in its region and the three large IXCs nationwide.⁴⁷⁰ Significantly, we also find that WorldCom, in contrast to AT&T, MCI, and Sprint, lacks existing customer relationships with a substantial number of mass market customers.⁴⁷¹ Because WorldCom is not a most significant market participant in the mass market, we conclude below that its combination with MCI is unlikely to retard competition to mass market consumers in any local market. This conclusion is further buttressed when we consider the number of firms, some of which are described below,⁴⁷² that appear to be at least as well-situated as WorldCom to provide local exchange and exchange access services to the mass market.

⁴⁶⁷ See *AT&T/TCG Order* at para. 25.

⁴⁶⁸ See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20032-33, paras. 87-88.

⁴⁶⁹ *Id.* at 20020-21, para. 62.

⁴⁷⁰ As the Commission noted in the *Bell Atlantic/NYNEX Order*, brand name recognition is a "critical" asset for offering services in the mass market. *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20031, para. 84. Although a competitor can in time develop brand name recognition, the need to do so may render a competitor incapable of having an effect on competition while the 1996 Act is being implemented.

⁴⁷¹ In 1997, the top three long distance carriers had the following residential long distance market shares: AT&T had 67.2 percent, MCI had 12.6 percent, and Sprint had 5.7 percent. WorldCom's residential long distance market share is not separated from the remaining long distance carriers because WorldCom has a small share of the residential end user market. See *1998 Long Distance Market Shares Report* at 21 n.12 & 22.

⁴⁷² See *infra* paras. 174-181.

b. Larger Business Market

172. We recently noted in the *AT&T/TCG Order* that incumbent LECs continue to dominate the market for local exchange and exchange access service to business customers.⁴⁷³ We observed, however, that in contrast with the relative lack of competition incumbent LECs experience in the mass market for local service, they face increasing competition from numerous new facilities-based carriers in serving the larger business market.⁴⁷⁴ Nevertheless, we affirm our finding that incumbent LECs still dominate the larger business market for local exchange and exchange access service.

173. Our analysis of the record in this proceeding and of publicly available information confirms our earlier conclusion that there are a large number of firms that actually compete or have the potential to compete in this market. We find that a large number of firms, including WorldCom and MCI, all have the necessary capabilities and incentives to compete in the larger business market.⁴⁷⁵ In the following paragraphs, we briefly discuss the capabilities and incentives of certain of these firms, including WorldCom and MCI. We note, however, that this list of companies is not intended to be exhaustive.⁴⁷⁶

174. *WorldCom.* Although WorldCom's market share in the local areas in which it serves business customers is quite low, never exceeding 6 percent,⁴⁷⁷ we find that WorldCom currently possesses capabilities for success in the larger business market. WorldCom's local

⁴⁷³ *AT&T/TCG Order* at para. 26.

⁴⁷⁴ *Id.*

⁴⁷⁵ For example, some of the capabilities important for a competing LEC's success include an experienced management team, marketing expertise, ownership of network and infrastructure, access to capital, efficient operations, an integrated product offering, and a high level of customer service.

⁴⁷⁶ Applicants argue that competitors, or potential competitors, for local exchange and exchange access services market include electric and gas utilities, wireless carriers, other interexchange carriers, independent telephone carriers, construction companies, cable companies, and out-of-region incumbent LECs. WorldCom/MCI Jan. 26 Reply Comments at 17. We find that there are a sufficient number of market participants on our list below to allay anticompetitive concerns in the larger business market; therefore, we conclude that we need not reach the question of whether the types of companies identified by Applicants are potential competitors in this market.

⁴⁷⁷ *See supra* at para. 168.

exchange subsidiaries, Brooks Fiber and MFS, combine the advantages of extensive facilities,⁴⁷⁸ existing customer accounts,⁴⁷⁹ substantial experience in both sales and customer care, and superior management. Both Brooks Fiber and MFS have accumulated experience in providing local exchange and exchange access services to business customers. MFS has focused on building extensive fiber networks in a number of major metropolitan areas, including the New York City metropolitan area.⁴⁸⁰ Brooks Fiber, by contrast, has built a reputation for providing quality service in smaller cities and, according to one analyst's report, was the first competing LEC to achieve significant success in using unbundled local loops.⁴⁸¹ WorldCom also has significant capabilities for serving the business long distance market, including facilities, customer relationships, and "know how."

175. *MCI*. Like WorldCom, MCI has a relatively small share of the larger business market for local exchange and exchange access service. The record shows, however, that MCI has a widely-recognized brand name, recognized marketing expertise, and a broad base of business customers.⁴⁸² Further, MCI's local exchange services division, MCImetro, has an established network of facilities in place, including switches in 15 cities, with switches planned or pending for another seven cities.⁴⁸³ Moreover, like WorldCom, MCI has significant capabilities for serving the business long distance market, including a vast customer base, "know how," and existing facilities.

176. *AT&T/TCG*. AT&T/TCG presently has substantial assets, capabilities, and incentives for competition in the larger business market for local exchange and exchange access services. Self-described as the nation's first and largest competing LEC,⁴⁸⁴ TCG is a well-established and recognized competing LEC primarily serving the business market. TCG

⁴⁷⁸ Applicants describe WorldCom as perhaps the furthest along among competitive LECs in constructing local access facilities, citing 13,000 buildings served in 23 states as a "far greater number than reported by any other competitive access provider." See WorldCom/MCI Jan. 26 Reply Comments, Carlton and Sider Decl. at 5-7. This makes WorldCom at least comparable in size to TCG. See *AT&T/TCG Order* at para. 5 n.16.

⁴⁷⁹ WorldCom has a "diverse business base." See WorldCom/MCI Mar. 20 Reply Comments at v.

⁴⁸⁰ See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20032-33, para. 87.

⁴⁸¹ Bruce J. Roberts, *Local Telecommunications Industry*, SBC Warburg Dillon Read, Inc., Sept. 16, 1997, at 40.

⁴⁸² WorldCom/MCI Jan. 26 Reply Comments at 9.

⁴⁸³ Letter from Andrew D. Lipman, Counsel to WorldCom, Swidler & Berlin, to Magalie Roman Salas, Secretary, FCC, Exhibit 1, (filed June 24, 1998) (citing *1997 Annual Report on Local Telecommunications Competition*, New Paradigm Resources Group, Inc. at 165-85) (WorldCom June 24 *Ex Parte*).

⁴⁸⁴ TCG 1997 Annual Report at 17 (1998).