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Decision 97-07-060 July 16, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Joint Application of MCI Communications Corporation (MCIC) and British Telecommunications plc (BT) for All Approvals Required for the Change in Control of MCIC's California Certificated Subsidiaries That Will Occur Indirectly as a Result of the Merger of MCIC and BT.	Application 97-01-012 (Filed January 3, 1997)

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O P I N I O N

Summary

In this opinion, we approve the proposed merger between MCI Communications Corporation (MCIC) and British Telecommunications plc (BT) (also jointly referred to as applicants) as in the public interest under Public Utilities (PU) Code § 854(a).

The Application

On January 3, 1997, MCIC and BT filed the instant application seeking expedited, ex parte Executive Director approval under PU Code § 854(a) for the change in control of MCIC's five California certificated carriers. These subsidiaries are: 1) MCI Telecommunications Corporation (MCIT), an interexchange carrier providing interLocal Access and Transport Area (LATA) and intraLATA private line and metered services and intrastate resale switched cellular services; 2) MCI Metro Access Transmission Services, Inc., a competitive local exchange carrier (LEC) operating in the service area of Pacific Bell which also provides intraLATA toll services and switched and special access service intrastate; 3) Teleconnect Company, an interexchange carrier providing interLATA and intraLATA metered services; 4) Teleconnect Long Distance Services and Systems, an interexchange carrier providing interLATA and intraLATA private line services; and 5) Nationwide Cellular Services, Inc., a cellular carrier providing intrastate resale switched cellular service and interexchange metered services. BT has owned a 20% interest in the voting stock of MCIC since 1994 with the ability to affect certain MCIC corporate actions pursuant to an attendant Investors Agreement. After the 20% stake in MCIC was acquired, MCIC and BT formed a joint venture, Concert, to provide for clients' global communications needs. The joint venture Concert covers 60 countries and has around 2,500 customers.

Pursuant to § 7.1(b) of the Agreement and Plan of Merger (Agreement), the termination date for the transaction is October 31, 1997, which shall be extended to April 30, 1998, if required regulatory approvals are not yet obtained.

The transaction is structured for U.S. federal income tax purposes as a reorganization under Internal Revenue Code (IRC) § 368(a).[1] Under the Agreement, dated as of November 3, 1996, each issued and outstanding share of common stock, par value $0.10, of MCIC, other than shares already owned directly or indirectly by BT or MCIC, will be converted into the right to receive ordinary shares of BT represented by American Depositary Shares (ADS) of BT, each representing ten ordinary shares of 25 pence each of BT, and $6.00 cash per share of MCIC exchanged. MCIC shareholders will receive 0.54 ADS plus $6.00 for each share exchanged. The dollar value of fractional ADSs will be paid in cash. Dissenting stockholders have appraisal rights. As a result of the exchange of MCIC shares, MCIC will become a wholly owned subsidiary of BT. MCIC will then immediately be merged into Tadworth, another wholly owned subsidiary of BT. Tadworth's name will be changed to MCI Communications Corporation (new MCIC) upon consummation of the MCIC-Tadworth merger.

All certificated California carriers owned by MCIC will thus become indirectly owned by BT, but shall continue to operate under their present names and pursuant to their tariffed rates, terms, and conditions. Applicants allege that the manner in which service is provided to California telephone subscribers will not be affected by the change in control. The affiliate relationships between applicant MCIC and its subsidiaries providing service in

1 This IRC provision would exempt the exchange of shares from capital gains taxes, though taxes would be due on the receipt of the cash consideration by MCIC shareholders.

California will be unaffected by the merger. These subsidiaries will continue to provide telecommunications services subject to the Commission's jurisdiction. Upon consummation of the change in control, BT will then change its name as the parent company to Concert plc (new Concert) and will create a new subsidiary for its United Kingdom (UK) operations called British Telecommunications plc. Applicants assert that our regulatory authority over the entities providing telecommunications services in California will not be affected after approval of the merger.

Iain Vallance, the chairman of BT, and Bert C. Roberts, Jr., the chairman of MCIC, will be appointed co-chairmen of the new Concert holding company. Vallance has been a director of BT since 1984, served as its chief executive from 1986 through 1995 and has been chairman since 1987. Board meetings will be alternated between the United States (US) and the UK. Gerald H. Taylor, Chief Executive Officer (CEO) of MCIC, will become president and chief operating officer of the new Concert. Senior management of the new Concert will be comprised of nine current BT executives and eight current MCIC executives. A majority of the board of directors of the new MCIC will consist of US citizens. The officers of MCIC immediately prior to the merger will remain the same post merger. The boards of directors of MCIC subsidiaries holding California certificates and Federal Communications Commission (FCC) licenses and certificates will be unaffected and shall remain comprised of entirely US citizens. The new Concert board of directors will be comprised of 15 directors. There will be three executive directors and one nonexecutive director designated by BT, three executive directors designated by MCIC, and eight additional nonexecutive directors to be drawn equally from the present boards of MCIC and BT. Applicants believe that after the merger, approximately 35% of new Concert's shares will be held by US citizens. The new Concert will have its headquarters in both Washington, DC and London.

BT currently has more than 2.3 million shareholders and is listed on the London, New York, and Tokyo stock exchanges. It employs approximately 130,000 people. BT's main products and services are local, long-distance and international calls (with direct dial connections to more than 230 countries), telephone lines, equipment and private circuits for homes and businesses, mobile communications services, Internet services, and provision and management of private networks. In the UK, BT has 20.5 million domestic and 6.8 million business exchange lines. It handles about 100 million local, national, and international calls each day. BT's main presence is in the UK which is now open to competition. The UK has over 150 licensed telecommunications operators, including cable television companies.

BT also has a significant presence in most of the worldwide markets. In mainland Europe, BT is involved in joint ventures with Banco Santander in Spain, the German Industrial Group VIAG, and the Italian Banca Nazionale del Lavoro. BT has arrangements with Danish and Norwegian telecommunications operators to provide services in the Swedish market. In the Asia-Pacific region, BT has partner or distributorship arrangements in a number of countries, including China (Hong Kong), India, Indonesia, Japan, Korea, Malaysia, New Zealand, Singapore, Taiwan, and Thailand.

BT has been modernizing and expanding its networks and supporting systems, having invested over 2 billion pounds ($3.33 billion) in the 1995-1996 fiscal year.[2] Capital improvements have been made in modernization of its local access network, telephone exchanges, and construction of its cellular digital network. BT anticipated even higher capital outlays for

2 The amount of dollars in parentheses in this and the following paragraph are derived from the Wall Street Journal Exchange Rate of June 24, 1997.

improvements in the 1996-1997 fiscal year. BT has been continuing a downward trend in its retail prices. BT's program of community involvement is one of the largest of its kind in the UK. In 1995, BT made contributions in cash and kind worth 15 million pounds ($25.02 million), with total donations to charities exceeding 2.7 million pounds ($4.5 million). BT offers a Light User discount scheme (similar to Lifeline services) for those needing the phone as a lifeline. BT has been the recipient of awards for its work to meet the needs of its customers with disabilities.

For its year ending March 31, 1996, BT's total group operating profit was 3.1 billion pounds ($5.17 billion), a 16.4% increase over the prior year. Operating costs exceeded prior year's costs by only 1%. Its net profit for the fiscal year was 1.98 billion pounds ($3.3 billion), a 14.7% increase over the prior year. Total assets amount to 23.53 billion ($39.2 billion) pounds. Net worth stands at 12.67 billion pounds ($21.13 billion). Cash in the bank and in hand amounts to 121 million pounds ($201.8 million).

MCIC is a Delaware corporation, authorized to transact business in California. Through its subsidiaries, MCIC provides common carrier communications services within California and in both the domestic interstate and international markets. The MCIC group employs 50,367 people. Its services include voice, data, messaging, facsimile, and a variety of enhanced services. It has 6.786 billion miles of capacity circuit and processed 23.365 billion billable calls in 1995. For its 1995 fiscal year, MCIC revenues grew to $15.3 billion, an increase of 14% over 1994 revenues. Net income was $1.1 billion (excluding special charges), which was a 20% increase over the prior year. Its total assets are $19.3 billion. Net worth stands at $9.6 billion.

Applicants' Supplement to the Application

On May 27, 1997, applicants filed a supplement to the application. In their supplement, applicants stated that MCIC

representatives had been meeting with members of the Commission's Office of Ratepayer Advocates (ORA) to discuss benefits of the merger to California ratepayers. As a result of these discussions, applicants made the following additional commitments. First, applicants will acquire and place a local switch and local network to serve Sacramento. Second, MCIC will expand its existing local networks to provide facilities-based service to consumers in Oakland, San Jose, Anaheim, and the surrounding areas of Orange County. These new infrastructure investments will involve a minimum of $20 million. MCIC's long distance subsidiary, MCIT, will also offer an intrastate Family Assist long distance lifeline calling plan in California, to become effective no later than July 1, 1997. This new intrastate Family Assist Plan (FAP) will supplement MCIT's current interstate FAP, which is a unique, low price, long distance service that MCIT has introduced to meet the needs of eligible Lifeline customers.[3] As part of the new intrastate FAP, MCIT will provide 60 minutes of discounted intrastate calling per month in addition to the 60 minutes currently offered for monthly interstate calling, for a total of 120 minutes of inter-and intrastate Lifeline calling. Intrastate, interLATA calls will be billed at $0.08 per minute and intraLATA calls will be billed at $0.03 per minute. After the 60 minutes per month of discounted intrastate FAP calls have been reached, additional calling will be priced at the rate of $0.10 per minutes for intrastate interLATA calls and $0.05 cents per minute for intraLATA calls. MCIC estimates that qualified customers will achieve savings of approximately $2 million in the first year of service in addition to savings achieved under the existing

3 Lifeline service is a reduced rate program for local service which is offered to consumers who qualify as low income. It is part of the Commission's universal service program.

interstate FAP. The intrastate FAP will be supported in all standard MCIC languages.

Regulatory and Shareholder Approvals

We take official notice of the fact that the shareholders of both corporations have approved the merger, as have the European Commission and the Department of Justice (DOJ), each with conditions to prevent anticompetitive behavior. The FCC has not yet acted upon applicants' application, nor have all of the states from which approval has been sought.

