Before the
FEDERAL COMMUNICATIONS COMMISSION

In re Applications of	)	
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SPRINT CORPORATION,	)	
Transferor,	)	
	)	
and	)	
	)	
MCI WORLDCOM, INC.,	)	**CC Docket No. 99-333**
Transferee,	)	
	)	
For Consent to Transfer Control of	)	
Corporations Holding Commission Licenses	)	
and Authorizations Pursuant to Sections 214	)	
and 310(d) of the Communications Act and	)	
Parts 1, 21, 24, 25, 63, 73, 78, 90, and 101.	)	
	)	

COMMENTS OF THE PUBLIC UTILITY LAW PROJECT

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Date: February 17, 2000

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COMMENTS OF THE PUBLIC UTILITY LAW PROJECT

1. Introduction and Summary of Comments.

The Public Utility Law Project of New York, Inc. ("PULP") submits these comments in response to the January 12 and 19, 2000 notices of the Federal Communications Commission ("FCC" or "Commission") inviting comments on the joint application of MCI WorldCom, Inc. ("MCI WorldCom") and Sprint Corporation ("Sprint") to merge Sprint into MCI WorldCom (the "proposed merger").

PULP recommends that the application be denied because the Applicants failed to meet their burden to show that present or future public convenience and necessity require or will require the merger; failed to demonstrate that the potential benefit of the merger outweighs potential harms; failed to demonstrate that the merger promotes competition and de-regulation; and failed to demonstrate that the merger will advance the broad aims of the Communications Act, including universal service and acceleration of deployment of advanced telecommunications services in low income and rural communities.

The Commission's 1998 order approving the MCI - WorldCom merger does not provide a foundation for approving this merger of MCI WorldCom and Sprint because both parties in this case are national, brand name competitors in many markets, including the residential mass market. The application inadequately addresses the effects of the proposed merger on current markets, and focuses on largely speculative claims that the proposed merger will advance competition in future markets. Both providers are robust suppliers of a wide range of services. Their merger, while desirable to their stockholders, is not necessary for the public convenience and is not in the public interest. The combination of the second and third largest national providers of long distance service threatens universal service and customer protection policies that are premised upon the existence of healthy competition for all customers and all market segments.

2. The Public Utility Law Project (PULP).

PULP is an independent non profit public interest law firm representing the interests of low income residential consumers in telecom, energy, and other utility matters. PULP welcomes the opportunity to submit these comments.

3. The Legal Standard for Merger Approval.

The November 17, 1999 joint *Application for Consent to Transfer Control ("Application")* of MCI WorldCom and Sprint states that upon closing of the proposed merger in mid-2000, "the separate corporate existence of Sprint will cease…." *Application* at 3.[1] The *Application* focuses almost exclusively upon the competitive

[1] "[T]he respective Boards of Directors of MCI WorldCom and Sprint have each determined that the merger

effects of the proposed merger, but does not directly articulate or fully address the applicable legal standard. The Commission recently discussed the standard, as follows:

> 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 ... would serve the "public interest" . . . . *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" [the merged entity] to operate the acquired telecommunications lines, and that "neither the present nor future public convenience and necessity will be adversely affected" by the discontinuance of service from [Sprint]."* ****
>
> The public interest standard of sections 214(a) and 310(d) is a flexible one that encompasses the "broad aims of the Communications Act" . . . . *These broad aims include, among other things, the implementation of Congress' "pro-competitive, de-regulatory national policy framework designed to . . . open [] all telecommunications markets to competition" .... "preserving and advancing" universal service . . . , and accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services*"..... 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.... [T]he 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.... Of course, we note that this list of considerations is not exhaustive, and an assessment of other factors may be appropriate in the future.
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> 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 ... and, under both standards, *Applicants bear the burden of proof.*[2]

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of Sprint with and into MCI WorldCom … is in the best interests of their respective stockholders…." *Agreement and Plan of Merger Dated As Of October 4, 1999 Between MCI WorldCom, Inc. and Sprint Corporation,* at 1.

[2] *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control,* 13 FCC Rcd. 18025, (FCC 98-225, para. 8 - 9 1998) (*Footnotes omitted) (Emphasis added).*

The proposed merger is extraordinary. As stated by the Chairman of the Commission:

> American consumers are enjoying the lowest long distance rates in history and the lowest Internet rates in the world for one reason: competition. Competition has produced a price war in the long distance market. This merger appears to be a surrender. How can this be good for consumers? The parties will bear a heavy burden to show how consumers would be better off.[3]

4. The Application Should be Denied Because Applicants Failed to Meet Their Burden to Show that the Merger is Necessary, that its Benefits Outweigh its Harms, that it Would Advance Competition and the Aims of the Communications Act, and that it is in the Public Interest.

