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

In the Matter of	)	
	)	**IB Docket No. 96-261**
International Settlement Rates	)	

To: The Commission

COMMENTS OF
CABLE & WIRELESS, PLC

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February 7, 1997

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SUMMARY

The Commission's stated goal in this proceeding is to ensure that U.S. consumers have available to them high quality, technologically advanced international service, at reasonable rates. The *NPRM* proposes to achieve this goal by promoting effective competition in the global market for communications services. The *NPRM* states that the promotion of effective international competition depends upon revision of the current accounting rate system.[1] Accordingly, the *NPRM* proposes to reduce accounting rates through the implementation of cost-oriented accounting rate benchmarks, and aggressive enforcement of mandatory negotiation (or renegotiation) by U.S. carriers of settlement agreements with foreign carriers consistent with the benchmarks.[2]

Although the FCC's general goal of reforming the accounting rate system is admirable, C&W respectfully questions the means with which the *NPRM* proposes to achieve its objective. The unilateral action proposed by the *NPRM* does not comport with the requirements of international law, and flouts the well-established principles of international cooperation and comity as regards the establishment of accounting rates. Moreover, these actions lie outside the scope of the Commission's jurisdictional authority. The Communications Act does not confer on the FCC the authority to prescribe international accounting rates unilaterally: the Commission does not have plenary jurisdiction over matters that are within the jurisdiction of foreign administrations, such as setting the rates foreign carriers can charge to terminate U.S. traffic or determining the cost methodology a foreign carrier uses as a basis for those rates.

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1 *NPRM*, ¶ 5.

2 *NPRM*, ¶¶ 17, 87-89

Moreover, even if accounting rates were "rates" that the Commission is authorized by the Communications Act to prescribe, the Commission would be required to develop a record upon which a new rate could be justifiably prescribed. This it cannot do without expanding the scope of this proceeding because the *NPRM's* proposed actions are based upon unsupported facts and assumptions. The *NPRM* assumes a nexus between cost-based accounting rates and lower U.S. rates, and assumes that cost-based accounting rates will significantly affect the settlements deficit, but neither proposition is correct.

C&W respectfully suggests that the Commission should continue to use a multilateral approach to achieve reformation of the current accounting rate system.

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On December 19, 1996, the FCC issued a *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding to adopt new rules regarding international accounting rate benchmarks.[3] Cable & Wireless, plc ("C&W"), by its attorneys, submits the following comments on the Commission's proposals in the *NPRM*. C&W is an international carrier which interconnects with U.S. international service carriers. As such, its interests may be directly affected by the outcome of this proceeding.

The international telecommunications network is a remarkable and unique example of the ability of nations to collaborate for the universal social good. Despite wars, political conflicts, and social divisions, it is possible for any one of the roughly 700 million people with access to a telephone to talk to any other person, instantly traversing vast distances and divides. This capability is the product of more than a century of multilateral and bilateral cooperation. The ITU has been the essential, catalytic body responsible for facilitating and overseeing the technical and financial interconnection of the world's domestic and international telephone systems.

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[3] *International Settlement Rates*, IB Docket No. 96-261, Notice of Proposed Rulemaking, FCC 96-484 (rel. Dec. 19, 1996).

C&W fears that in the *NPRM* the Commission needlessly jeopardizes the valuable legacy of multilateral cooperation and international comity in the matter of accounting rate reform. C&W respectfully suggests that the proposed approach will be counterproductive and urges the Commission to work with the international community to achieve multilateral, managed change, and, ultimately, as proposed in ITU Recommendation D. 140, to obtain both cost-oriented accounting rates and bilaterally negotiated rate levels.

C&W has worked, and will continue to work, closely with the world telecommunications community through the ITU to adapt the international telecommunications network to the fundamental and sweeping structural, technological, and economic changes occurring throughout the world today. Specifically, C&W recognizes the necessity to reform the international accounting rate regime for a number of reasons, including the effect of the growth of alternative calling procedures on bilateral traffic balances. C&W is committed to contributing actively to the development of a solution which is acceptable to the world community and takes into account the differing needs of its various members.