The Protest Period

Notice of the application appeared in the Commission's Daily Calendar of January 15, 1997. The protest period expired on February 14, 1997. Due to our decisions in the Interim Opinion, Decision (D.) 97-05-092 discussed infra, and the withdrawal of the ORA "protest," the application is unprotested.

Procedural Background

1. The Responses to the Application

AT&T Communications of California, Inc. (AT&T-C) and Pacific Telesis Group and SBC Communications, Inc. (Telesis/SBC) filed timely responses to the application.[4]

AT&T-C asks that the Commission defer its decision on the application until the FCC rules on the applicants' request for FCC approval of the transaction. AT&T-C's federal antitrust concerns over the merger are raised in that forum, and AT&T-C believes that the FCC's resolution of these issues will provide important guidance to the Commission. AT&T-C requests that the Commission accord the proper deference to the FCC's resolution of the

4 Pursuant to Rule 44 of the Commission's Rules of Practice and Procedure (Rules), "a response is a document that does not object to the authority sought in an application, but nevertheless presents information that the party tendering the response believes would be useful to the Commission in acting on the application."

interstate and international issues that the merger poses. Appended to AT&T-C's response is a copy of its parent company's comments to the FCC.

In its response, Telesis/SBC raised the issue of whether any MCIC California subsidiary has more than $500 million in gross annual California revenues, thus triggering the application of PU Code § 854(b) and (c).[5]

2. Applicants' Reply to the Responses

On March 6, 1997, applicants filed their reply to Telesis/SBC's and AT&T-C's responses. Applicants contended that, regardless of whether MCIC has $500 million in gross annual California revenues, PU Code § 854(b) and (c) did not or should not apply to the merger transaction. Applicants asserted that under PU Code § 854(a), the Commission is given the discretion to establish by rule or order the guidelines for examining mergers, acquisitions or changes of control, and therefore could conclude this merger requires scrutiny only under PU Code § 854(a). Applicants also argued that PU Code § 853(b) permits the Commission to exempt any utility or class of utility from the provisions of PU Code § 854 if

5 PU Code § 854(b) requires that the Commission make certain antitrust and economic benefit findings before authorizing a change in control "where any of the utilities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars." Section 854(b) also requires the Commission to equitably allocate, where the Commission has ratemaking authority, at least 50% of the total short-term and long-term economic benefits to ratepayers. PU Code § 854(b)(3) requires that there be no adverse effect on competition and requires an advisory opinion from the state attorney general on this issue and any possible mitigation of adverse effects. PU Code § 854(c) requires that the Commission consider eight criteria and find that on balance the change in control is in the public interest "where any of the entities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars."

it found that such an exemption for this merger transaction was in the public interest.

Although the main thrust of applicants' reply was their assertion that PU Code §§ 854(b) and (c) should not apply to this transaction, the reply contained supplemental financial information filed under seal pursuant to the ruling of the Law and Motion Administrative Law Judge (ALJ). The information was made available to interested parties upon the signing of a nondisclosure statement. Applicants asserted that the 1996 year-end revenue records showed that no MCIC California-certificated subsidiary had gross annual California revenues in excess of $500 million.

3. The Motion to Accept a Late-filed Protest

On February 28, 1997, ORA filed a motion to accept a late-filed protest which also questioned whether there were $500 million in gross annual California revenues.[6] ORA's protest requested that the Commission hire an outside auditor to determine whether MCIC's gross annual California revenues exceeded $500 million. No hearing was requested in the pleading.

Applicants opposed ORA's motion to file the late protest, alleging that no reason for not making a timely filing had been shown, and that the protest raised no new issues and would unduly and unnecessarily delay the proceeding. Applicants also asserted that the pleading was not properly a protest under our Rules, as it did not contain the information required by Rule 44.2.[7]

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6 Rule 44 declares that, "[a] protest is a document objecting to the granting in whole or in part of the authority sought in an application."

7 Rule 44.2 requires that:

> "A protest must state the facts constituting the grounds for the protest, the effect of the

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ORA did not make a Rule 45(g) request for permission to reply to applicants' response.

4. The Petition to Intervene

On March 26, 1997, the Greenlining Institute (GI) and the Latino Issues Forum (LIF) filed a Notice of Intent to Participate and Petition for Leave to Intervene (petition) under Rules 53 and 54. The GI and LIF petitioned the Commission for leave to participate in the application proceeding, stating that they "[did] not yet either support or oppose the Application." Therefore, GI and LIF requested that the petition be granted and that they be allowed to become parties to Application 97-01-012 and their names be added to the list of active participants who receive all documents.

Applicants were not served with a copy of the petition until it was faxed to them on April 28, 1997, by LIF. On May 2, 1997, applicants filed their response in opposition to the petition and asserted that the petition was defective procedurally under our Rules. On May 8, 1997, GI and LIF requested leave to reply to applicants' response. On May 20, 1997, the ALJ denied the request.

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application on the protestant, and the reasons the protestant believes the application, or a part of it, is not justified. If the protestant requests an evidentiary hearing, the protest must state the facts the protestant would present at an evidentiary hearing to support its request for whole or partial denial of the application."

5. The Motion to Stay the Proceedings

On April 18, 1997, Telesis/SBC filed a joint motion to stay further proceedings until applicants amended their application to conform to the requirements of PU Code § 854(b) and (c). They requested that we require the amendment because MCIC's gross annual California revenues exceeded $500 million. Telesis/SBC argued that applicants had the burden to demonstrate that PU Code § 854(b) and (c) do not apply, and failed to meet their burden. Absent such an amendment, Telesis/SBC asserted that the application must be denied. Therefore, they requested we stay further proceedings until applicants amended the application to include the showings under PU Code § 854(b) and (c).

Telesis/SBC also called for the Commission to investigate MCIC's general reporting practices to ensure the accuracy of MCIC's reports regarding Commission funding, universal-service obligations, and other programs.

On April 30, 1997, applicants filed their response to the Telesis/SBC motion. Applicants opposed the motion and accused Telesis/SBC of using the motion as a tactic to seek delay of their pro-competitive, pro-consumer transaction. Applicants asserted that their gross annual California revenues were less than $500 million and that their accounting methodology was correct. The applicants declared that the motion for the stay was groundless, stating that a stay may be invoked only in extraordinary circumstances and upon a showing of manifest injustice and irreparable injury, which had not been shown.

6. The Motion to Grant the Application Without Delay

In their response to Telesis/SBC, applicants also moved the Commission to exercise its authority under PU Code §§ 853(b) and 854(a) and grant the application without delay. Applicants asserted that the Commission has the flexibility to approve a merger at its discretion under whatever terms we deem fair due to these provisions.

Applicants argued that since no one had raised any public interest objection to the merger or any other substantive reason for opposing it, the Commission should proceed expeditiously to assure our regulatory processes do not delay the merger. They contended that a full record exists for a decision and that evidentiary hearings or further proceedings are not needed.

7. The Interim Opinion

In D.97-05-092 (May 22, 1997) we adopted an Interim Opinion in which we found that this transaction would be subject to scrutiny under PU Code § 854(a). Under the authority granted to the Commission in PU Code §§ 853(b) and 854(a), we determined that the merger should be exempt from compliance with PU Code § 854(b) and (c) because compliance with those sections was not necessary in the public interest, based on the specific facts and circumstances of this merger.[8] For that reason, we did not address the parties' contentions regarding accounting methodology, nor did we choose to institute an investigation into MCIC's accounting procedures. Therefore, we denied the Telesis/SBC motion to stay further proceedings until the application was amended to comply with PU Code § 854(b) and (c). We observed that the grant of the exemption was not precedential since it was based on the combination of facts and circumstances particular to this transaction as set forth in D.97-05-092. We also found that the merger did not qualify for expedited, ex parte approval by our Executive Director. Instead the ALJ was directed, in consultation with the co-assigned Commissioners, to consider the application

8 While the Attorney General's opinion on the merger's impacts on competition was not required under PU Code § 854(b)(3) due to the exemption in D.97-05-092, we did invite the Attorney General's opinion at his discretion. As discussed infra, he provided us with his opinion on July 9, 1997.

under PU Code § 854(a), set the appropriate procedural schedule, determine what hearings, if any, were necessary, and bring the final decision before the entire Commission. We also found that those findings in the Interim Opinion rendered moot the applicants' motion urging the Commission to approve the merger without delay.

In D.97-05-092 we also granted the motion of ORA to accept its late-filed "protest," but found that the protest did not qualify as such under our Rules. Therefore, we directed our Docket Office to file the pleading as a response rather than a protest. The joint petition of GI and LIF to intervene was denied as procedurally incorrect under our Rules. However, GI and LIF were informed that they could utilize the procedure set forth in Rule 54 to intervene in this application at a hearing, if any.

As a result of the Interim Opinion, all issues raised in the Telesis/SBC response have been adjudicated.

8. ORA's Request to Withdraw Its "Protest"

On May 28, 1997, ORA filed its motion to withdraw its "protest" which had been restyled by the Commission in D.97-05-092 as a response. ORA stated that it was impressed by applicants' concrete commitments to make $20,000,000 in infrastructure investments and institute the intrastate FAP for long distance lifeline calling. ORA declared its belief that these additional specific commitments by applicants would bring substantial material benefits to California ratepayers in addition to strengthening MCIC as a competitive local carrier and provider of new, innovative services. Therefore, ORA requested that its "protest" be withdrawn and urged the Commission to act upon the application expeditiously.

There were no responses to the motion. By Ruling dated June 30, 1997, the ALJ granted ORA's motion.

9. GI and LIF's Petition to Modify the Interim Opinion

On June 10, 1997, GI and LIF filed a petition to modify D.97-05-092. Responses are not due until July 10, 1997. The petition will be the subject of a subsequent decision.