Not surprisingly, the Applicants place great reliance on the Commission's 1998 order which allowed WorldCom, then the fourth largest long distance provider, to acquire the second largest provider, MCI. *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control*, (FCC 98-225) (1998). Reliance on that order is misplaced, however, because of fundamental dissimilarities of the merging parties. Before merging with MCI, WorldCom was not a mass market provider. Rather, WorldCom then was "a 'maverick' supplier of wholesale long distance services." *Id.* at para. 23. Accordingly, when WorldCom was merging with MCI, the Commission expressly found:

> *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 share and its lack of substantial brand recognition,* as conceded by both Applicants and commenters. WorldCom states that it has chosen not to market directly to residential end users and, instead, services these customers indirectly through its wholesale of long distance services. *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control, supra,* (FCC 98-225, para. 33 1998) (*Emphasis added).*

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3 *Statement of FCC Chairman William E. Kennard on Proposed Merger of MCI WorldCom, Inc. and Sprint Corp.*, FCC News, October 5, 1999.

In sharp contrast, the merging entities in this case are now both major national competitors in many markets, including the residential long distance market, each having built strong brand name recognition among consumers as alternatives to the former monopoly provider, AT&T.[4] When it emphasized WorldCom's "maverick" characteristics and focus on the business and wholesale segments of the market, the Commission clearly signaled in approving the 1998 merger that any combination of major mass market providers must be viewed differently. This distinction is not sufficiently addressed in the *Application.*

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[4] As stated by the Applicants:

> *Sprint is a global communications company at the vanguard of providing long distance, local and wireless communications services.* Sprint built and operates the United States' first nationwide all-digital, fiber optic network. Sprint PCS is building the only all-digital, all-PCS nationwide wireless network from the ground up, and currently serves more than 280 metropolitan areas. Sprint's local telephone division serves approximately 7.9 million access lines in 18 states. Sprint earned $17 billion in 1998 revenues and serves more than 20 million residential and business customers. *Application* at 3 (*Emphasis added).*
>
> MCI WorldCom is a global leader in communications services with established operations in more than 65 countries encompassing the Americas, Europe and the Asia-Pacific regions. *MCI WorldCom is a premier provider of facilities-based and fully integrated local, long distance, international and Internet services....* *Id.* (Emphasis added).

The Applicants seek to convince the Commission of a counterintuitive proposition: eliminating Sprint, a prominent current competitor in many telecommunications markets, including the residential mass market, will advance and not lessen competition in each of numerous markets. The Applicants cannot negate the "here and now" reality – if the proposed merger were to go forward, just two companies, AT&T and the merged entity, would control approximately 80% of the long distance toll market in this country.[5]

The *Application* anticipates arguments against further market concentration, claiming "there are no barriers to mass market customers switching carriers if they are dissatisfied with their current long distance company," *id* at 29, citing estimates of "churn" rates that are as high as 30% a year. The word "churn" connotes a mindless rotation of customers among providers, but actually it represents customers switching to find cheaper or better service from an alternative provider. Today, these customers might choose among a handful of national brand name providers such as AT&T, MCI WorldCom, and Sprint. After the merger, the customers will no longer have Sprint as a choice.

[5] Applicants at page 22 of their application cite Commission data showing that "other" long distance companies have a market share of "almost 21%." Presumably, the remainder -- almost 80% -- is the combined market share of AT&T, MCI WorldCom and Sprint.

The Applicants try to balance the reduction of current major competitors by speculating that eventually more former Bell Operating Companies (BOCs) will be allowed to enter the long distance market. The customers' choices among national brand providers in the future envisioned by the Applicants will be mainly limited to the troika of two former monopoly providers (AT&T and the regional BOC) -- and MCI WorldCom. MCI in its 1998 Annual Report to its shareholders recognized that one of its major business risks is "the impact of competitive services and pricing."[6] The elimination of Sprint as the only major national competitor who is not AT&T and not the regional BOC handily reduces this risk, to the detriment of customers and the public interest.