I. NEITHER INTERNATIONAL LAW NOR THE COMMUNICATIONS ACT GRANTS THE FCC THE AUTHORITY TO PRESCRIBE A COSTING METHODOLOGY OR RATE LEVEL FOR A FOREIGN CARRIER IN ITS PROVISION OF TELECOMMUNICATIONS SERVICES IN A FOREIGN COUNTRY

The Commission's past actions regarding international accounting rates have focused on its preventing foreign carriers from playing off one U.S. carrier against another to obtain one-way lower accounting rates — in essence "whipsawing" U.S. carriers to the detriment of

U.S. ratepayers.[4/] In order to prevent this, the Commission established an International Settlement Policy ("ISP") that requires all U.S. carriers on a particular route to have access to the same arrangement. Specifically, absent special permission U.S. carriers can only enter into contracts with foreign carriers that give all U.S. carriers the same accounting rate and division of the accounting rate on each route. The ISP also generally requires that the U.S. carrier accept only a proportionate amount of return traffic.[5/]

The Commission with this *NPRM* has now shifted its focus away from ensuring nondiscriminatory treatment of U.S. carriers and toward the actual amount of the accounting rate.[6/] This new initiative is based on the perception that above-cost accounting rates have caused a growing international settlements deficit for the U.S., as well as creating a hindrance to the development of international competition. The result, in the Commission's view, is that on some routes U.S. consumers pay excessive rates for international message telephone service ("IMTS").[7/] The Commission proposes to drive accounting rates down

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4/ The accounting rate, as noted by the *NPRM*, is the "access" charge established by the U.S. carrier and the foreign carrier for terminating calls on each carrier's network. As it is the same for both the U.S. and foreign end, obviously the charge was never intended to reflect only the foreign carrier's or the U.S. carrier's costs. Rather, the accounting rate represents an amalgamation of both carriers' costs.

5/ *See Implementation and Scope of Uniform Settlements Policy for Parallel International Communications Routes*, 51 Fed. Reg. 4736 (1986), *recon.*, 2 FCC Rcd 1118 (1987), *fur. recon.*, 3 FCC Rcd 1614 (1988). In 1991, the FCC acted to facilitate U.S. carriers' ability to lower accounting rates. *Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), *recon.*, 7 FCC Rcd 8049 (1992).

6/ The FCC initially expressed a concern about the level of the accounting rates and the so-called "settlements deficit" in its 1990 *Accounting Rate Proceeding. Regulation of International Accounting Rates*, 5 FCC Rcd 4948 (1990).

7/ NPRM, ¶ 7.

toward cost by promoting competition in both domestic and foreign markets for IMTS.[8] Until IMTS competition can be relied upon for this purpose, however, the *NPRM* proposes to set the foreign carrier's accounting rate at the level at which it would be if such competition already existed in its country of license.[9]

The mere statement of the *NPRM's* goals is sufficient to demonstrate the dramatic and unprecedented nature of the FCC's claim of jurisdiction over the globe. Despite its breathtaking scope, the *NPRM* spends little time explaining the jurisdictional basis for its proposals. Rather, it simply asserts that: (1) unilateral action of this nature is permitted under international law and; (2) the FCC's jurisdiction derives from Sections 1, 4(i), 201-205 and 303 of the Act because the proposed measures are directed at U.S. carriers and seek to reduce U.S. IMTS rates. As demonstrated below, these claims simply will not withstand scrutiny.

A. International Law Requires Accounting Rates To Be Determined On A Bilateral Basis

The Commission, until the release of this *NPRM*, has always respected the concept — embodied in international law and comity — that its jurisdiction does not extend to carrier activities in a foreign country. In fact, over the entire 60-year history of the agency's involvement in accounting rates, beginning with its 1936 *Mackay Radio and Telegraph Company* decision, the FCC has been careful to avoid making any assertion of overriding

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[8] *NPRM*, ¶¶ 5, 25 and 71.

[9] *Id.*, ¶¶ 20, 23, 31 and 69.

jurisdiction.[10] Accounting rates since then have always been established consistently with the ITU requirement that they be set on a mutual basis.