Discussion

1. Determination of the Public Interest

PU Code § 854(a) declares that no person or corporation shall merge, acquire, or control, either indirectly or directly, any public utility organized and doing business in California without first securing our authorization. Under this section "[t]he primary question to be determined in a transfer proceeding is whether the proposed transfer would be adverse to the public interest. Questions relating to public convenience and necessity usually are not relevant to the transfer proceeding because they were determined in the proceeding in which the certificate was granted." (M. Lee (Radio Paging Co.), 65 CPUC 635, 637 (1966) (citations omitted).) We have had a long standing Commission policy forbidding relitigation of public convenience and necessity issues in transfer applications due to our recognition that such contests are likely to be profoundly anticompetitive, lead to long delay, and rarely present a good balanced record on the merits of increased or decreased competition in any particular market. (BellSouth Corporation, D.86-12-090, 23 CPUC2d 82 (1986), 1986 Cal.PUC LEXIS 852, 859.) Thus we carry out our sua sponte responsibility to insure that our proceedings are not abused by regulated companies as a means to destroy or harass competitors. (Id.)

A. Public Interest Factors

As we discuss infra, antitrust considerations are relevant to our consideration of the public interest. (M. Lee (Radio Paging), 65 CPUC at 637 n.1.) In transfer applications we also require an applicant to demonstrate that the proposed utility operation will be economically and financially feasible. (R.L. Mohr (Advanced Electronics), 69 CPUC 275, 277 (1969). See also, Santa Barbara Cellular, Inc., 32 CPUC2d 478 (1989).) Part of this analysis is a consideration of the price to be paid considering the value to both the seller and buyer. (Union Water Co. of

California, 19 CRRC 199, 202 (1920).) We have also considered efficiencies and operating cost savings which should result from the proposed merger. (Southern Counties Gas Co. of California, 70 CPUC 836, 837 (1970).) Another factor is whether a merger would produce a broader base for financing with more resultant flexibility. (Southern California Gas Co., 74 CPUC 30, 50, modified on other grounds, 74 CPUC 259 (1972).) As noted in Union Water Co.:

> "[T]he Commission is primarily concerned with the question of whether or not the transfer of this property from one ownership to another...will serve the best interests of the public. To determine this, consideration must be given to whether or not the proposed transfer will better service conditions, effect economies in expenditures and efficiencies in operation." (Id. at 200.)

We have also ascertained whether the new owner is experienced, financially responsible, and adequately equipped to continue the business sought to be acquired. (City Transfer and Storage Co., 46 CRRC 5, 7 (1945).) We also look to the technical and managerial competence of the acquiring entity to assure customers of the continuance of the kind and quality of service they have experienced in the past. (Communications Industries, Inc., 13 CPUC2d 595, 598 (1983).) Finally, as we noted in D.97-05-092, we will assess the relevant factors under PU Code § 854(c) in our analysis of the public interest.[9] However,

9 Public interest factors enumerated under PU Code § 854(c) are whether the merger will: (1) maintain or improve the financial condition of the resulting public utility doing business in California; (2) maintain or improve the quality of service to California ratepayers; (3) maintain or improve the quality of management of the resulting utility doing business in California; (4) be fair and reasonable to the affected utility employees; (5)

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outside the mandates of that statute, consideration of public interest factors must have some nexus to rates and service in order to pass muster under the doctrine prohibiting our unnecessary intermeddling by invasion of management. (See, Stepak v. AT&T, 186 Cal.App.3d 636, 231 Cal.Rptr. 37 (Cal.App. 1st Dist. 1986); Pacific Telephone & Telegraph Co. v. Public Utilities Commission, 34 Cal.2d 282, 215 P.2d 441 (1950).) After our assessment of public interest is made, we may impose any necessary conditions on a transfer. (Outingdale Water Co., 70 CPUC 639, 640-41 (1970).) Additionally, although we have granted the applicants an exemption from application of PU Code §§ 854(b) and (c), we may impose any conditions deemed necessary under the statutory power of PU Code § 853(b).[10]

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be fair and reasonable to a majority of the utility shareholders; (6) be beneficial on an overall basis to state and local economies and communities in the area served by the resulting public utility; and (7) preserve the jurisdiction of the Commission and our capacity to effectively regulate and audit public utility operations in California.

10 PU Code § 853(b) declares that:

> "The Commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest. The Commission may establish rules or impose requirements deemed necessary to protect

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B. Analysis of Public Interest Factors

As we observed in D.97-05-092, this merger transaction has many unique aspects. BT operates mainly in the UK, currently has no presence in California, and does not propose physically to enter the California market. Its entry by virtue of this transaction will be very indirect. As a result of the merger transaction, BT will merely be the ultimate corporate parent for MCIC's US operations. BT is an international corporation owning multinational subsidiaries, which is now acquiring the MCIC organization as an additional independent set of operating subsidiaries already under a holding company structure.

This application does not involve putting together two traditionally or incentive regulated telephone systems. The merger does not involve merging any BT operations into MCIC operations. Neither contiguous nor nearby service territories are involved. The substance of this transaction merely substitutes BT, albeit under the new name Concert plc, as the ultimate corporate parent of MCIC's California subsidiaries, with no change in their names, rates, or conditions of service. As a result of the transaction, MCIC will remain the parent holding company of its California subsidiaries, but will now have the new Concert as its holding company. No consolidation of MCIC subsidiary management with BT

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the interest of the customers or subscribers of the public utility or class of public utility exempted under this subdivision. These rules or requirements may include, but are not limited to, notification of a proposed sale or transfer of assets or stock and provision for refunds or credits to customers or subscribers."

management is contemplated. Instead, the top management of BT and MCIC will be blended into the new Concert. The officers of MCIC will stay the same, although its board may have minority UK representation. The officers and boards of the MCIC subsidiaries will be unaffected. Yet MCIC will have the expertise and financial backing of the BT group.

A review of the financial data from applicants discloses that the merger is economically and financially feasible. Both companies are healthy financially, and ownership by BT will increase MCIC's financing options at a time of increased competition. Our review of the price paid for the shares leads us to conclude it is fair and reasonable considering the value to both BT and MCIC shareholders. We find that efficiencies and operating cost savings will accrue, but because MCIC will still operate as a separate holding company, these savings will accrue primarily in terms of the broader base for financing with the resultant corporate flexibility which it brings. Access to more financing at a time when both applicants are trying to improve infrastructure and technology while operating in competitive global markets is likely to lead to better service conditions for MCIC's California ratepayers. The applicants' commitment to make over $20 million in infrastructure improvements in California will enhance service options for California ratepayers as well as result in more deployment of advanced technologies. Expansion of MCIC's local services and its investments in switches and fiber optic digital networks to provide these services will inure to the benefit of California consumers. Enhancing MCIC's competitive position with BT's expertise and financial standing will be likely to increase competition in the local telecommunications market, which furthers this Commission's policies to promote competition. In addition, the affiliation with BT's cellular and paging interests will enhance service on a global scale to California wireless customers. Global product development and marketing of global services will

product development and marketing of global services will make California businesses better able to compete in international markets. Without question, BT as the new owner is experienced, financially responsible, and more than adequately equipped to continue MCIC's business as its ultimate parent.

Looking to relevant PU Code § 854(c) factors, we have already concluded that the merger will improve the financial condition of the acquired MCIC and the quality of service to California ratepayers. We find that the merger will maintain the quality of management of the California-certificated MCIC subsidiaries since no changes are contemplated. We also find that the merger is fair and reasonable to affected utility employees due to the maintenance of staff levels at MCIC subsidiaries. To the extent that the utility assets are being transferred at a fair price, we conclude that the merger is fair and reasonable to the majority of each applicant's shareholders due to the value-based price of the acquired corporation. Dissenting shareholders have appraisal rights if they wish to exercise them. The merger will also be beneficial overall to state and local economies and communities in the area served by MCIC by virtue of the commitment to infrastructure improvements and the FAP on intrastate calls, the access to BT's community-giving programs and the uninterrupted presence of MCIC offices in California communities. Since MCIC will remain in its current US corporate form, with BT as only the ultimate parent holding company, we find that our jurisdiction is preserved and we will maintain our capacity to effectively regulate and audit MCIC's operations in California. Thus all PU Code § 854(c) criteria are met.

C. Antitrust and the Public Interest

The final part of our public interest analysis concerns antitrust considerations. (M. Lee (Radio Paging Co., supra at 640.) The Commission must take into account the antitrust aspects of applications which are before it. (Northern California Power

Agency v. Public Utilities Commission, 5 Cal.3d 370, 379, 96 Cal.Rptr. 18, 486 P.2d 1218 (1971).) "[B]y considering antitrust issues, the Commission merely carries out its legislative mandate to determine whether the public convenience and necessity require a proposed development. That task does not impinge upon the jurisdiction of the federal courts in federal antitrust cases. . . . [T]he Commission may approve projects even though they would otherwise violate the antitrust laws; it may also disapprove projects which do not violate such laws. Its consideration of antitrust problems is for purposes quite different from those of the courts; it does not usurp their function." (Id. at 378.) See also, Industrial Communications Systems, Inc. v. Public Utilities Commission, 22 Cal.3d 572, 150 Cal. Rptr.13, 585 P.2d 863 (1978); Northern Natural Gas Co. v. Federal Power Commission, 399 F.2d 953, 958 (DC Cir. 1968). Under Northern California Power Agency, we are required to consider sua sponte every element of the public interest affected by our approval, including economic and competitive aspects. See also, U.S. Steel Corp., 29 Cal.3d 603, 608, 175 Cal. Rptr. 169, 629 P.2d 1381 (1981); City of Los Angeles v. Public Utilities Commission, 15 Cal.3d 680, 694, 125 Cal.Rptr. 779, 542 P.2d 1371 (1975). However, Northern California Power Agency requires consideration of antitrust issues where a close nexus exists between the matter to be approved and any agreement presenting antitrust problems, not when the antitrust implications have only tangential impact on the primary matter before the Commission. (Industrial Communications Systems, Inc., 22 Cal.3d at 582.) When alternatives with different economic effects are presented to the Commission, we must consider the alternatives and the factors warranting the adoption of those alternatives if the economic effects of the application are material to the exercise of the Commission's discretion. (U.S. Steel Corp., 29 Cal.3d at 608-609.) "A clear line of cases specifies that competition is one of the factors bearing on the exercise of this Commission's

discretion, and is one of the factors that must be considered in its decision-making process. This is true regardless of whether the effect is intrastate as in Industrial Comm. Systems, interstate as alleged in Northern California Power Agency, or foreign as in U.S. Steel." (Application of SCEcorp, 40 CPUC2d 159, 179 (1991) (citations omitted, footnote omitted).)