Significantly absent from the *Application* is any real analysis of (1) the proposed merger's impact on competition in markets where both MCI and Sprint presently compete, such as long distance toll and (2) the effects of the merger on local service competition. In New York, the ground-breaking actions of the state commission paved the way for Sprint and MCI WorldCom both to compete with incumbent former monopolies in local service markets. With Sprint out of the way, it will be easier for the merged entity to focus their energies in non-local and other global markets. They may be able to delay their entry into smaller domestic markets, confident with Sprint gone that they can enter at a later time.

The *Application* craftily avoids rigorous analysis of the effects of the merger on existing markets and the emerging local markets, and instead shifts the emphasis to the more speculative effects of the merger in future markets for future services. For example, the Applicants assert their combination will create a

[6] *MCI 1998 Annual Report, Management's Discussion of Financial Condition and Results of Operations.*

"robust supplier for all distance services." *Application* at 4. This shifts attention from the immediate market concentration the proposed merger would create among *existing* providers in *existing* markets, such as long distance toll, to a more easily manipulated construct of what will be needed to meet *future* competition from former Bell Operating Companies (BOCs) in *a future* market for re-packaged "all distance" service customers would obtain from just one provider. Meanwhile, the merger would eliminate Sprint as an existing "robust supplier" and competitor in the *existing* local, toll, Internet and wireless markets.

A merger is not necessary for present or future public convenience. Indeed, until recently was not deemed necessary by Sprint:

> Sprint Corp. is thriving on its own and has no need to join the parade of mergers transforming the telecommunications industry, chief executive officer William T. Esrey said Thursday. "If I thought we needed something we didn't have, we would consider going and getting it or even consider a merger," Esrey said. "But I don't know what that is. We're very comfortable where we are." * * * *
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> Esrey, while declining to comment on speculation, said Sprint stands alone in the industry in the range of services it offers. "We spent a lot of time positioning ourselves for the last six to eight years for the things we think the public is going to need, whether its local service, long-distance, data services, Internet access and our global alliance, to give us economical worldwide communications," he said. *Sprint CEO: No Merger in Company's Future; Esrey Says Business Already Offers Wide Range of Services,* Corpus Christi Caller Times, September 25, 1998.

The *Application* cannot disguise the present robustness of these two remarkably successful competitive companies, and does not demonstrate that the elimination of Sprint is necessary to prevent it from faltering in the future.

The *Application* cleverly attempts to avoid two realities: (1) there is little evidence that the merged entity will enter the market for local service, and (2) the merger would result in an overwhelming concentration of market power in the long distance market. These awkward facts are finessed by conflating the two existing deficiencies in the *existing real markets* by postulating a *future ideal market* of "all distance" service that defines away the problem.[7] A persistent refrain is that the difference between local service and long distance should be ignored, so the virtual absence from one market can be offset by overwhelming domination of two providers in the other market:

[7] The Applicants assert that there is customer demand "to buy a package of wireline telephone service together from the same company." *Application* at 6. If true, both companies are now well positioned with nationally prominent brand name recognition to compete with one another and any other new entrants for such customers, without the proposed merger. The companies are able to offer such service whenever they have access to a local market. They do not need to merge to do this.

The *Application* does not explain how the proposed melding of long distance and local service can be accomplished without compromising the Commission's and states' regulatory requirements that create a separate basic local service playing field, and protect customers from disconnection of that service for non-payment of long distance toll services. *E.g.*, New York PSC regulations 16 NYCRR § 609, *et. seq*. These state and federal policies, along with improved lifeline and link-up programs, have led to increased household access to local telephone service in recent years.[8] These policies require continued separate treatment of the local and long distance markets, whether provided by one company or several. Any attempt to re-meld local and long distance service threatens these important gains for residential telephone customers. Conflation of basic local service and toll service markets should be rejected as being counter to the public interest and regulatory principles protecting basic local service, and, therefore, the vaguely described future market for "all distance" service cannot be a justification for the merger.

The merger also frustrates the de-regulatory goals of the Commission, which include the channeling of competitive market forces to accomplish what once was done with direct regulation. If the force of competition is weakened by consolidation and merger, the need for direct regulatory intervention increases. The New York Commission illustrated this principle in 1998 when considering the MCI-WorldCom merger:

> Because of the increased market concentration that will occur as a result of the merger in the intrastate toll market during the near-term, we shall make our approval subject to the condition that the combined entity not raise toll rates

[8] Household telephone penetration in New York rose from 91.8% in 1984 to 94.8% in 1998. *Telephone Penetration By State,* PSC (Nov. 4, 1999) http://www.dps.state.ny.us/penetrat.htm.