Given the FCC's historical view of its own international jurisdiction and the clarity of the law, the *NPRM's* reliance on the ITU regulations to support unilateral action is surprising. It is true, as the Commission notes, that both the ITU Constitution and Regulations allow member nations to authorize carriers to enter into "special <u>mutual</u> arrangements" with respect to international telecommunications matters not of interest to members in general and not otherwise covered by ITU law.[11] This does not mean, however, as the FCC asserts, that the member nations are not "compelled by the international legal regime" to establish accounting rates bilaterally. The Regulations, in fact, specifically address the establishment of arrangements regarding accounting rates:

> For each applicable service in a given relation, administrations <u>shall by mutual agreement</u> establish and revise accounting rates to be applied between them, in accordance with the provisions of [these Regulations] and taking into account relevant CCITT Recommendations and relevant cost trends.[12]

B. <u>The Communications Act Does Not Grant The Commission The Power To Regulate Foreign Rates Directly</u>

The hierarchial legal relationship between international and U.S. law often can be complex. Here, however, such an analysis is unnecessary because there is no conflict. The Communications Act also does not grant the FCC the authority to prescribe international

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[10] *Mackay Radio and Telegraph Company*, 2 F.C.C. 592 (1936), *aff'd Mackay Radio and Telegraph Co. v. FCC*, 97 F.2d 641 (1938).

[11] *NPRM*, ¶ 6 & n.5, *International Telecommunication Regulations*, Article 9 (Melbourne, 1988); Constitution of the International Telecommunication Union, Article 31 (Nice, 1989) (emphasis added).

[12] *International Telecommunication Regulations*, Article 6.2.1 (Melbourne, 1988) (emphasis added).

accounting rates unilaterally. In fact, there is not a scintilla of evidence in the text of the Communications Act or its legislative history to support such a proposition. Nor has the Commission ever claimed such jurisdiction in previous actions.

Certainly, Section 1 of the Act grants the Commission the authority to regulate generally "foreign communication by wire and radio."[13/] The Act does not, however, confer on the Commission plenary jurisdiction over matters that are within the jurisdiction of foreign administrations. Past proclamations of the Commission consistently have noted the limited nature of its jurisdiction in the international environment. In a prior proceeding looking at accounting rates, the FCC noted:

> Unlike domestic telecommunications, our jurisdiction over international service applies only to one end of the service. Authority over the foreign end resides in the particular foreign correspondent.[14/]

In a Section 214 proceeding reviewing an application for an undersea cable between the continental U.S. and the U.S. Virgin Islands, the FCC reiterated its view of its own jurisdiction:

> In the case of domestic facilities, since we have jurisdiction over the entire facility, the situation is relatively clear. In the case of overseas facilities, however, the facilities are jointly owned by United States interests and their foreign correspondents who are beyond our jurisdiction.[15/]

It also has noted the difficulties that this can cause:

> Because the international communications market involves a cooperative effort of service providers in two different coun-

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[13/] *See* 47 U.S.C. § 152(a).

[14/] *Uniform Settlement Rates on Parallel International Communications Routes*, 84 F.C.C.2d 121, 122 (1980) (emphasis added).

[15/] *AT&T et al.*, 88 F.C.C.2d 1630, 1640 (1982) (emphasis added).

> tries, the provider at the foreign end, or the government under whose jurisdiction the foreign provider operates, has the power to facilitate or impede [U.S. policy].[16]

Given the above, the Commission has noted that as a matter of international comity it must take into account the different regulatory frameworks of foreign jurisdictions.[17]

The Commission's claim that its jurisdiction stems from Sections 201-205 of the Act also will not withstand scrutiny. Those provisions of the Act only put forth the regulatory scheme for the rate regulation of carriers that are subject to the FCC's independent jurisdiction.[18] They cannot be read as an expression of jurisdiction beyond U.S. boundaries.

In an apparent recognition of this, the *NPRM* characterizes its actions as actually directed at U.S. carriers and the rates they charge U.S. consumers. In view of the fact that the only cost issues or possible hearings involve foreign carrier rates, however, the basis for this contention is unclear. The *NPRM* apparently adopts this tortured construction, however, in an attempt to argue that accounting rates are "rates" under these sections of the Communications Act. In support of this proposition, the *NPRM* cites to a 1942 U.S. District Court case, *RCA Communications*.[19] That decision, however, does not stand for the proposition for which the *NPRM* cites it.[20]

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[16] *Regulation of International Accounting Rates*, 7 FCC Rcd 559, 561 (1991).

[17] *See, e.g.*, *VIA USA Ltd.*, 9 FCC Rcd 2288, 2292 (1994), *recon.*, 10 FCC Rcd 9540 (1995) (international call-back service); *AT&T*, 88 F.C.C.2d at 1640.