Our task is to balance any anticompetitive effects of the merger against the benefits of the merger to see if anticompetitive effects are outweighed by the merger's benefits, therefore making the merger consistent with the public interest. (Pacific Southwest Airlines, 75 CPUC 1, 19 (1973).) We are not strictly bound by the dictates of the antitrust laws, for we can approve actions which violate antitrust policies when other economic, social, or political considerations are found to be of overriding importance. SCEcorp, 40 CPUC2d at 179. We need not choose another course of action if our proposed course has anticompetitive effects, as long as the course of action is in the public interest. (Pacific Gas & Electric Co., D.93-02-018, 48 CPUC2d 162 (1993); 1993 Cal. PUC LEXIS 275, 282.)

D. Antitrust Analysis

We observe that no party has protested the merger on antitrust grounds, nor has any party presented us with any economic alternatives in our treatment of the application. However, AT&T-C in its response did furnish the Commission with a copy of its parent company's comments to the FCC, which raise certain antitrust issues. In order to fulfill our sua sponte obligation to fully consider the antitrust implications, if any, of this merger, we have reviewed the antitrust record before the FCC in its GN Docket No. 96-245. We have also reviewed the FCC's prior opinion on BT's acquisition of 20% of MCIC's voting common stock, (9 FCC Rcd 3960 (1994)(BT/MCIC I)), which dealt with many of the same antitrust concerns raised in the current FCC proceeding on the merger. We, therefore, take official notice of the comments filed before the

FCC in its proceeding to approve or disapprove the merger. As we stated in Application of Pacific Telesis Group and SBC Communications, Inc., "[w]e do not find, in the absence of specific evidence, that a merger in itself adversely affects competition, simply by making a large and strong company larger and stronger." (D.97-03-067, mimeo. at p. 43 (footnote omitted)(March 31, 1997).) We also note that while federal law on the competitive effects of mergers is found in § 7 of the Clayton Act (15 USC § 18) and §§ 1 and 2 of the Sherman Act (15 USC §§ 1 & 2), California law contains no specific provisions governing mergers. Instead the state's statutory policy on economic competition is contained in our Cartwright Act (Bus. & Prof. Code § 16720 et seq.).[11] (73 Op.

11 The Cartwright Act prohibits certain restraints on competition by trusts, which are defined as a combination of capital, skill or acts by two or more persons for any of the following purposes: 1) to create or carry out restrictions in trade or commerce; 2) to limit or reduce the production, or increase the price of merchandise or of any commodity; 3) to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity; 4) to fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in State of California; or 5) to make or enter into or execute or carry out any contracts, obligations or agreements by which they do all or any or any combination of any of the following: a) bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value; b) agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure; c) establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity; or agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

Atty. Gen. Cal. 366 (May 7, 1990).)

We begin our analysis by observing that the UK has a far different regulatory and competitive framework than the US. Its deregulation plan stresses competition at all levels of telephone services, including the delivery of local lines. Thus, the UK Office of Telecommunications (OFTEL), which regulates BT, has rejected "equal access" because OFTEL believes it is a disincentive to new competition in the delivery of local telephone lines. In the UK, indirect access to long distance service from other providers is available through the dialing of access codes. On the other hand, in the US, the delivery of local lines had been found to be a natural monopoly until the passage of the Telecommunications Act of 1996, making "equal access" a necessity for fair competition. Moreover, even after the local market was opened to competition, Congress, the FCC, and this Commission have emphasized the need for equal access to provide customers with the greatest number of choices.

In the international service market, recent changes have occurred in the competitive landscape. Previously, carriers like BT were required to return UK-US traffic in proportion to the amount of traffic BT received from competing US carriers. This system, the FCC's International Settlements Policy (ISP), prevented discrimination among US carriers by requiring, among other things, that BT return minutes in the same proportion they were sent to US carriers. However, the FCC recently vitiated this policy for competitive markets. See Summary of Fourth Report, 62 CFR 5535 (Feb. 6, 1997). A provider in another country may now enter into "alternative payment arrangements" with US carriers so long as the foreign market provides "effective competitive opportunities." Dominant carriers in markets are still subjected to the

proportionate traffic rule under the ISP.[12] Both the UK and US systems envision competition in international service to take place as end-to-end packages.

(i) Review of the FCC Record

Our review of the FCC comments discloses that none of the parties has suggested that BT's possible anticompetitive activities might extend beyond the international service market. There are no allegations that the BT/MCIC merger would raise interstate or intrastate antitrust problems. Below we summarize the allegations of those parties commenting on possible anticompetitive impacts of the merger before the FCC.

ACC Corp. (ACC), a US corporation which owns an international-facilities license and resells network services in the UK, argues that lack of equal access has a discriminatory

12 Prior to institution of the ISP, under the correspondent system, carriers from one country set up correspondent relationships with carriers from other countries to facilitate the movement of traffic between their countries. The traffic is carried at a negotiated rate, called the "accounting rate". However, foreign monopoly carriers could discriminate against US carriers by threatening to send all of their traffic to one US carrier unless other US carriers would accept a higher accounting rate. For this reason, the FCC instituted the ISP which requires each carrier to pay one-half of the accounting rate ("the settlement rate") for the completion of calls on the corresponding carrier's network. The ISP also mandates that all US carriers be charged the same accounting rate and that traffic be returned to a particular US carrier in proportion to the traffic received by the foreign carrier from that US carrier ("the proportionate return"). Since US carriers send more minutes of traffic to the UK than UK carriers send to the US, US carriers must make net settlement outpayments to UK carriers which are equal to the settlement rate multiplied by the imbalance of minutes. Because of BT's dominance in the UK, the ISP applies to its US-UK accounting rates which are still above cost. Were the FCC to find the UK market provides effective competitive opportunities, these ISP rules would no longer apply.

impact on US-based competitors in the international-facilities market due to: 1) increased costs (dialer installation, marketing, and customer service costs caused by the confusion of access codes); 2) default revenue to BT arising from consumers forgetting to dial the codes or customer confusion and the like; and 3) the lack of any real ability to offer true end-to-end service. Thus ACC wants equal access in the UK market. ACC also argues that non-geographic number portability is necessary to compete effectively with BT. Finally, ACC asserts that the BT-administered submarine cable stations for transatlantic access are a bottleneck facility controlled by BT. ACC and other competitors must arrange to route calls over a digital cross-connection (DXC) switch, located in submarine cable landing stations. Because BT controls access to DXCs by virtue of its control of the existing submarine cable stations, ACC requests a condition that BT makes available, on a reasonable, nondiscriminatory and timely basis, DXC capacity at BT administered submarine cable stations.

AT&T Corp. (AT&T) argues that, due to BT's control of call-termination in the UK, BT/MCIC will be able to price their US-to-UK calls based on their actual incremental costs, while MCIC's competitors will have to pay above-cost accounting rates to BT. AT&T contends that, under the recently adopted FCC Flexibility Order,[13] BT could further disadvantage MCIC's competitors by routing most of its outbound traffic to MCIC, thereby increasing the accounting disparity, at above-cost rates, between US competitors and BT. AT&T asserts that making MCIC pay above-cost rates would be an ineffective mitigation since this would merely shift revenue from one corporate affiliate pocket to the other. AT&T contends that routing of calls to MCIC during off-peak hours

13 Regulation of International Accounting Rates, Fourth Report and Order, FCC Docket No. 90-337 (December 3, 1996).

to areas closer to MCIC's gateway switch or to less expensive domestic access and to a preferred transmission medium, as opposed to use of inferior satellite transmission for competitors, would make MCIC more efficient to the detriment of competitors.

Due to these possibilities AT&T argues that the FCC must keep in place the conditions imposed in BT/MCIC I[14] to mitigate such discrimination, and prohibit BT from routing its traffic through MCIC to third countries. AT&T admits that the enforcement of the fair trading conditions placed in BT's license by OFTEL will lessen anticompetitive pricing behavior. But, AT&T also requests that BT be required to establish settlement rates at levels based on BT's forward-looking, total service, long-run incremental costs and to offer such rates to unaffiliated US carriers. AT&T contends that BT, by hubbing[15] UK-third-country minutes to MCIC's US network so as to equalize the third country's outbound minutes, with no outlays by BT, can thereby increase MCIC's "proportionate share" of return calls to the third country. Thus, AT&T demands that a ban be placed on re-origination by BT. AT&T argues that, because inbound competition alone is not viable, equal access must be provided in the UK market to increase outbound competition, so alternatives to call-termination by BT are profitable. It also asserts that relaxation of the proportionate return policy under the ISP would allow BT to send its minutes to MCIC, thus requiring restrictions on so doing. AT&T also declares that because the largest proportion of undersea cable capacity is in BT's hands, BT/MCIC will be able to control the market until OFTEL deals with

14 See footnote 17 infra.

15 Hubbing is the potential for BT to balance off its UK traffic stream with traffic from third countries by sending surplus minutes to MCIC for MCIC to originate in the US. This would gain MCIC more return minutes from the third country carrier.

the issues of BT's interconnection-and-access obligations to new market entrants. Finally, it contends that portability of phone numbers between competitive carriers is necessary to effective competition in the UK. Therefore, until BT undertakes obligations to resolve such matters, AT&T urges that the merger not be approved.

BellSouth and Telesis/SBC argue that it would be inconsistent for the FCC to find this merger to be in the public interest while not allowing the regional Bell operating companies (RBOCs) to enter the interstate long-distance market. SBC asserts that BT operates in less competitive markets than the RBOCs do, and BT has less regulatory oversight than they do.

Bell Atlantic argues for a denial of the merger because the applicants made an insufficient showing that US carriers will be able compete with BT/MCIC post merger, due to the lack of requirements that BT: 1) provide access to unbundled elements of its network; 2) make its services available for resale at wholesale rates; and 3) provide equal access to BT's local facilities.