> over the next 2 years, or until Bell Atlantic-New York is authorized to provide interLATA services…."[9]

Competition, not regulatory interventions, should be expected to bring *lower* rates and improved services to consumers over time. This expectation is undermined whenever a major competitor is eliminated and market shares become more concentrated. If concerns over price competition among remaining providers were the only problem with the filing, a condition more appropriate than a price cap would be to require substantial rate reductions to capture for consumers some of the alleged synergy benefits of the proposed merger.

The elimination of a major competitor raises concerns well beyond pricing of existing services, however, including the rate of deployment of advanced services, "redlining," customer protection, and maintenance of service quality. Market power can be exercised not only by maintaining high prices to increase revenue, but also by subtle, tacit understandings among major competitors to shed costs by not competing to provide services that are less profitable. Eliminating Sprint could reduce competition among the remaining major providers for customers in rural areas or low income neighborhoods, and for customers perceived to have low profit potential or higher service costs (such as those with low volume usage, collection or frequent customer service problems). After the merger such customers may become even a lesser priority for service or extension of advanced networks in the marketing strategies of the remaining giants, MCI WorldCom and AT&T. The Applicants point to the number of small long distance providers,

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[9] *Petition of WorldCom, Inc. for Approval of the Transfer and Control of MCI Communications Corporation to WorldCom, Inc., NY PSC* Case 97-C-1804, Order Approving Merger Subject to Conditions and Denying Petitions for Rehearing (Issued June 2, 1998) at 7.

suggesting they might be eager to step in to serve market segments mutually ignored by AT&T and MCI WorldCom. Many of these are companies, however, are resellers or cream-skimmers themselves, focusing only on business customers. They lack the ubiquity of Sprint, the ability to make major infrastructure investments, and none of them enjoy the brand name recognition of Sprint.

The Applicants fail to provide information from which one may assess the impact of the merger on local service competition, universal service, and deployment of advanced services. In 1998, the Commission relied upon commitments of MCI and WorldCom that their merger, if approved, would foster the local services market competition for residential customers sought by the Commission:

> With respect to their commitment to providing local residential service, Applicants submitted two letters from WorldCom Chairman, President, and CEO Bernard J. Ebbers and MCI Chairman Bert C. Roberts. The first letter states MCI WorldCom's intention to be "the leading local service competitor for both residential and business customers of all sizes across the country. * * * * Significantly, Applicants also contend that MCI WorldCom will use the fiber that it has deployed in city centers to provide residential service to multiple dwelling units (MDUs). * * * * *These letters from Messrs. Ebbers and Roberts represent a commitment from WorldCom and MCI not to abandon the residential long distance market, to augment their efforts in the residential local market, and to offer residential customers a total package of services including local, long distance, wireless, international, and Internet. FCC 98-255, at para. 191-192 (*Emphasis added).

As Commissioner Tristani pointed out in her separate opinion regarding the 1998 merger, this consideration was understood to be a solemn commitment upon which the FCC's approval was premised. Yet the *Application* provides no basis upon which once can judge, in 2000, the degree to which MCI WorldCom fulfilled their 1998 commitment. To be sure, the Applicants again sing the familiar refrains to soothe the Commission with vague representations about future plans to enter local markets. Yet, no verse goes beyond vaporous promises and symbolic efforts to develop local competition, particularly in the residential market.[10]

In 1998, the Commission examined and rejected the contentions of commenters that the MCI - WorldCom merger would perpetuate alleged "redlining" in the deployment of fiber optic backbone, and the consequent limitation of advanced services dependent upon such infrastructure. The Commission concluded that "such actions would be contrary to the purpose of the Communications Act, the obligations imposed on common carriers in the Communications Act, and the fundamental goal of the 1996 Act to bring communications services 'to all Americans.'" *FCC 98-225*, at para. 208. The Commission found, however, that while the maps of fiber deployment by MCI and WorldCom showed little penetration of such backbone and services in low income and minority communities, this was not due to redlining but simply because both WorldCom and MCI had up to that time aimed their deployment of fiber optic lines mainly at the business sector. The merging parties, as discussed above, made a commitment in1998 to enter local residential markets. Accordingly, it was incumbent upon MCI WorldCom to have come forward with a demonstration of the degree to which they are meeting their local service commitments, and how they are addressing the issue of selective deployment of fiber and other infrastructure needed to bring advanced services to low income

[10] In its New York Petition, MCI WorldCom claims it "expanded its service offering on a statewide basis," *Joint Petition to New York PSC* at 19, after the 1998 merger, but did not provide data to indicate fulfillment of its promise to serve local markets. "Sprint, which began offering resold local exchange service in New York on November 7, 1999 [ten days before the merger petition], has negligible local exchange market share in New York." *Id.* at 19.

communities. The assertion that future broadband wireless service offerings will emerge to address these concerns is speculative at best.