[18] The fact that these same provisions establish the regulatory scheme for other industries demonstrates their jurisdictional nature. *AT&T v. FCC*, 487 F.2d 864 (2d Cir. 1973).

[19] *RCA Communications v. United States*, 43 F. Supp. 851 (S.D.N.Y. 1942).

[20] Moreover, as discussed, *infra*, the actions contemplated by the *NPRM* have very little likelihood to affect U.S. rates — and certainly not to any significant extent.

The *RCA Communications* proceeding involved a question of the reasonableness of a domestic rate classification by a U.S. carrier that resulted in improperly high rates being charged to U.S. consumers. The Commission's action was challenged as being beyond its jurisdiction because, *inter alia,* it would have an inevitable effect on foreign interests as well. The District Court found the FCC to have the requisite jurisdiction regardless of the possible tangential foreign effect.

No one denies that the FCC has the power to establish the rate a domestic carrier can charge U.S. ratepayers, even if it might have a tangential effect on others beyond its jurisdiction. It certainly has that power. If the FCC could not set domestic rates despite such consequences, it simply could not accomplish its Congressionally established role of regulating domestic telecommunications.[21] The issue in this proceeding, however, is quite different. The *NPRM's* claim is that the FCC has the authority to set a foreign carrier's rate for service offered in a foreign country that could have an affect on domestic rates. This is quite a different legal proposition than that articulated by *RCA Communications*.

Further, the claim that the FCC has jurisdiction to set the rate foreign carriers can charge in their countries of license to terminate U.S. traffic because the rate can indirectly affect rates charged by U.S. carriers to U.S. ratepayers proves too much. If this were true, the FCC would have rate jurisdiction over all entities that provide a service or asset to a carrier that is calculated as part of the carrier's revenue requirement.[22]

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[21] It is for this reason that no one argued that the FCC's ISP was beyond its jurisdiction even though it indirectly affected foreign interests.

[22] Before divestiture, Western Electric products constituted a very significant portion of the costs that a Bell Operating Company ("BOC") incurred in providing their services. Regardless, the FCC never claimed direct jurisdiction over Western Electric's prices.

The FCC, however, is not powerless to protect consumers in such regards. The Communications Act and related law make clear that the FCC can affect a carrier's rates by excluding impermissible costs from any calculation of the carrier's revenue requirement or requiring the cost to be booked at the lesser of actual cost or market.[23] This latter approach is in fact how the FCC's rules deal with transactions between regulated entities (like the BOCs) and their unregulated affiliates.[24]

Nor is there an argument that the FCC would be unable to regulate effectively U.S. telecommunications without such expansive jurisdiction. It is clear that the FCC can effectively regulate international rates to U.S. consumers without setting the accounting rates for foreign carriers; it has done so for over 60 years.[25]

Section 303(r) of the Act also will not give any support to the *NPRM's* jurisdictional assertions. The text of that Section makes plain that the authority granted is limited to circumstances where the FCC has been granted jurisdiction elsewhere in the Act. Absent an independent grant of authority elsewhere, Section 303(r) is of no help to the *NPRM*.

The *NPRM's* citation to Section 4(i) of the Act fares no better. As the U.S. Court of Appeals noted over 20 years ago, Section 4(i) is not an independent grant of jurisdiction. Rather, it gives the Commission the authority to make rules and issue orders that are not otherwise inconsistent with its powers and jurisdiction.[26] Like Section 303(r), Section 4(i) looks elsewhere for a grant of authority.

23/ *See* Alfred E. Kahn, *The Economics of Regulation*, Vol. 1, p. 30 n. 23 (1991).

24/ See 47 C.F.R. § 32.27.

25/ In this regard, the FCC's role with foreign governments is similar to its role with state regulators. *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986).

26/ *AT&T*, 487 F.2d at 877-78.

While the Communications Act certainly grants the FCC wide-ranging jurisdiction, there is no evidence whatsoever that it grants the FCC the authority to set the rates for services provided by a foreign carrier in its country of license. Consistent with this view, the FCC until this proceeding has never alleged that it has the jurisdiction to direct the activities of a foreign carrier.[27] To the contrary, as cited above, it has explicitly denied that it has such powers.

C. The FCC Does Not Have The Authority To Prescribe What Cost Methodology A Foreign Carrier Must Use And Thereby Its Policy On Universal Service

The *NPRM* begins the process of unilaterally determining the appropriate accounting rate for each foreign carrier by selecting the cost methodology that each foreign carrier should use. The *NPRM* candidly states that in doing this it has concluded that cost-based accounting rates will best lead to achieving universal service in each foreign country.