Deutsche Telekom AG (DT), the owner of a 10% interest in Sprint Corporation (Sprint), asserts that submarine cable access will be impaired since BT/MCIC will control 35% of the cable capacity, with the next closest competitor (DT/France Telecom (FT)/Sprint) holding 10%. DT also argues that, if the FCC finds the UK market is open to competition, it must find that the German market is also open to competition. DT urges the FCC to impose the following conditions on the merger: 1) structural separation of domestic US (MCIC), domestic UK (BT), and international operations (Concert); 2) accounting separation; 3) nondiscrimination requirements as to competitors; 4) dominant-carrier treatment standards to BT/MCIC on the US-UK route; 5) reporting requirements; and 6) the maintenance of the confidentiality of proprietary information obtained from competitors.

Energis, a competitor of BT in the UK, argues that BT effectively dominates the backhaul market[16] since it owns nearly all cable landing sites, and that equal access is necessary to develop market share in the international market to compete with the dominant carrier, BT. Energis asserts that BT's control of the majority of the end customers in the UK, combined with its ability to potentially bundle service to customers with presence in the UK and US because of BT's common ownership with MCIC, will provide BT advantages over all other UK and US operators.

FT, which also owns a 10% stake in Sprint, suggests several conditions be placed on the merger. They are: 1) equal access; 2) a structural separation between the national (UK and US) operations and international operations of the combined BT/MCIC with accounting separation requirements; 3) unbundling of the US-UK route from other services so BT and MCIC cannot sell domestic and international services together; 4) an audit of BT/MCIC divisions by an independent auditor every 12 months; 5) accounting separation; and 6) an obligation to provide annual reports to the European Commission on all of the foregoing. FT also contends that hubbing is a problem and a separate FCC proceeding should be opened to deal with it and require BT's compliance with the ISP.

Frontier Corporation (Frontier), which holds an international-facilities license, expresses two concerns: 1) the high costs of interconnection and 2) the lengthy service intervals for connection to BT's network. To remedy these, Frontier requests that the FCC: 1) require detailed reporting on pricing, installation, and service quality issues and 2) subject the combined BT/MCIC to dominant international carrier regulation on

16 Backhaul is the transport of traffic from the international cable's head-end to a point of interconnection with a carrier's domestic facilities.

the US-UK route, including use of the proportionate return rules under the ISP.

Sprint suggests several conditions be placed on the merger. First, Sprint asserts separation between BT, MCIC, and Concert must be maintained, with all agreements negotiated at arms length, reported and made public. Second, Concert must be required to protect confidential and proprietary information of competitors. Third, Concert should be required to file information regarding allocation, ownership, lease terms, installation and maintenance of BT's US-UK submarine cable facilities and to certify that any restrictions on the use of such cables or access to cable head and dry-side facilities on BT's end of the cable have been eliminated. Fourth, Concert must be required to publish details of all rates, terms, and conditions for providing transiting, refile or hubbing services to MCIC and certify its operating subsidiaries will offer such rates, terms, and conditions to any US carrier. Fifth, Sprint asserts that MCIC should be declared dominant in the US-UK market and be subjected to dominant-carrier regulation. Finally, Sprint argues that the FCC should continue all conditions imposed in its BT/MCIC I order as well as all DOJ conditions regarding same, particularly the prohibition against acceptance by MCIC of any special concessions from Concert and its affiliates.

US West, Inc. (USW), the owner of an incumbent and a facilities-based competitive LEC in the US and a facilities-based competitor of BT in the UK, does not oppose the merger. However, it observes that the UK's telecommunications scheme and attendant regulation is completely different from the US model which relies on competitors' usage of the facilities and services of incumbent LECs. USW states that, prior to this merger, BT has opposed MCIC's arguments to the FCC that competition in the US requires the incumbent LECs' networks to be severed with portions given to MCIC at prices not reflective of a carrier's cost. Therefore, USW wants

the post-merger Concert group to be prohibited from making this MCIC argument.

WorldCom, Inc. (WCI) argues that unbundling of local loops with attendant equal access is necessary for effective competition in the UK market. WCI believes that BT/MCIC's dominant position as to submarine cable capacity and associated backhaul provides the potential for anticompetitive discrimination. WCI is concerned about BT warehousing cable capacity for its future needs and those of its affiliates and seeks conditions to remedy this problem. Due to BT's control of DXC switches, WCI wants BT to be ordered to provide access at nondiscriminatory rates, terms, and conditions. In addition, WCI urges the FCC to apply its dominant carrier regulation to the combined BT/MCIC. WCI also seeks a declaration that the extant "no special concessions" clause in BT/MCIC I will require MCIC to accept no more than its proportionate share of return traffic on the US-UK route.

OFTEL filed comments with the FCC to explain the UK regulatory scheme and dispel any misconceptions arising from parties' comments. OFTEL states that carriers pay the same cost-based rates to BT that BT pays. OFTEL also posits that imposition of equal access in the UK is inappropriate because it would impair the UK's vertically integrated competition model and create a disincentive to building new local infrastructure.

Regarding submarine cable access, OFTEL declares that backhaul is easy to self-provide and OFTEL's fast-track approval process gains competitors quick access. While OFTEL admits that submarine cable station access causes it some short-term concern about its availability and price to new UK international-facilities licensees, since the stations are largely controlled by BT, it does not believe that international cable capacity is a bottleneck controlled by BT. OFTEL states that BT is required under its license to provide backhaul and access at cost. OFTEL admits it does not regulate those costs, but merely monitors them, yet

asserts that the fair-trading condition in BT's license prevents unfair pricing. OFTEL also admits that cable capacity is a problem, but asserts that vigorous regulation on the UK side requires sales of capacity to a nonmember of the consortium which owns the cable. OFTEL believes that the better way to regulate is through cooperation between the US, Europe, and UK authorities and the consortium. OFTEL observes that, even if BT/MCIC were to self-terminate calls on the cable, AT&T has sufficient international capacity to retaliate.

As to fears of abuse of the accounting rate system by self-termination, BT's control of termination facilities and hubbing of UK-third country traffic through MCIC, OFTEL believes that end-to-end control benefits consumers. Its position is that "The degree of competition will be enhanced where there is a multiplicity of operators with end-to-end control." (OFTEL comments at 15.) OFTEL notes that BT does not have end-to-end control, whereas AT&T, MFS-WorldCom, Sprint, and ACC do have facilities at both ends. OFTEL asserts that end-to-end control enhances competition because it allows the delivery of traffic at non-accounting-rate prices and encourages operators using accounting rates to agree to lower settlement rates. OFTEL observes that, once a route is liberalized at both ends, any operator displeased with far-end-termination terms could respond by establishing its own affiliate or threatening to do so. Such retaliation, rather than regulation, is encouraged, with both competitors and the third country having strong incentives to retaliate as to hubbing. OFTEL thinks that the retention of the proportionate-share rules will reduce the flexibility of operators to pass and receive different volumes of traffic from other operators, which will not permit capacity to be filled efficiently. Therefore, OFTEL has lifted the proportionate-return rules for competitive routes, including the US-UK route.

Speaking to concerns that BT could discriminate in the routing of US-destined traffic, OFTEL does not believe it would be in BT/MCIC's best interest to send traffic over allegedly substandard satellite links. OFTEL asserts that competitors have alternative operators on both ends of the UK-US route with which they can terminate traffic.

Hubbing is not of concern to OFTEL. OFTEL admits that the re-origination of calls in the US would be included in MCIC's market share for determining return traffic, resulting in the third-country terminating carrier allocating a greater share of the return minutes to MCIC, thus shifting minutes away from other US competitors on the route. Yet, OFTEL states that it is unclear whether such shifting would be an incentive for BT, pending detailed studies on a per-route basis. OFTEL further observes that adversely affected US carriers are in a position to do something similar to rebalance call origination. Again, OFTEL thinks that the threat of retaliation, rather than regulation, will provide a check. OFTEL believes that the efficient use of transmission capacity is in the best interest of both UK and US customers, while the regulations proposed by commenters would lead to an undesirable outcome.

As to termination of US carrier traffic in the UK, OFTEL asserts that there are 44 carrier alternatives to BT for call completion in the UK. OFTEL thinks that, if ISP rules are lifted, all such alternative carriers would be free to negotiate competitive settlement rates. Thus, BT would be unable to leverage its local access strength to maintain above-cost international settlement rates. Even if BT were to do so, OFTEL asserts that such behavior would breach BT's fair trading condition in its UK license. This condition prohibits misuse of market power. Finally, OFTEL believes that AT&T's argument that building facilities for self-termination is uneconomical is at odds with its argument that the settlement rate is too high.

Applicants refute the allegations of possible anticompetitive behavior. Applicants argue that OFTEL's methodology for introducing competition in the UK should be honored by US regulators who are approaching the same goal, just in a different manner. They note that in the UK carriers other than BT account for 40% of the business phone service expenditure, and carriers other than BT provide 25% of the business lines. Applicants assert that one third of residential subscribers can subscribe to other carriers for local exchange service. Resale based carriers have a 22% share of the UK market for international calling with Mercury, BT's biggest UK competitor, having another 23% share. Applicants observe that BT has already implemented local number portability for geographic numbers under OFTEL's mandate, and that number portability for non-geographic numbers is currently under consideration by OFTEL. Therefore, applicants contend that equal access is not necessary to competition in the UK.

Applicants note that many carriers own submarine cable themselves and, in reality, only nonmembers of the consortium may not able to get access. Applicants also point to the fact that there are new cables awaiting approval. They contend that submarine cable access is an industry-wide problem that should be solved at an industry-wide level, rather than in their merger application. Applicants assert that backhaul is priced nondiscriminatorily. They admit that the transmission speed a competitor wants is not always available, but that BT provides it if feasible. Applicants allege that the worst-case waiting period for cable access has been six months. Applicants reiterate the comments of OFTEL regarding the different deregulation model the UK has versus the US and contend the UK model has its own safeguards.

As to settlement rates and proportionate return, the applicants assert that their settlement rates are close to cost and that competitive alternatives are available. They contend that the

ISP rules will not be changed in the FCC proceeding since an opportunity to comment is required under the Flexibility Order. For this reason, they assert that there is no reason to lock them in with a license condition. Applicants argue that there is no relationship between the merits of this merger and the RBOCs' applications for in-region entry into long-distance since local market competition is far more substantial in the UK than it is in the US and because the RBOCs' in-region entry is governed by much more detailed standards under the Telecommunications Act than foreign entry into US markets thereunder. Finally, they assert the conditions in BT/MCIC I are no longer necessary due to changes in the competitive UK and international markets.