In 1998, the Commission also expressed the view that if economic investments in low income communities could be made, the merging entities would make those same investments whether or not they merged. This view should be reexamined because in any enterprise, there are some projects that are more economic than others to pursue, and there are limits to what can be invested and managed well at any time. The merged entity might well decide to invest further in global operations in Mexico, Peru or Rome, and to defer extension of the benefit of advanced technologies to the rural or low income residents of Mexico, N.Y., Peru, NY, Rome, NY., or the Bronx, N.Y. Both of the market titans that would remain after the merger could more freely focus on their larger international markets, confident that in the meantime there was no major competitor like Sprint moving to capture the marginally less lucrative markets.

The goal of connecting all Americans to the telecommunications networks is yet to be realized. Approximately five percent of households in New York State still lack *any* telephone service, and 32 states have lower household telephone penetration rates than New York.[11] Among states with large populations, New York has the lowest percentage of households with Internet access; only 15 states have lower household internet access than New York, and none of those states have more than 600,000 households.[12] The *Application* does not address these concerns or show how removal of a vigorous major

[11] *Falling Through the Net: Defining the Digital* Divide, *Percent of Households with Telephones, by States*, p. 16, U.S. Dept. of Commerce (1999).
[12] *Id.*, at 30 (*Percent of Households with Internet Access, by States: 1998).*

competitor and redeployment of resources of the merged entity will affect competition to serve low income and rural households and communities.

Applicants may argue that they are contributing to meet the costs of universal service and will offer lifeline assistance to eligible customers whenever they provide local service. The Commission may have accepted that rationale in the MCI-WorldCom merger, but it must be remembered that the merging entities in that case had not focused on local residential service. The Applicants failed to show what efforts they are now making to assure that all local service customers eligible for reduced price lifeline and link-up service actually receive it, and how they are working to effectuate Congress' goal to make advanced services available in all low income and rural communities, and how the proposed merger would affect those efforts.

In addition, the reduced competition in intrastate toll service raises consumer protection concerns that customers will lose toll service due to arbitrary or overly harsh collection actions. For example, with the advent of intrastate toll competition, the New York Commission relaxed of its Telephone Fair Practices (TEFPA) rules governing, *inter alia,* the obligation of competitive providers to serve, termination of service, deferred payment agreements, and medical emergency service. This relaxation was premised on the assumed existence of robust competition. Under this theory, companies with abusive collection practices that compromise continuous service would be punished, not by regulators, but by losing customers who would be recruited by other vigorous competitors.[13] That assumption is now threatened by the proposed elimination of Sprint as a competitor and further concentration of market power in both the interstate and the intrastate toll markets. In a toll market dominated by only two providers the leading companies may, even without overt collusion, develop similar practices that would enable them to redline, shed customers with credit risk, suspend, block or terminate service without adequate notice as a collection tactic, confident that the customer is not likely to find a significant competitor employing better practices.[14] Preserving Sprint as a vital national competitor in the residential long distance toll market will lessen the likelihood of such abuses, reduce the number of consumer complaints requiring determination by the regulatory agencies, reduce the need for direct regulatory intervention to protect customers, and thus further the Commission's de-regulatory policies.

CONCLUSION

The *Application* should be denied because Applicants failed to demonstrate that the proposed merger would be in the public interest and consistent with the Commission's regulatory policies. Alternatively, Applicants should be required to supplement the

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[13] The New York Commission eased the requirements of the Telephone Fair Practices Act regulations by making them applicable only to basic local service upon a showing that competitive intraLATA toll service was available.

[14] IntraLATA long distance service (in general, long distance calls made within the same area code) is included in the New York definition of "basic local exchange service" services, *"unless intraLATA pre[sub]scription is offered and selective intraLATA service is available*." 16 NYCRR §609.2(15). The availability of "selective intraLATA service" means that if a customer is terminated by one provider, it is technologically possible for that customer to select another competitive provider willing to provide service. In 1997 the New York Commission determined that throughout New York State, except for customers of one small company, "IntraLATA presubscription is available." Case 96-C-1114, *In the Matter of the Rules and Regulations of the Public Service Commission*.

application with further information to address the concerns discussed above, and the parties should be given further opportunities to respond to any new submissions.

Dated: February 17, 2000
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