As a company with responsibility for operations in over 55 countries covering the whole spectrum of geo-political, socio-economic and regulatory features, C&W has extensive experience with the different drivers determining telecommunications policy, particularly in the developing world. Based on our experience, we believe that many of the proposals contained in the *NPRM* are inconsistent with the practical realities faced by telecommunications operators in developing countries.

Developing countries differ substantially one from another, in both their level of and potential for economic development, their political and economic philosophies, and in the

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[27] The Courts, in reviewing an agency's interpretation of its own organic statute, look carefully at whether the agency's view is a new one or one of long standing. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 381 (1969).

size and independence of their national markets. The impact of changes of accounting rates on the economies and market development of telecommunications in low-income countries with small potential telecommunications markets will be very different from that in mature or serviced-based economies. It will also be very different between countries within the developing world, even between those whose commitment to restructuring is universally praised, let alone those with different attitudes to the desirability of restructuring itself.

The three categories into which the FCC proposes to divide the world for the purposes of its benchmarking policy takes little account of these differences. Accordingly, such categorization inevitably will give rise to serious market distortions and inequities.

In the developing world, the debate as to whether it is "fair" or economically efficient for international telecommunication services to "subsidize" local service is academic: the reality is that they do and in some cases must.[28/] The attainment and maintenance of universal service has been and continues to be one of the fundamental instruments of telecommunications policies of all countries.[29/] That goal depends on the continuing support of low-income households, the rural and the needy by revenue transfer arrangements. While the need for cross-subsidies between national telecommunications

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[28/] C&W's use in this pleading of the term "subsidize" is not meant to indicate concurrence with the FCC's definition of that term. Professor Martin Cave correctly notes that the Commission's definition of "subsidy" -- an accounting rate in excess of the carrier's incremental cost -- is questionable. Attachment A at 2. Attachment A is a commentary on the FCC's benchmarking methodology by the eminent economist Professor Martin Cave, Vice Principal of the University of Brunel.

[29/] The *NPRM* does not explain why it rejects out of hand the policy of charging above-cost rates to one class of users to finance universal service. This is especially troubling because the FCC always has used that approach to achieve U.S. universal service goals. *NPRM*, ¶¶ 10, 25 and 59; *see also* Attachment A at 2-3.

markets in industrial economies may no longer be such an imperative,[30] it remains so with developing economies. Revenues from international telecommunications are essential for the development of a national infrastructure in the majority of developing countries, where many consumers cannot afford access to telecommunications at any economically justified price. For the majority of developing countries, international calls account for a significant proportion of their traffic. Their governments have a legitimate right, therefore, to impose a larger proportion of the cost of their telecommunications policy objectives on the international sector.

Telecommunications service improvements made possible by inflows of hard currency provide a basis for industrial growth and wealth, surely an excellent remedy for narrowing the calling imbalance between the U.S. and its less prosperous correspondents. Absent alternative means of reducing the cost of access to the local network for low-income customers, a reduction in international revenue is likely to lead, in the short term at least, to higher prices for and reduced accessibility of domestic telecommunications, particularly in rural areas. While reduced international prices may stimulate increased traffic and revenue, this is most likely to occur between advanced industrial countries, which already account for the vast majority of bilateral international traffic. Low-income developing countries might well lack confidence that they will benefit from such a change, particularly if the inability to cross-subsidize leads to stagnation in national network development.

The development of a country's telecommunications networks is not only of benefit to consumers of service in that country. The global growth of the telecommunications

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[30] The U.S., of course, has the same commitment to universal service and has established a number of cross-subsidies to promote it.

customer base benefits all customers, not just those who have gained access. There is much data available to demonstrate that as developing country networks expand, the volume of incoming international calls increases significantly.[31/] It is not the cost of the call that prevents calls from the developed to the developing world, but the lack of access due to the limited reach and poor quality of many national networks.

The proposition that the development of telecommunications business can best be met by privatization and competition needs much greater verification. This approach assumes that the necessary private financial sources will be available to meet all demands; this is not necessarily correct. It is becoming increasingly difficult for governments to locate investors willing to participate in the privatization of the telecommunications industry. Not every developing country is capable of securing investment from the open market. Governments must compete for a limited pool of funds, both within the telecommunications industry and against the claims of other utility industries being privatized.

Although it is generally recognized that telecommunications infrastructure and information technology play a crucial role in social and economic development, developing economies offer little short term scope for the rapid expansion of national telecommunications networks. While developing countries with large domestic markets are seeking new ways to tap into the latest technology so as to leapfrog past development cycles, the successful development of telecommunications has primarily been confined to countries with large, developed economies, most of which already enjoyed universal telephone access

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31/ In the six-year period from 1988-1993, Gamtel, the national operator of Gambia, invested approximately $50 million and increased the total number of customers by 140% to 14,000. During the same period, incoming calls from the US increased from 585 thousand minutes to 4.5 million minutes a year.

before the introduction of competition. None started down the road of liberalization and competition with economies as underdeveloped or teledensities as low as those of the majority of today's developing countries, not all of which have the magnetic attraction of large markets such as China and India.

Furthermore, although the *NPRM* acknowledges the need for time for countries to make the adjustments necessary to introduce competitive reforms, the timeframes suggested -- up to a maximum of five years for developing countries -- are unrealistic and take no account of experience to date, even in the U.S.. The U.S. industry, benefiting from a much higher level of national economic activity, was allowed a transition period in excess of 15 years. The U.K. has enjoyed a similar transition period. In the European Union, encompassing only industrialized countries but with a broader range of economic development than either the U.S. or U.K., transition periods from between 12 to 17 years have been permitted.[32/]

A factor common to all those who have accepted transitional periods is the right to set their own and make them subject to their own review. We assume that the U.S., no more than the U.K. or the European Union, would not have been prepared to have deadlines in which to implement policies imposed on them by foreign administrations, as is being proposed in the *NPRM*.

Although technological development and our understanding of the issues involved have reduced the time needed to achieve the necessary structural changes, our experience remains confined primarily to industrialized economies with a relatively advanced

32/ The proposed transition period for the lowest income countries is shorter than that for Greece as proposed in the European Union's offer in the current WTO discussions on basic telecommunications.

telecommunications service industry. There is no evidence to suggest, therefore, that developing countries, starting from a much lower economic base, can achieve similar results in a third of the time that has been needed to date.

II. THE RECORD WILL NOT SUPPORT A RATE PRESCRIPTION FOR A FOREIGN CARRIER

Even assuming, *arguendo*, that accounting rates are "rates" under the Communications Act, Section 205 of the Act requires the Commission to determine a carrier's cost before it can prescribe a rate or practice. To do this, the Commission must first develop a record upon which it can find not only that the old rate is improper, but that the new rate it is prescribing is justified.[33]

In lieu of the Act's requirements to develop a record on "facts" relating to a carrier's actual costs,[34] the *NPRM* simply attempts to take a short-cut by deducing from various assumptions the costs incurred by foreign carriers.[35] In many cases, however, the basis for the assumptions is quite questionable. For example, the *NPRM's* analysis utilizes an "average network cost" for termination of inbound calls obtained form AT&T. That information, apparently requested by the Commission, was furnished in a cryptic two-page letter dated three days before the adoption and release of the *NPRM*.

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[33] *See Nader v. FCC*, 520 F.2d 182, 192-93; *AT&T v. FCC*, 449 F.2d 439 (2d Cir. 1971).

[34] The *NPRM* correctly notes that the Communications Act does not require the FCC to establish only cost-based rates in every case. ¶¶ 31-33, 50. However, that does not mean that the Commission can ignore a carrier's cost when prescribing a rate. The Act requires that a carrier be able to recoup its legitimate costs and that rates be at least cost-related. As the FCC itself has said, a carrier's costs are the basis for setting rates. *AT&T v. FCC*, 836 F.2d 1386, 1389-90 (D.C. Cir. 1988).

[35] The *NPRM* is quite candid in noting it has no real cost information and that it probably cannot obtain it — at least in the timeframe in which the Commission wishes to act. The *NPRM* does not indicate, however, what efforts the FCC has made to obtain such information. *NPRM*, ¶¶ 33 and 41.

C&W does not dispute the cost figure; it has no way to judge it. It seems apparent, however, that there is no way the FCC can evaluate the figure, either.[36] Moreover, it comes from AT&T, the company which admittedly has the most to gain from this proceeding. The significance of this matter cannot be overstated, for the *NPRM* states that the AT&T figure is its "starting point" for its analysis of incremental cost.[37]

In another instance, the *NPRM* notes that the average charge for a domestic call is 16¢ a minute, while the average international call is 99¢ a minute. It then concludes that this difference is not due to cost differences, but is the result of inflated accounting rates. However, the *NPRM* provides no support for that proposition, nor for the claim that cost differences can only be a few cents per minute. While it is true that costs of major international facilities may be similar, most calls originate, terminate, and transverse other, more costly, local and national plant.[38]

In an apparent recognition of these problems, the *NPRM* implicitly begins to set the basis for an argument that the benchmarks do not actually constitute a prescription of rates. Whether an agency action constitutes a prescription, however, is not determined by how an agency describes its action, but rather by its actual effect.[39]

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[36] The AT&T letter consists of only two pages and contains no substantiation for its statement of cost.

[37] *NPRM*, ¶ 50.

[38] *See* Attachment A at 4. Professor Cave points out that the *NPRM* does not explain why it believes there is an inverse relationship between GNP per capita and the unit costs of the countries' telecommunications network. Further, the classification raises significant MFN issues.

[39] *See, e.g.*, *Nader*, 520 F.2d at 202 ("the Commission need not explicitly announce its action as a prescription to have that effect"); *Moss v. Civil Aeronautics Board*, 430 F.2d 891, 897 (D.C. Cir. 1970) (same).

The U.S. Court of Appeals in *Moss v. CAB* examined an order issued by the Civil Aeronautics Board ("CAB") that "proposed" and "suggested" a rate-making formula for domestic airlines to use to establish fare schedules. The court found that, although the order did not specifically require carriers to use the proposed formula, the CAB's words and proposed actions made clear that only rates conforming to the formula would be accepted and not suspended. The CAB had stated that it would view any fare in excess of the ceiling established by the formula as *prima facie* unjust and unreasonable, and that any such fare ordinarily would be suspended and ordered investigated. Accordingly, the court found that the CAB "did all that it could, short of formally styling its order as rate-making, to induce the [airlines] to adopt the proposed rates."[40/] Because the pressures on airlines to file rates conforming with the CAB's formula "were great, if not actually irresistible," the court held that the CAB had, in fact, effectively prescribed a rate.[41/]

Similarly, here the pressures on foreign carriers to negotiate FCC-mandated settlement rates complying with the Commission's benchmark will be "irresistible." In fact, the *NPRM* is quite open about the pressures it intends to exert: denying recalcitrant carriers entry to the U.S.; conditioning and/or revoking their existing Section 214 authorizations; and denying them ISR authority.[42/] In contrast, the *NPRM* promises that cooperative entities will be favored with flexible rulings.[43/]

40/ *Moss*, 430 F.2d at 898.

41/ *Id.* at 897-98. *See also OXY USA v. FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995) (order establishing new petroleum valuation methodology formula constituted a prescription because only companies using that formula were granted access to the pipeline).

42/ *NPRM*, ¶¶ 63, 76-83, 89.

43/ *NPRM*, ¶¶ 66, 70, 72-74.

III. THE *NPRM'S* PROPOSED ACTIONS ARE BASED ON A NUMBER OF UNSUPPORTED ASSUMPTIONS

The *sine qua non* of reasoned decision-making is a proper understanding of the problem being addressed.[44] The *NPRM*, however, fails to explain the perceived relationship between cost-based accounting rates, and either lower rates for U.S. consumers or a reduction in the settlements deficit.

A. The *NPRM* Does Not Explain The Nexus Between Cost-Based Accounting Rates And Lower U.S. Rates

The *NPRM* assumes that there is a direct and significant relationship between what U.S. consumers pay for IMTS and the charges U.S. carriers pay foreign carriers for terminating U.S. traffic. The *NPRM* does not, however, explain the basis for this assumption. As the *NPRM* notes, the Commission has been quite successful in lowering accounting rates through a myriad of bilateral approaches.[45] Despite this, the *NPRM* admits that the U.S. rates have not declined in proportion to the accounting rate

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[44] *Home Box Office v. FCC*, 567 F.2d 9, 37 (1977), *cert. denied*, 434 U.S. 829 (1977), *reh'g denied*, 434 U.S. 988 (1977).

[45] The FCC's success in this area and the clear international trend away from accounting rates belies the need for the Commission to act unilaterally in any event. For example, all of the countries in the Caribbean with whom C&W is involved in the provision of international telecommunications have negotiated agreements with U.S. carriers which have either brought them within the appropriate former benchmark or provided for its phased attainment. All such agreements received the FCC's approval. The question now becomes how the *NPRM* relates to these existing agreements. There has been extensive planning and investment based on these agreements. The business plans of C&W's Caribbean operations are based on the year-on-year declining rate agreements. Significant undersea fibre and national network investment that have been planned are put at risk by the proposed unilateral cuts in the accounting rates.

reductions.[46] In fact, as the FCC is aware, the accounting rate to Hong Kong has dropped while the U.S. collection rate has gone up.[47]

Using the Commission's most recently published analysis, Figure 1 (Attachment B) shows the development of U.S. carrier revenues over the past few years, and the breakdown between settlements and retained revenue. All three have consistently increased, but it is clear that the growth in settlement payments has been dwarfed by the growth in revenue retention by U.S. carriers. Figure 2 (Attachment C) shows evidence of this trend on one bilateral route, between the U.S. and the U.K. Between March 1991 and May 1994, the U.S./U.K. accounting rate was reduced from 0.75 SDRs per minute to 0.33 SDRs -- a 55% decrease over three years. While this has been reflected in steeply declining tariffs for calls from the U.K. to the U.S., as Figure 2 shows, the U.S. international carriers have made few or no reductions in their basic U.K.-bound rates over this same period. Consequently, U.S. carriers have expanded the proportion of retained revenues from these calls. There is evidence of this type of behavior by U.S. carriers on numerous other routes. Merrill Lynch & Co. estimates for the period 1989 to 1993 that international collection rates in the U.S. rose by 0.2% per year, but outbound settlement rates fell by 4.9% and inbound by 7.3% per year.

There are a number of possible reasons for this disconnect. Because carriers pay accounting rates only on the difference between inward and outward traffic, the amount saved on most routes may not be significant enough to show up in the rates.[48] Another

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[46] *NPRM*, ¶ 27.

[47] *NPRM*, ¶ 12 & n.15; *see also* Attachment A at 2.

[48] To the extent that this is true, the *NPRM's* allegation of U.S. consumer harm is of course undermined.

possible explanation is that the carriers are simply not "passing-through" the savings to their subscribers.[49/] This may be because the FCC lacks the legal authority to require the carriers to do so.[50/] The Commission hints at this problem by requesting advice as to whether it should "encourage" — not force — the carriers to flow-through any accounting rate savings. Certainly, however, if the FCC cannot be assured that the savings will go directly to U.S. consumers, none of its projected public interest benefits can be expected to result and the major basis for its jurisdictional claim disappears.

B. The *NPRM* Does Not Explain How Cost-Based Accounting Rates Will Significantly Affect The Settlements Deficit

While the *NPRM* expresses great concern about the settlements deficit, it does not discuss in detail how its proposals will reduce the deficit.[51/] Instead, the *NPRM* simply assumes that above-cost accounting rates create a significant portion of the settlement deficit. This is not, however, self-evident. In fact, a strict application of the proposals contained in

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49/ In previous similar circumstances, the FCC ensured that FCC-mandated rate reductions were flowed-through to end-users of the service. *See RCA Global Communications, Inc.*, 90 F.C.C.2d 1233 (1982) (authorization for flow-through net of direct and administrative costs related to the flow-through); *ITT World Communications, Inc.*, 70 F.C.C.2d 1316 (1978) (guidelines for flow-through set forth); *AT&T*, 56 F.C.C.2d 821 (1975) (Sections 4(i) and 4(j) cited for flow-through authority); *Communications Satellite Corporation*, 56 F.C.C.2d 1101 (1975) (flow-through, net of direct and administrative costs, required); *Hawaiian Transponder Case*, 45 F.C.C.2d 252 (1974) (partial flow-through required). The Commission has made no effort to do this in the area of accounting rates, perhaps because it feels it does not have the authority to mandate a flow-through.

50/ *Regulation of International Accounting Rates*, 6 FCC Rcd 3434, 3435 (1991).

51/ Since the Commission does not know the degree to which the accounting rates in any country are above cost, it cannot determine the degree to which the settlements deficit will be affected by the imposition of a cost-based accounting rate.