We observe that, in the face of many of the same anticompetitive concerns over BT's 1994 acquisition of its 20% interest in MCIC, the FCC stated that:

> "[I]n light of the U.K. regulatory framework and the relative openness of the U.K. telecommunications services market, we find that MCI's 'no special concessions' and record-keeping commitments and the other safeguards imposed in this order[17] are both

17 The FCC anticompetitive safeguards imposed in BT/MCIC I are that MCIC: 1) shall amend all its Section 214 certificates to state that MCIC shall not accept special concessions, directly or indirectly, from any foreign carrier or administration with respect to traffic or settlement revenue flows between the US and any foreign country served; 2) shall maintain complete records on the provisioning and maintenance of network facilities and services it procures from BT and make those records available to the FCC on request; 3) shall continue to file its monthly circuit status reports for the US-UK circuits and shall make them publicly available on a quarterly basis; 4) shall file with the FCC notification of each addition of circuits on the US-UK route, specifying each joint owner; 5) shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for the US-UK route; 6) shall file with the FCC a circuit status report on the US-UK route,

(Footnote continues on next page)

necessary and sufficient at this time to guarantee competing U.S. carriers, and their customers, access on a nondiscriminatory basis to basic services from the parties to this alliance. We believe these safeguards are sufficient to protect against MCI's participation in, or acceptance of, competitive advantages due to any direct or indirect efforts by BT to abuse its market power. With the exception of the monthly circuit status reports, these regulatory requirements are subject to modification as a result of any action the Commission may take in any relevant future proceeding of general applicability." (9 FCC Rcd at 3970.)

We also observe that the UK market is even more open in 1997 than it was in 1994.[18]

(Footnote continued from previous page)
specifying the number of circuits and identifying the joint owners within 30 days of the BT/MCIC I order; 7) shall obtain from BT, and file with the FCC, a written commitment not to offer or provide any special concessions to old Concert relating to the provision of basic services; and 8) shall file with the FCC copies of all contracts, agreements, and arrangements with BT that relate to the routing of traffic and the settlement of accounts on the US-UK route. These conditions also cover the respective officers, directors, and employees of MCIC, BT and old Concert and any affiliated companies and their officers, directors, and employees.

18 The UK government in the intervening period granted 45 international facilities licenses allowing carriers other than BT and Mercury to become facilities-based providers of international telecommunications services in the UK. The UK has also granted international simple resale licenses permitting use of telecommunications facilities to carry international telecommunications traffic over private leased lines. This provides an alternative to use of BT or Mercury as correspondents and thus bypasses ISP rules.

(ii) Analysis of the FCC Record

Our review of the FCC record leads us to conclude that there are essentially four anticompetitive concerns presented by the BT/MCIC merger. The first is that the UK's lack of equal access, which requires UK customers to dial access codes to access BT's competitors, has a discriminatory impact on US carriers' abilities to compete in the UK international-facilities market. We do not agree with OFTEL that imposition of an equal access requirement would necessarily be a disincentive for the development of alternative local infrastructures in the UK, but we will defer to OFTEL to determine the most appropriate telecommunications policy for the UK. We take the same approach with OFTEL's beliefs regarding the unbundling of local loops. In both instances our policies in California are different, but we believe that it is not in the public interest to withhold our approval of a merger likely to be beneficial to the state and its consumers based on a policy disagreement as to how to introduce competition in a telecommunications market thousands of miles away.[19] Finally, the commenters' argument that the lack of non-geographic number portability discriminates against US carriers currently is being addressed by OFTEL, and we will not second-guess UK regulators on this issue. The occurrence of the merger will not, in itself, alter these policy differences over equal access nor should this application be a forum to resolve them. Therefore, we find there is no discriminatory impact from this merger on US carriers due to lack of equal access in the UK.

The second recurrent anticompetitive allegation is the extent to which BT/MCIC would dominate access to transatlantic

19 We also believe this deference to another country's regulators is not inconsistent with our decision in the SBC/Telesis merger (D.96-03-067) where our approach to competition in telecommunications might have differed from that of the states within this country in which SBC originally operated.

cables, especially the TAT12/13 cable, which is the most modern and sought-after cable, since new Concert would own 35% of total cable capacity. However, new Concert will not have a controlling share of the cable-owning consortium, and therefore we find it could not exercise monopoly control. We also find that safeguards against anticompetitive behavior exist because US carriers own sufficient capacity for their needs, new cables are being planned, and BT has promised to provide access to new entrants at cost.[20] Thus, we see no anticompetitive impact from this merger on access to transatlantic cable capacity.

The commenters' third, and similar, antitrust argument is that BT has monopoly control over access to transatlantic cable stations and backhaul infrastructure. We concur that the cable station market is noncompetitive but note that, under BT's UK license, access must be provided at cost and nondiscriminatorily. This condition should prohibit anticompetitive behavior. On the other hand, the backhaul market is "presumptively competitive" with alternatives to BT already operating at least on the TAT12/13 route and more expected shortly as OFTEL has fast-tracked such infrastructure-development approvals. Even so, BT is obligated to provide backhaul services to competitors at cost and nondiscriminatorily. Thus we find no anticompetitive threat from this merger in the submarine cable station market and its backhaul infrastructure.

Finally, it is argued that BT/MCIC may profit at competitors' expense on the US-UK route in three ways. First,

20 As part of the European Commission's approval of the merger, BT was required to make TAT 12/13 cable capacity available to certain international facilities license holders by divesting all capacity it obtains through its merger with MCIC and certain of its capacity presently leased to other operators.

competitors allege that BT/MCIC will not be burdened with above-cost international accounting rates, such costs being passed merely between subsidiaries. Second, they argue that the FCC's recent Flexibility Order would allow BT to route its calls to MCIC on a discriminatory basis, costing competitors proportionate return share. Third, it is asserted that BT may also skew accounting rates by "hubbing" third-country calls through the US. However, we believe that end-to-end competition will benefit consumers. BT/MCIC's competitors will have to form alliances in the UK or build their own alternative infrastructures to compete effectively. We will accord deference to OFTEL's model which encourages retaliation rather than regulation as a check on such anticompetitive behavior. Thus, we find that no anticompetitive impacts should occur on the US-UK route due to the BT/MCIC merger.

In making this assessment as to lack of competitive impacts on the US-UK route, we are assuming that the FCC will continue the imposition of appropriate BT/MCIC I order conditions, delineated supra at note 17, on the merged entities. Within 30 days of the FCC order, we may consider whether to reopen this proceeding to reexamine the need for conditions regarding international routes, should the FCC not impose the appropriate conditions.

(iii) The US DOJ's Approval

On July 7, 1997, the DOJ's Antitrust Division issued its approval of the merger, but placed conditions on the combined companies to prevent anticompetitive consequences. Many of these conditions were extant as a result of the DOJ's approval of BT's acquisition of a 20% equity interest in MCIC in 1994 and their formation of a joint venture, Concert Communications Company (CCC) in late 1993. Thus, much as we believe the FCC will do by extending the conditions in its BT/MCIC I order, the DOJ retained and expanded relevant prior conditions on MCIC, BT, and CCC, and deleted conditions which were no longer necessary due to competitive market changes. These conditions place certain

substantive restrictions and obligations on Concert, BT, MCIC, and CCC in their pre and post merger forms, as well as any subsidiary, affiliate, predecessor, successor or assign, and any entity in which the new Concert has at least a 20% ownership interest. We review the conditions below.

First, Concert and MCIC cannot offer, supply, distribute, or otherwise provide in the US any telecommunications or enhanced telecommunications service that makes use of telecommunications services which are provided by BT in the UK or between the US and UK, unless disclosure is made to the DOJ of the following information: 1) the prices, terms, and conditions, including any applicable discounts, on which telecommunications services are provided by BT to CCC in the UK under any interconnection arrangement; 2) the prices, terms, and conditions, including discounts, on which any other telecommunication services are provided by BT to CCC in the UK for use by CCC in the supply of telecommunications or enhanced telecommunications services between the US and UK or are provided by BT in the UK in conjunction with such CCC services where BT is acting as CCC's distributor; 3) as to international switched telecommunications or enhanced telecommunications services jointly provided by BT and MCIC on a correspondent basis between the US and UK, and to the extent not already disclosed publicly under FCC requirements, (a) the accounting and settlement rates and other terms and conditions for the provision of each such service and, (b) for any international direct dial or integrated services digital network (ISDN) service (except ISDN traffic not subject to a proportionate return requirement), separately for each accounting rate, MCIC's minutes of traffic to and from BT and, separately, BT's minutes of traffic to MCIC and each US international telecommunications provider by time of day, by point of termination and by type of transatlantic transmission facility; 4) a list of telecommunications services provided by BT to CCC in the UK for CCC's use in the supply of

telecommunications or enhanced telecommunications services between the US and UK, or provided by BT in the UK in conjunction with such CCC services where BT is acting as CCC's distributor, showing (a) the types of circuits, including capacity, and telecommunications services provided, (b) the actual average time intervals between order and delivery of circuits (separately indicating average intervals for analog circuits, digital circuits up to two megabits and digital circuits two megabits and larger) and telecommunications services, and (c) the number of outages and actual average time intervals between fault report and restoration of service for circuits (separately indicating average intervals for analog and digital circuits) and telecommunications services; 5) a list showing (a) separately for analog and digital international private line circuits jointly provided by BT and MCIC between the US and UK, (i) the actual average time intervals between order and delivery by BT and (ii) the number of outages and actual average time intervals between fault report and restoration of service, for any outages that occurred in the international facility, in the cablehead or earth station outside the US, or the network of a telecommunications provider outside the US, indicating separately the number of outages and actual average time intervals to restoration of service in each such area, and (b) for circuits used to provide international switched telecommunications services or enhanced telecommunications services on a correspondent basis between the US and UK, the average number of circuit equivalents available to MCIC during the busy hour; and 6) any information provided by BT to MCIC or CCC about planned and authorized improvements or changes to Concert's UK public telecommunications system, operating pursuant to its license, that would affect interconnection arrangements between BT and CCC or BT and other licensed operators.

