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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)	**IB Docket No. 97-142**

COMMENTS OF VIATEL, INC.

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SUMMARY

Viatel supports the Commission's proposal to replace compliance with the effective competitive opportunities ("ECO") test with a rebuttable presumption in favor of entry in authorizing companies from WTO Member countries to provide international switched services provided over private lines. This will promote competition and contribute to market-based incentives for reductions in accounting rates and lower international collection charges.

However, Viatel strongly objects to the imposition of accounting rate benchmarks as a pre-condition to the utilization of any such authorization. The Commission's proposal would require withholding of authorizations of services that will tend to promote accounting rate reductions on the condition that accounting rates must already be reduced to desired levels. Such a condition will inhibit entry and hinder competition and blunt market forces that otherwise would encourage accounting rate reductions, turning longstanding Commission policies on their head. This approach is also contrary to evidence that shows that in fact provision of switched services over private lines has a beneficial impact on accounting rates.

On the other hand, there is no evidence that such services lead to "one-way bypass," with detrimental impact on the U.S. settlements deficit, as the Commission has feared. Such concerns are only speculative. In any event, such a concern involves only service configurations which allow accounting rate bypass on the U.S. end without permitting U.S. carriers a similar bypass opportunity on the foreign end. In any event, through its reporting requirements, the Commission retains sufficient capability to identify and redress any such issues should they actually arise in the market. Consequently, the proposed benchmark condition is unduly restrictive and overbroad, and therefore unreasonable.

The proposed conditions are not consistent with the U.S. obligations under the General Agreement on Trade in Services ("GATS"). First, such conditions, though characterized as post-authorization restrictions effectively operate to limit market access. However, these market access restrictions are not listed in the U.S. schedule of commitments, as required by Article XVI of the GATS. More importantly, because there is no supportable expectation of anticompetitive behavior or harm to U.S. consumers from most forms of switched services over private lines, the conditions are not justifiable under the Regulatory Reference Paper and do not meet the GATS standard of reasonableness.

To the extent the Commission determines that benchmark conditions are required to protect the U.S. market and U.S. consumers, they should be applied only to services that constitute one-way bypass on the U.S. end.

Viatel also believes that the Commission's policies and rules on this issue should treat all WTO Members alike and that there is little justification for imposing differential treatment. Also, to the extent that the Commission considers it appropriate to retain the ECO test for non-WTO Member countries, Viatel urges the Commission to target it to carriers affiliated with foreign carriers having market power on the foreign end.

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To: The Commission

COMMENTS OF VIATEL, INC.

I. Introduction.

Viatel, Inc. ("Viatel"), by its attorneys, hereby submits these Comments on the Federal Communications Commission's ("FCC's") *Notice of Proposed Rulemaking*, FCC 97-195, released June 4, 1997 in IB Docket No. 97-142 ("*Notice*").[1] In this proceeding, the Commission is considering revisions to its rules governing the entry of foreign-affiliated carriers into the U.S. market for basic telecommunications services in light of the recent adoption by the United States and other members of the World Trade Organization (the "WTO") of the WTO Basic Telecom Agreement. Viatel is a U.S.-based carrier authorized to provide international resale and facilities-based services. As such, Viatel's interests will be directly affected by the outcome of this proceeding.

Viatel's comments are limited to those issues that concern the provision of switched services over private lines. As discussed below, Viatel supports the Commission's

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[1] These comments also are being submitted in the *Benchmark Proceeding* because the Commission has made clear that the benchmark condition issue will be resolved there. International Settlement Rates, IB Docket No. 96-261, *Notice of Proposed Rulemaking,* FCC 96-484 (Dec. 19, 1996) ("*Benchmark Proceeding*").

proposal to eliminate the effective competitive opportunities ("ECO") test in favor of a rebuttable presumption of entry for applications of companies from WTO Member countries to provide international switched services using private lines. This will stimulate new entry and competition in the market.

However, Viatel does not support the Commission's proposal to condition these authorizations on compliance with accounting rate benchmarks. The proposed conditions would discourage competition for the sake of preventing a problem (*i.e.*, one-way bypass) which is entirely speculative. As such, the Commission's proposal is an unreasonable and inappropriate "safeguard" inconsistent with U.S. obligations under the General Agreement on Trade in Services ("GATS"). Viatel strongly urges the Commission to abandon this proposal or, at a minimum, restrict its application to U.S. inbound services that are interconnected to the public switched telephone network ("PSTN") at the U.S. end.