The purpose of these reports is to ensure that the DOJ and competitors can detect anticompetitive and discriminatory

activities by the new Concert group. While the DOJ did express concern over access to backhaul facilities, it deferred to the FCC to place necessary regulatory conditions on the merger to alleviate its concerns. However, the DOJ, MCIC, and BT agreed that the DOJ could modify its order to impose conditions reguiring MCIC to sell backhaul capacity to certain competitors if the FCC did not do so.

Second, Concert and MCIC are prohibited from using any proprietary information of US telecommunications or enhanced telecommunications service providers, which is obtained by BT as a result of BT's provision of interconnection or other telecommunications services in the UK, for any purpose other than BT's provision of such services. This information may only be disclosed inside BT to those persons who need it so BT can provide such services.

Third, Concert and MCIC are prohibited from using any confidential, nonpublic information, which is obtained from BT's correspondent relationships with other US international telecommunications or enhanced telecommunications service providers, for any purpose other than conducting BT's correspondent relationships with them. This information may only be disclosed inside BT to those persons who need it so BT can conduct such correspondent relationships.

Fourth, Concert and MCIC are prohibited from using any nonpublic information about the future prices or pricing plans of any provider of international telecommunications services between the US and UK, obtained through BT's correspondent relationships with other US international telecommunications providers, for any purpose other than accounting rate negotiations between BT and such providers. This information may only be disclosed inside BT to those persons who need it so BT's accounting rates can be negotiated with other US international telecommunications providers.

In order to ensure compliance, Concert agreed to maintain sufficient records and documents to demonstrate compliance and to permit DOJ personnel access to documents and testimony or interviews with any officer, director, employee, trustee or agent either at Concert's premises or at the DOJ. Also, if requested by the DOJ, Concert agreed to submit written reports under oath relating to any of the conditions. Concert also agreed to notify the DOJ if MCIC or Concert file with the FCC or OFTEL an application to assign or transfer control of any license or authorization held by MCIC or BT relating to telecommunications services between the US and UK, or if Concert seeks to combine CCC and BT in the same corporate entity.

These conditions shall be in effect until September 29, 2004. New Concert has agreed to jurisdiction and venue over it by the US federal courts for purposes of enforcement.

We believe these conditions, and related ones we expect to see continued from the FCC's BT/MCIC I order, will protect the interests of California consumers against any anticompetitive behavior as a result of the merger.

(iv) The Attorney General of California's Comments

In D.97-05-092, we invited the comments of the Attorney General of the State of California (AG) on the merger proposal. On July 9, 1997, he rendered his opinion stating that:

> "We find that MCIC and BT are neither actual nor potential competitors in any relevant California market for telecommunications services. We also conclude that the merger would not provide BT with any incentive to engage in anticompetitive behavior, such as providing discriminatory interconnections or cross-subsidization, in favor of MCIC operations within this state. Accordingly, this office concludes that the merger should have no adverse effects upon California interstate or intrastate telecommunications markets." (Comments of the Attorney General of California on Proposed Merger, mimeo. at 1.)

The AG found that the merger does not raise any significant horizontal[21] merger issues within California or any other part of the United States, since MCIC and BT do not compete in these markets. He also declared that BT is not a potential competitor in any California market, and observed that BT had no plans to enter those markets in the future. Therefore, he concluded that "the traditional model for assessing the competitive effects of a merger, embodied in the DOJ/Federal Trade Commission Horizontal Merger Guidelines, indicates that the merger will not raise prices or reduce output within California markets." (Id. at 7.)

The AG also concluded that the vertical[22] consolidation of the BT international operations with MCIC's long distance services will not have adverse price or output effects within California interLATA or intraLATA markets. He declared that cross subsidization of competitive services with regulated revenues was not a concern, because it does not appear the new Concert will use facilities based in California or the US to provide both regulated services currently offered by BT and competitive services now offered by MCIC. He also found that if new Concert were to attempt to cross-subsidize MCIC's domestic operations, it would be ineffective and have minimal effects upon California consumers. Due to BT's cost-based regulation and market power, cross subsidies would be anticompetitive if new Concert used them to drive rivals out of a market and could reasonably expect to prevent future competitive reentry while it recoups the profits it lost during the

21 Horizontal mergers generally involve combinations of companies which operate at the same level in an industry by selling the same or similar products to the same customers.

22 A vertical merger generally involves two companies which are at different levels of the product distribution chain, such as a manufacturer and a retail seller.

predatory pricing [23] stage. The AG found that any attempt to monopolize long distance markets now served by MCIC would be futile since AT&T, Sprint, and other well-financed carriers would easily reenter those markets as soon as prices rose above the costs of production.

However, the AG had no opinion on whether the merger would adversely affect competition in international markets, including those between the UK and California. He also took no position on whether the applicants had satisfied the FCC's effective competitive opportunities standard for international telecommunications mergers, which requires that a foreign carrier demonstrate that effective competitive opportunities exist for US competitors in the foreign country before the foreign carrier can serve a destination market where it has market power. (Market Entry and Regulation of Foreign-Affiliated Entities, 11 FCC 3873, 3890-91 (1995).)[24] The AG noted that in its 1994 assessment of BT's 20% interest of MCIC, the DOJ believed this 20% interest would give BT an incentive to discriminate in favor of MCIC in the markets for telecommunications services between the US and UK, and that AT&T has made similar allegations in the current FCC docket.[25] However, the AG found the interests of California consumers here coincide with those of other US customers in the international markets. Finally, the AG declared that the issues raised by AT&T before the FCC and this Commission were technical

23 Predatory pricing usually involves selling a product at a price which is less than its production costs.

24 This test is applied any time a foreign carrier acquires equity interests exceeding 25 percent.

25 However, the DOJ placed conditions on its order in this earlier proceeding, which it continued after its investigation of this merger, to alleviate these concerns.

and, because AT&T's settlement outpayments to BT were $25 million out of total US telecommunications market revenues of all carriers of $200 billion, the alleged competitive injuries appeared "relatively small in the context of this transaction." (Comments, mimeo. at 10.) Thus, the AG concluded that "the competitive effects upon international markets resulting from the vertical consolidation of BT's UK-US operations with MCIC's long distance services will be relatively minor." (Id.) Because these issues are not unique to California, the AG suggested that the Commission defer to the FCC on the resolution of the competitive effects of this merger in international markets.

We have reviewed thoroughly the AG's comments and thank his office for its careful analysis. We concur with his comments, and have given deference to the FCC, subject to the condition we may reopen this proceeding should we find its conditions on the merger deficient. Therefore we see no reason to alter our antitrust analysis, supra, based on the AG's comments.

B. Conclusion

We declare that, considering all relevant public interest factors, this merger, on balance, is in the public interest. We find that no conditions on the merger's consummation are necessary to protect consumers.

We observe that MCIC has grown under competitive forces at the sole risk of its shareholders without a captive ratepayer base and guaranteed franchise territory to buffer risk and reward. Our policy as well as that espoused in the Telecommunications Act of 1996 is to open the field to competitive forces for the benefit of consumers. We continue to believe that competitive market forces will distribute the benefits of this merger to MCIC's California ratepayers.

2. CEQA Analysis

We conclude that the proposed transfer will have no adverse effect or impact on the environment because the transaction

involves only the transfer of outstanding shares of MCIC stock for BT, ADSs, and cash.

Findings of Fact

1. Applicants filed for approval of the proposed merger between MCIC and BT by application under PU Code § 854(a).

2. Notice of the application appeared in the Commission's Daily Calendar on January 15, 1997. The protest period expired on February 14, 1997.

3. AT&T and Telesis/SBC filed timely responses to the application.

4. On February 28, 1997, ORA filed a motion to accept a late-filed protest. The pleading does not meet our requirements under Rule 44.2 for a protest, but is instead a response.

5. On March 6, 1997, applicants filed a reply to AT&T and Telesis/SBC's responses. The reply annexes as Exhibit C confidential financial data, filed under seal.

6. On April 18, 1997, Telesis/SBC filed a joint motion to stay further proceedings until applicants amend their application to conform to the requirements of § 854(b) and (c) and requested that the Commission investigate MCIC's general reporting practices to ensure the accuracy of MCIC's reports regarding Commission funding, universal service obligations, and other programs.

7. On April 30, 1997, applicants filed their response to the Telesis/SBC motion.

8. On April 30, 1997, applicants also filed a motion urging the Commission to approve the merger without delay.

9. On March 26, 1997, GI and LIF filed a petition for leave to intervene under Rule 53.

10. Applicants were served with the petition via fax on April 28, 1997. On May 2, 1997, applicants filed their response opposing the petition.

11. In D.97-05-092 the Commission found that the public interest would be protected by review under PU Code § 854(a) and

the powers to impose any necessary requirements on our approval under PU Code § 853(b). Therefore, the Commission granted this merger an exemption from compliance with the requirements of PU Code § 854(b) and (c) and declared that the issues as to whether MCIC had more than $500 million in gross annual California revenues to be moot. The Commission also found that an investigation into MCIC's accounting procedures was not necessary at that time. The joint motion of Telesis/SBC to stay further proceedings and require amendment of the application under PU Code § 854(b) and (c) was denied. The motion of applicants urging the Commission to approve the merger without delay was deemed moot. The application was found not to be subject to the expedited Executive Director approval process. The ALJ was directed to process the application under PU Code § 854(a) in consultation with the co-assigned Commissioners and to bring any decision before the entire Commission.

12. In D.97-05-092, the Commission also denied the petition of GI and LIF to intervene. The Commission granted the motion of ORA to file a late-filed protest, but found it only qualified as a response under its Rules and directed the Docket Office to file it as a response.

13. On May 27, 1997, applicants filed a supplement to the protest, detailing $20 million in proposed infrastructure improvements post-merger and outlining a new intrastate FAP for lifeline customers in California.