II. Elimination of the ECO Test for Applications to Provide Switched Services Over Private Lines Will Promote Competition in Furtherance of the Commission's Goals in This Proceeding.

In the *Notice*, the Commission proposes to eliminate compliance with the ECO test as a requirement for grant of authority to provide switched services using private lines to WTO Member countries.[2] Viatel supports the Commission's proposal.

The intent of the Commission in adopting the ECO test was to prevent "one-way bypass," *i.e.*, where private lines are used only for inbound switched traffic into the U.S., while outbound switched traffic from the U.S. remains subject to accounting rates. In

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[2] *Notice* at ¶ 48. The Commission grants authority to provide switched services using resold private lines (referred to as international simple resale, or "ISR") or facilities-based private lines. Such services may be interconnected with the PSTN, or "open" on one or both ends of the international circuit.

the Commission's view, one-way bypass exacerbates the U.S. net settlements deficit and ultimately increases the burden on U.S. ratepayers through higher rates for international message telephone service ("IMTS").

As the Commission acknowledges in the *Notice*, implementation of the WTO Basic Telecom Agreement will bring fundamental changes to the competitive environment that will alleviate this concern. In particular, the WTO Basic Telecom Agreement will substantially reduce the threat of one-way bypass of the U.S. by exerting considerable pressure for accounting rate reform, due to the opening of foreign markets.[3] U.S. carriers will have the opportunity to send U.S. outbound switched traffic over private lines to 52 countries.[4] This competitive response by U.S. companies will reduce the incentive of foreign companies to bypass settlements on the U.S. end.

Removal of the ECO test will facilitate new entry on WTO Member country routes among U.S.-based and foreign-affiliated carriers alike. It also will eliminate for both carriers and the Commission the costly regulatory burdens associated with this requirement. Thus, eliminating the ECO test in favor of a rebuttable presumption of entry on applications to provide switched services over private lines is timely, appropriate, and will serve the Commission's paramount goal in this proceeding, which is to promote competition.

III. Imposition of Entry Conditions on Section 214 Applications for Switched Services Over Private Lines is Unnecessary and Unwarranted.

In the *Notice*, the Commission states that the U.S. is obligated under the WTO Basic Telecom Agreement and the Reference Paper on Pro-Competitive Regulatory Principles

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[3] *Id.*

[4] *Notice* at ¶ 50.

("Reference Paper") to maintain "appropriate measures to prevent anticompetitive practices in the basic telecommunications market."[5] Accordingly, the Commission proposes various "safeguards" designed to prevent and to aid in the detection of anticompetitive behavior on the part of foreign-affiliated carriers. Among other things, the Commission proposes to condition the authorizations of carriers to provide switched services over private lines on compliance with the benchmark accounting rate ranges proposed in the *Benchmark Proceeding*. For the reasons discussed below, Viatel strongly objects to this proposal.

A. The Proposed Conditions Will Hinder the Development of Competition in the Market.

The Commission's proposal to condition authorizations to provide switched services using private lines on compliance with benchmark accounting rates will not serve the public interest or the Commission's goals in this proceeding because it will inhibit entry and thereby frustrate competition. Authorizations to provide switched services over resold private lines give startup carriers a means to enter the market for international services quickly and at low cost.

However, the imposition of the proposed conditions on carrier authorizations would dampen competition. The readily apparent possibility that a carrier's authorization could be revoked or severely restricted would create market and financial uncertainty. This would not only actually limit entry but would also hamper the ability of smaller carriers to obtain long-term financing. Thus, the proposed authorization conditions would place carriers

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5 *Notice* at ¶ 79.

that provide switched services using private lines at a distinct competitive disadvantage. The Commission has previously recognized these facts.[6]

Moreover, conditioning Section 214 authorizations to provide switched services over private line facilities on compliance with benchmark accounting rates is inconsistent with the policy considerations that underlie the Commission's original authorization of these services. When the Commission established its policy on ISR services in 1991, the Commission stated that allowing switched traffic to be carried on private lines would encourage new entry on international routes. Increased competition would in turn exert downward pressure on above-cost accounting rates and foreign collection rates, thereby promoting the U.S. public interest in cost-based international services.[7] Thus, it makes little sense to authorize the provision of a service that is intended to reduce accounting rates, and then prohibit or severely restrict the provision of that service unless accounting rates have already been reduced to the desired levels.

B. The Anticompetitive Conduct That The Proposed Conditions Are Intended to Address is Speculative.

Evidence suggests that switched services provided over private lines indeed have had a beneficial effect on competition in the market for international services and on the level of accounting rates. For example, on the U.S.-U.K. route alone, where carriers have

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[6] *See, e.g., Market Entry and Regulation of Foreign-Affiliated Entities* (Report and Order), 11 FCC Rcd. 3873, 3931 (1995) ("*Foreign Carrier Entry Order*"); *fONOROLA Corp.*, 9 FCC Rcd. 4066, 4069-4070 (1994) ("*fONOROLA Reconsideration*"); *Cable & Wireless, Inc.*, DA 94-1344, released December 8, 1994.

[7] *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd. 559, 560 (1992); *See also Foreign Carrier Entry Order* at 3931, 3933; *Streamlining the International Section 214 Authorization Process and Tariffing Requirements*, Notice of Proposed Rulemaking, 10 FCC Rcd. 13477, 13485 (1995); *fONOROLA Reconsideration* at 4067.

been allowed to provide switched services using resold private lines since 1994, accounting rates have dropped approximately 40% during that period.[8] Furthermore, it has been alleged that ISR service providers have captured some 10-15 percent of the market for U.S.-U.K. service.[9]

At the same time, there is no apparent evidence of one-way bypass or other anticompetitive conduct arising from the provision of switched services using private lines. Despite the fact that switched services over private lines have been widely available for some time,[10] to the best of Viatel's knowledge and belief there have been no complaints filed at the Commission alleging one-way bypass or other anticompetitive conduct arising from the provision of these services. Furthermore, it does not appear that the Commission has ever taken action against a carrier for anticompetitive conduct arising from the provision of switched services over private lines. In a similar vein, it appears that the UK government has no evidence of one-way bypass. In its recent comments in the *Benchmark Proceeding*, the U.K. government stated that since first authorizing service providers to engage in ISR in 1992, it has never had to take action against ISR operators on account of one-way bypass or other anticompetitive manipulation of accounting rates.[11] In light of these facts, it is not at all clear that one-way bypass actually is or ever will be a problem. In any event, since the

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[8] *See Trends in the U.S. International Telecommunications Industry*, Industry Analysis Division, Common Carrier Bureau, FCC (June 1997), at 69.

[9] *See* BT North America Motion to be Reclassified as a Non-Dominant Carrier for US-UK Services, I-T-C-96-007-ND, filed Aug. 2, 1996, at 6.

[10] The Commission issued its first ISR authorization in 1992. To date, permission has been granted to provide ISR services to four countries (Canada, the UK, Sweden, and New Zealand).

[11] *See* Comments of the UK Government in the *Benchmark Proceeding* filed Feb. 6, 1997, at 2.

Commission requires ISR licensees to submit semi-annual reports on ISR traffic as a means of detecting anticompetitive conduct,[12] the Commission will have the necessary evidence to proceed against any carrier that actually engages in such conduct.

C. The Proposed Conditions Are Not Consistent With U.S. Obligations Under GATS.

Because there is no evidence of one-way bypass or other anticompetitive conduct arising from the provision of switched services over private lines, the Commission's proposed conditions cannot withstand scrutiny under the GATS once the WTO Basic Telecom Agreement has been implemented. Article VI of the GATS specifically requires that a country's regulations be "reasonable" and "objective" and not constitute unnecessary barriers to trade in services. The Reference Paper similarly requires that any competitive safeguards adopted be "appropriate." The Commission's proposed conditions do not meet this standard.

First, adoption and enforcement of these conditions with respect to the authorizations of carriers from WTO Member countries would violate U.S. obligations concerning market access. GATS Article XVI provides that a Member country will not restrict access to its markets by carriers from other WTO Member countries except as provided in its schedule of specific commitments. While the FCC characterizes its proposed conditions as "post entry" regulations, the fact remains that the Commission would require compliance with the settlement rate benchmarks before service can be provided. This is effectively the same as a pre-entry restriction.[13] The result is indistinguishable, as a

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12 *See fONOROLA Reconsideration* at 4070.

13 Various commentors in the *Benchmark Proceeding* noted that the Commission's proposed conditions are inconsistent with U.S. obligations under the GATS. *See, e.g.*, Comments of France Telecom at 15; Comments of GTE Service Corp. at 30; Comments of the Embassy of Japan at 2.

practical matter, from an initial refusal to grant Section 214 authority. Thus, the imposition of these market access restrictions, which are not specified in the U.S. Schedule of Specific Commitments, violates GATS requirements.

Second, the conditions are not "reasonable." There is no justification for the Commission to adopt conditions to address a problem that has been shown to be highly speculative. Indeed, the proposed conditions are excessively restrictive and overbroad. They restrict rather than promote competition and actually blunt the beneficial pressures such services can bring to bear on reductions in accounting rates. As the courts have made clear, a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.[14]

Because the proposed conditions are not sustainable under the GATS, the Commission should abandon its proposal. In the event that evidence of one-way bypass or other competitive harm does come to light, the Commission can impose conditions at that time. When evidence of anticompetitive harm is present, carefully tailored conditions on particular Section 214 authorizations to provide switched services using private lines may be reasonable and appropriate.

In the event the Commission decides to adopt its proposed conditions, however, the Commission should restrict the application of the conditions to U.S. inbound services where the U.S. end is open to the PSTN. The stated function of the conditions is to prevent one-way bypass, which would have an adverse impact on the U.S. net settlements balance. By definition, this problem affects only U.S. inbound services. As such,

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[14] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

conditioning the provision of U.S. outbound services on compliance with accounting rate benchmarks serves no real purpose.

IV. Other Issues

The Commission raises two other issues in the *Notice* that are of concern to Viatel. First, the Commission asks whether it should examine the extent of a WTO Member's commitment or its implementation of its commitment in determining whether a particular application to provide switched services using private lines presents competition problems that must be addressed.[15] The Commission tentatively has concluded that such action would be inadvisable with respect to applications to provide facilities-based, resold switched, and resold non-interconnected private line services.[16] Viatel believes that this tentative conclusion is correct and equally is applicable with respect to applications to provide switched services over private lines.

As the Commission observes in the *Notice*, scrutinizing the extent of a Member's commitment or implementation of that commitment would not be in keeping with the spirit of the GATS and the WTO Basic Telecom Agreement.[17] All Members to the Agreement have made specific commitments on market access or are likely to make such commitments in the future. In addition, all Members are bound by the GATS general obligations regarding non-discriminatory treatment and the like. The U.S. can enforce these commitments and obligations through the WTO dispute resolution mechanism. The application process itself will bring problems with a Member country's commitments to light,

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15 *Notice* at ¶ 52.

16 *Notice* at ¶¶ 35-37.

17 *Notice* at ¶ 37.

since the process will afford interested parties the right to rebut the presumption that an application should be granted. In light of these facts, any requirement to consider a Member country's commitment or implementation thereof as an initial matter is unnecessary and unduly burdensome for applicants and the Commission.

Second, the Commission seeks comment on its tentative conclusion that it should retain the ECO test for applications to provide switched services using private lines to countries that are not WTO members.[18] The Commission states that retention of the ECO test is warranted in this case because these countries have made no commitments regarding U.S. carrier entry or equivalent treatment. As such, the Commission believes that the threat of one-way bypass is substantial in these cases. As discussed above, Viatel is not convinced that one-way bypass is a problem warranting action by the Commission. However, should the Commission decide to retain the ECO test for applications to provide switched services using private lines to non-WTO Member countries, Viatel urges the Commission to apply the test in a more targeted fashion so as to allow greater competition on the route in question. For example, the Commission should consider restricting application of the test to carriers affiliated with foreign carriers having market power in the destination country. Unless the carrier is affiliated with a foreign carrier having market power at the distant end, it is difficult to see how the carrier could engage in one-way bypass to the point of substantially aggravating the U.S. net settlements deficit.

V. Conclusion.

For the reasons set forth herein, Viatel supports the Commission's proposal to eliminate the ECO test for applications to provide switched services over private lines to

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[18] *Notice* at ¶ 58.

WTO Member countries. However, the Commission's proposal to condition Section 214 authorizations to provide switched services via private lines on compliance with accounting rate benchmarks is unnecessary and inappropriate. Accordingly, Viatel urges the Commission to abandon its proposal to condition Section 214 authorizations to provide switched services over private lines on compliance with accounting rate benchmarks. At a minimum, the Commission should restrict application of these conditions to U.S. inbound services where the U.S. end is open to the PSTN.

Respectfully submitted,

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July 9, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing **Comments of Viatel, Inc.** this 9th day of July, 1997, upon the following parties by hand delivery:

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