14. On May 28, 1997, ORA filed a motion to withdraw its protest/response. There were no responses to the motion.

15. By Ruling dated June 30, 1997, the ALJ granted ORA's request to withdraw its protest/response.

16. On June 10, 1997, GI and LIF filed a petition to modify D.96-05-092. Parties have until July 10, 1997, to respond.

17. The shareholders of both corporations have approved the merger, as has the European Union. The FCC and DOJ have not yet acted upon applicants' applications before those agencies, nor have all of the states from which approval has been sought.

18. BT operates mainly in the UK, currently has no presence in California, and does not propose physically to enter the California market.

19. BT is an international corporation owning multinational subsidiaries, which is now acquiring the MCIC organization as an additional independent set of operating subsidiaries already under a holding company structure.

20. This application does not involve putting together two traditionally or incentive regulated telephone systems.

21. The merger does not involve merging any BT operations into MCIC operations. Neither contiguous nor nearby service territories are involved.

22. The substance of this transaction merely substitutes BT, albeit under the new name Concert plc, as the ultimate corporate parent of MCIC's California subsidiaries, with no change in their names, rates or conditions of service.

23. As a result of the transaction, MCIC will remain the parent holding company of its California subsidiaries, but will now have the new Concert as its holding company.

24. No consolidation of MCIC subsidiary management with BT management is contemplated. Instead, the top management of BT and MCIC will be blended into the new Concert. The officers of MCIC will stay the same, although its board may have minority UK representation. The officers and boards of the MCIC subsidiaries will be unaffected.

25. MCIC will have the expertise and financial backing of the BT group.

26. The merger is economically and financially feasible. Both companies are healthy financially, and ownership by BT will increase MCIC's financing options at a time of increased competition. The price paid for the shares is fair and reasonable considering the value to both BT and MCIC shareholders.

27. Efficiencies and operating cost savings will accrue, but because MCIC will still operate as a separate holding company, these savings will accrue primarily in terms of a broader base for

financing with the resultant corporate flexibility which it brings. Access to more financing at a time when both applicants are trying to improve infrastructure and technology while operating in competitive global markets is likely to lead to better service conditions for MCIC's California ratepayers.

28. The applicants' commitment to make over $20 million in infrastructure improvements in California will enhance service options for California ratepayers as well as result in more deployment of advanced technologies. Expansion of MCIC's local services and its investments in switches and fiber optic digital networks to provide these services will inure to the benefit of California consumers. Enhancing MCIC's competitive position with BT's expertise and financial standing will be likely to increase competition in the local telecommunications market, which furthers this Commission's policies to promote competition.

29. MCIC's affiliation with BT's cellular and paging interests will enhance service on a global scale to California wireless customers. Global product development and marketing of global services will make California businesses better able to compete in international markets.

30. BT as the new owner of MCIC is experienced, financially responsible and more than adequately equipped to continue MCIC's business as its ultimate parent.

31. The merger will improve the financial condition of the acquired MCIC and the quality of service to California ratepayers.

32. The merger will maintain the quality of management of the California-certificated MCIC subsidiaries since no changes are contemplated.

33. The merger is fair and reasonable to affected utility employees due to the maintenance of staff levels at MCIC subsidiaries.

34. To the extent that the utility assets are being transferred at a fair price, the merger is fair and reasonable to the majority of each applicant's shareholders due to the value-based price of the acquired corporation.

35. The merger will also be beneficial overall to state and local economies and communities in the area served by MCIC by virtue of the commitment to infrastructure improvements and the FAP on intrastate calls, the access to BT's community-giving programs and the uninterrupted presence of MCIC offices in California communities.

36. Since MCIC will remain in its current US corporate form, with BT as only the ultimate parent holding company, we find that our jurisdiction is preserved and we will maintain our capacity to effectively regulate and audit MCIC's operations in California.

37. All PU Code § 854(c) criteria are met by the proposed merger.

38. No party has protested the merger on antitrust grounds, nor has any party presented us with any economic alternatives in our treatment of the application.

39. California law contains no specific provisions governing mergers. Instead the state's statutory policy on economic competition is contained in our Cartwright Act (Bus. & Prof. Code § 16720 et seq.).

40. The UK has a far different regulatory and competitive framework than the U.S. Its deregulation plan stresses competition at all levels of telephone services, including the delivery of local lines. Thus, OFTEL, which regulates BT, has rejected "equal access" because OFTEL believes it is a disincentive to new competition in the delivery of local telephone lines. In the UK, indirect access to long distance service from other providers is available through the dialing of access codes. On the other hand, in the U.S. the delivery of local lines had been found to be a natural monopoly until the passage of the Telecommunications Act of 1996, making "equal access" a necessity for fair competition. Moreover, even after the local market was opened to competition, Congress, the FCC, and this Commission have emphasized the need for equal access to provide customers with the greatest number of choices.

41. In the international service market, carriers like BT were required previously to return UK-US traffic in proportion to the amount of traffic the carrier received from competing US carriers. This system, the FCC's ISP, prevented discrimination among U.S. carriers by requiring, among other things, that BT return minutes in the same proportion they were sent to U.S. carriers. However, the FCC recently vitiated this policy for competitive markets. A provider in another country may now enter into "alternative payment arrangements" with US carriers so long as the foreign market provides "effective competitive opportunities." Dominant carriers in markets are still subjected to the proportionate traffic rule under the ISP.

42. Both the UK and US systems envision competition in international service to take place as end-to-end packages.

43. None of the parties to the FCC proceeding have suggested that BT's possible anticompetitive activities might extend beyond the international service market. There are no allegations that the BT/MCIC merger would raise interstate or intrastate antitrust problems.

44. The UK market is even more open in 1997 than it was in 1994 when the FCC approved BT's acquisition of a 20% voting interest in MCIC over antitrust concerns similar to those raised about this merger.

45. There are four anticompetitive concerns presented by the MCI/BT merger: 1) the UK's lack of equal access, which requires UK customers to dial access codes to access BT's competitors; 2) the BT/MCI consortium's domination of access to transatlantic cables, especially TAT12/13, which is the most modern and sought-after cable, since Concert would own 35% of the total cable capacity; 3) BT's monopoly control over access to transatlantic cable stations and backhaul infrastructure; and 4) BT/MCIC's ability to profit at their competitors' expense by not being burdened by above-cost international accounting rates, by BT routing its calls to MCI on a discriminatory basis, and by allowing BT to skew accounting rates by "hubbing" third-country calls through the US.

46. OFTEL is the proper body to determine the most appropriate telecommunications policy for the UK, including the introduction and encouragement of competition in that market.

47. It is not in the public interest to withhold the approval of the instant merger, which is likely to be beneficial to the state and its consumers, over a policy disagreement as to the best manner in which to introduce competition in a telecommunications market thousands of miles away.

48. There is no discriminatory impact from this merger on US carriers due to lack of equal access in the UK.

49. The new Concert will not have a controlling share of the transatlantic-cable-owning consortium upon completion of the merger, and therefore cannot exercise monopoly controls.

50. US carriers own sufficient transatlantic cable capacity to meet their needs, new cables are being planned and BT has promised to provide access to new entrants at cost.

51. There is no anticompetitive impact from this merger on access to transatlantic cables capacity.

52. BT must provide access to transatlantic cable stations at cost and nondiscriminatorily under its UK license.

53. The backhaul market is presumptively competitive, with alternatives to BT already operating on the TAT12/13 route, and more are expected to receive OFTEL approval shortly.

54. BT is obligated to provide backhaul services to competitors at cost and nondiscriminatorily.

55. There is no anticompetitive threat from this merger in the submarine cable station market and its backhaul infrastructure.

56. The Commission defers to OFTEL's policy choice to encourage competitive alliances and the build-out of alternative infrastructures by not checking BT's potential anticompetitive behavior through regulatory means, but through competitive retaliation.

57. There are no anticompetitive impacts from this merger on the US-to-UK route.

58. In making our antitrust assessment, we are assuming that the FCC will continue the imposition of appropriate BT/MCIC I order conditions, delineated supra at note 17, on the merged entities.

59. The DOJ's Antitrust Division has approved the merger, subject to conditions which will protect the interests of California consumers against any anticompetitive behavior as a result of the merger.

60. The AG has rendered his opinion concurring with our finding of no anticompetitive impacts from this merger in intrastate or interstate markets.

61. The AG also concurred with our deference to the FCC to resolve the competitive effects of the merger in international markets.

62. Considering all relevant public interest factors, this merger, on balance, is in the public interest. No conditions on the merger's consummation are necessary to protect consumers.

63. Competitive market forces will distribute the benefits of this merger to MCIC's California ratepayers.

64. It can be seen with certainty that the proposed transfer will not have an adverse impact on the environment.

Conclusions of Law

1. The application, as supplemented, should be granted as it is in the public interest.

2. Within 30 days of the FCC order, the Commission may consider whether to reopen this proceeding as to anticompetitive concerns should the final FCC order in GN Docket No. 96-245 not contain the appropriate safeguards from its BT/MCIC I order, 9 FCC Rcd 3960 (1994).

3. This authority is not a finding of the value of the rights and property to be transferred.

O R D E R

IT IS THEREFORE ORDERED that:

1. On or after the effective date of this order, MCI Communications Corporation (MCIC) is authorized to merge with British Telecommunications plc (BT) in accordance with the terms described in Application (A.) 97-01-012, as supplemented. Within 30 days of the Federal Communications Commission (FCC) order, the Commission may consider whether to reopen this proceeding as to anticompetitive concerns should the FCC order in GN Docket No. 96-245 not contain the appropriate safeguards from its BT/MCIC I order, 9 FCC Rcd 3960 (1994).

2. MCIC and its California certificated subsidiaries shall continue to use their existing corporate identification numbers in the caption of all original pleadings and in the titles of pleadings filed in existing cases with the Commission.

3. MCIC shall file with the Commission's Docket Office for inclusion in the formal file of A.97-01-012 written notice that the authorized change in control has been completed, within 30 days after the change in control has taken place.

4. The authority granted in Ordering Paragraph 1 shall expire if not exercised within 12 months after the effective date of this order.

5. In the event that the books and records of the applicants or any affiliates thereof are required for inspection by the Commission or its staff, applicants shall either produce such records at the Commission's offices or reimburse the Commission for the reasonable costs incurred in having Commission staff travel to either applicant's offices.

6. Application 97-01-012 is closed.
This order is effective today.
Dated July 16, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners