at this time to mandate a particular approach U.S. carriers should take to pass through to consumers reductions in net settlements that occur as a result of the settlement rate benchmarks we adopt in this *Order*.

271. We are committed to ensuring that U.S. consumers receive the full benefits of settlement rate savings. We will therefore monitor closely carriers' prices to ensure that the U.S. market for IMTS is sufficiently competitive and carriers are passing on to U.S. consumers the full extent of savings in net settlements that occur as a result of the benchmarks we adopt here.[458] If, in the future, there is evidence that U.S. consumers are not receiving the full benefits of settlement rate savings, we will review the performance of the U.S. market for IMTS to determine whether we should revisit our conclusion that the market is sufficiently competitive to ensure that carriers pass settlement savings on to consumers.

272. We expect to see U.S. carriers pass on to consumers the savings in net settlements payments on a route-by-route basis because settlement costs, and consequently, savings, are incurred on a route-by-route basis. U.S. customers that make calls on routes on which foreign carriers lower their settlement rates should enjoy the benefits of such reduced rates. Moreover, a route-by-route pass through of net settlement savings would provide incentives for foreign carriers to reduce their settlement rates. This is because a route-by-route pass through of net settlement savings would ensure that foreign carriers that reduce their settlement rate with U.S. carriers enjoy the benefits of stimulated demand that results from lowered collection rates. Without a flow-through of net settlement savings on a route-by-route basis, traffic on such routes could remain static if U.S. carriers apportion settlement savings from such routes to other routes.

273. In reviewing the experience of the past several years, it appears that competition in the U.S. market for IMTS has caused U.S. carriers to direct the cost savings they have realized from settlement reductions more toward higher-volume residential customers than toward basic rate customers. We are concerned that competition alone will not produce lower rates for low-volume residential customers taking service from basic rate schedules. Therefore, in our monitoring of U.S. carriers' collection rates, we will pay particular attention to whether U.S. carriers pass on net settlement savings to residential basic rate schedules.

274. Many of the commenters that argue that reductions in settlement rates have not resulted in commensurate reductions in collection rates compare reductions in the nominal

[458] Telstra suggests that we monitor collection rates for IMTS. Telstra Reply at 3-4. The Commission has moved away from a rate-of-return regulatory regime to a regime that relies on a price cap methodology for dominant carriers provisioning interstate and international services. We thus decline to adopt KDD's suggestion that we regulate the rates charged by U.S. international carriers.

settlement rate (*i.e.*, the per minute settlement rate level) to collection rates.[459] This is, however, an inappropriate comparison because the proper basis for calculating any pass through of savings is the *net* settlement payment.[460] When a settlement rate is reduced, carriers' settlement savings are not equal to the reduction in the per minute settlement rate times the volume of traffic on the affected route. Rather, because settlement payments are made on a net basis, settlement savings on each route are reflected in the reduction of net settlement payments.[461] Thus, in determining whether U.S. carriers have passed settlement savings on to consumers, we will take into account reductions in net settlements, not reductions in the level of settlement rates.

E. Legal Basis For Establishing Benchmark Settlement Rates

275. As noted above, we conclude that we have the authority under the Act, relevant case law, and international regulations to adopt settlement rate benchmarks. In this section, we respond to the legal arguments of the commenters in detail.

1. The Communications Act and Relevant Case Law

a. Jurisdiction Over Foreign Communication that Originates or Terminates in the United States

i. Positions of the Parties

276. U.S. carriers generally agree that the Act gives us the statutory authority to adopt our benchmarks proposals.[462] Specifically, AT&T and Sprint argue that Section 2(a) of

[459] GTE Reply at 19; KDD Reply at 7-8; Telefónica de España Comments at 27.

[460] We note that many commenters compare settlement rate reductions to basic collection rate schedules. This is also an inappropriate comparison because all carriers offer discount plans that are not reflected in the basic rate schedule. As AT&T notes, rates under these discount plans have in many cases been reduced.

[461] At settlement, each carrier nets the minutes of service it originated against the minutes the other carrier originated. The carrier that originated more minutes of service pays the other carrier a net settlement payment calculated by multiplying the settlement rate by the number of imbalanced traffic minutes. KDD objects to the characterization of the settlements process as a netting system. It states that on most routes, U.S. and foreign carriers calculate settlement obligations for every minute of traffic, not just the imbalanced minutes. KDD Reply at 5. While this may be true as a matter of pricing strategy, as KDD notes, the actual payment from one carrier to another, and thus any savings from settlement rate reductions, reflects a netting of the respective amounts due between carriers.

[462] *See, e.g.*, AT&T Comments at 46-58; Sprint Reply at 3-5.

the Act gives us jurisdiction over "all interstate and foreign communication by wire or radio."[463] Sprint notes that Section 3(17) of the Act defines "foreign communication" as "communication to or from any place in the United States to or from a foreign country."[464] Sprint contends that, because traffic settled under accounting rates either originates or terminates in the United States, it squarely falls within the Act's definition of "foreign communication" as that term is used in Section 2(a).[465]

277. Other commenters, including many foreign carriers and governments as well as GTE, argue that, despite the language of the *Notice*, we are attempting to exercise jurisdiction over the foreign end of international telecommunications services.[466] Telefónica de España argues that Section 2(b) of the Act expressly prohibits us from exercising jurisdiction over a carrier "engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier."[467] Cable and Wireless notes that we have previously acknowledged that the Act generally limits our jurisdiction over international telecommunications services to the U.S. end of the service only.[468] It claims our benchmarks proposals would exceed this jurisdiction by effectively dictating the rates a foreign carrier could charge to terminate U.S.-billed international switched traffic in its own country.[469] GTE and Telefónica de España argue that a showing of an affirmative Congressional intent to apply the Act's enforcement provisions extraterritorially is necessary to overcome the presumption against such extraterritorial effects of legislation. They contend

463 AT&T Comments at 47; Sprint Comments at 5.

464 Sprint Comments at 5.

465 *Id.*

466 *See, e.g.*, Cable & Wireless Comments at 6; GTE Comments at A-17; HKTI Comments at 21-22; KDD Comments at 2-7; Panama Comments at 18.

467 Telefónica de España Comments at 11-12.

468 Cable & Wireless Reply at 3-4. *See also* KDD Comments at 5-6.

469 Cable & Wireless Reply at 3-4. Cable & Wireless argues the basis for our contention that we are directing the benchmarks proposals only at U.S.-licensed carriers is unclear since the cost issues (and possible hearings) relevant to the proposed benchmarks involve foreign rates. *Id.* at 7. *See also* Philippines Comments at 29 (stating that "even in the [U.S.] domestic arena, the ability to secure recovery of joint and common costs from a particular service has been (and remains today) basically a policy decision" outside our jurisdiction); Telefónica del Perú Comments at 6-8 (arguing that there is no way to invalidate the terms of a bilateral settlement rate agreement without exercising jurisdiction over both the U.S. carrier and the foreign correspondent).

that no provision of the Act shows an intent by Congress to do so.[470] KDD argues that we do not have authority to adopt the benchmark settlement rates because their adoption would not afford a foreign country the same degree of regulatory authority as we would be exercising over settlement rates.[471]

ii. Discussion

278. This proceeding continues our more than sixty years of regulatory oversight of international settlement arrangements.[472] We initially conclude that the Act provides us with the authority to reform U.S. carrier participation in international settlement rate practices in the manner we adopt in this *Order*.[473] In Sections 1 and 2(a) of the Act, Congress indicated its affirmative intent to give us jurisdiction over "all interstate and foreign communication by wire or radio . . . which originates and/or is received within the United States . . . ."[474] Such an affirmative Congressional intent to give us jurisdiction over "foreign communication" overcomes the general presumption against the extraterritorial effect of a statute argued by GTE and Telefónica de España.[475] "[F]oreign communication," as that term is defined in the Act, refers to "communication from or to any place in the United States to or from a foreign

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470 GTE Comments at A-12 (citing *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)). *See also* Telefónica de España Reply at 26.

471 KDD Reply at 21.

472 *See Mackay Radio and Telegraph Company, Inc.*, 2 FCC 592 (1936), *aff'd by the Commission en banc*, 4 FCC 150 (1937); *aff'd sub nom. Mackay Radio and Telegraph Co. v. F.C.C.*, 97 F.2d 641 (D.C. Cir. 1938); Regulation of International Accounting Rates, *Report and Order*, 6 FCC Rcd 3552 (1991); Regulation of International Accounting Rates, *Second Report & Order and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 8040 (1992).

473 As a general matter, GTE argues that the *Notice* is "procedurally flawed" in that its "conclusory listing" of Sections 1, 4(i), 201-205 and 303(r) of the Act as a basis for our authority to establish and enforce settlement rate benchmarks "is a wholly insufficient discussion of a crucial issue." GTE Reply at 11-12. We disagree. Paragraph 19 of the *Notice* clearly placed GTE and other interested parties on notice that we might, as we in fact do, primarily rely on those sections as the statutory basis to apply settlement rate benchmarks to U.S. international carriers. There is no legal requirement for a more detailed discussion.

474 47 U.S.C. § 152(a); *see also United States v. Weiner*, 701 F. Supp. 14, 17 (D. Mass. 1988), *aff'd*, 887 F.2d 259 (1st Cir. 1989); *RCA Communications, Inc. v. United States*, 43 F. Supp. 851 (S.D.N.Y. 1942).

475 *See Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949); *see also Hartford Fire Insurance Co. v. California et al.*, 509 U.S. 764 (1993); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

country."[476] International telecommunications services that are settled under a settlement rate agreed to by a U.S. carrier and its foreign correspondent clearly fall within the definition of "foreign communication" used in the Act because such telecommunications services either originate or terminate in the United States.

279. The rules adopted here do not constitute the exercise of jurisdiction over foreign carriers. Instead, we establish in this *Order* the rate at which a settlement rate agreed to by a U.S. carrier satisfies that carrier's obligation to comply with the "just and reasonable" requirements of Sections 201 and 205. As such, it is a direct constraint on our U.S. carriers. Where U.S. carriers and their foreign correspondents cannot agree to a settlement rate that falls at or below the relevant benchmark, we will use our powers under the Act to take enforcement actions that will, as proposed in the *Notice*, "apply to U.S. carriers within our jurisdiction, not to their foreign correspondents."[477]

280. We have taken similar action to ensure that a carrier does not pay excessively for an individual component of an end user rate where one of the parties to the transaction falls outside of our jurisdiction. Under our rate-of-return regulation of AT&T, we made sure that AT&T did not pay an unreasonable amount for goods it purchased from its Western Electric affiliate without ever exercising jurisdiction over the latter.[478] There, we disallowed "from AT&T's interstate rate base the relevant portions of any excess earnings Western receives from sales to the Bell System."[479] We have taken a similar approach here by restricting what U.S. international carriers can pay for a service provided by a foreign carrier that falls outside of our jurisdiction. Obviously, in the context of international telecommunications services, our actions will have an indirect effect on foreign carriers. Such services, by their very nature, require one end of the communication to be handled outside of the United States, and thus rules regarding the U.S. end of the communication may have an impact on the foreign end as well.

281. An indirect effect on foreign carriers does not preclude us from adopting settlement rate benchmarks. In *RCA Communications*, the District Court for the Southern District of New York reviewed a Commission order involving the ratio between the charges

[476] 47 U.S.C. § 153(17).

[477] *Notice* at ¶ 89.

[478] AT&T, 64 FCC 2d 1, 80 (1977).

[479] *Id.* We also stated that we would consider disallowances from AT&T's interstate rate base "if price comparisons using competitive benchmarks show 'overpayment' by AT&T for any equipment." *Id.*

for handling "Urgent" and "Ordinary" telegraph messages.[480] International agreements had established the charges for "Urgent" messages at twice the level of those for "Ordinary" messages. We directed RCA Communications and other telegraph companies to cease and desist from the practice of charging amounts for "Urgent" messages "which bear any greater ratio than 1 1/2 to 1 to the charges for Ordinary . . . messages, respectively."[481] The court held that, although our order indirectly affected foreign carriers, "it operate[d] directly only on persons within the United States and an indirect effect on outsiders d[id] not militate against its validity."[482] We reach the same conclusion here.

b. Application of Section 201's "Just and Reasonable" Requirement to Accounting Rates

i. Positions of the Parties

282. AT&T argues that U.S. carriers' settlement arrangements with foreign correspondents clearly constitute "practices" and "charges" for and in connection with "foreign communication by wire or radio" subject to Section 201's "just and reasonable" requirement.[483] Opponents of our benchmarks proposals contend that, even if we are exercising jurisdiction only over U.S. international carriers as we have stated, the Act does not authorize us to adopt benchmark settlement rates. GTE and Telefónica de España argue that, while Section 201 generally gives us the authority to regulate intercarrier charges where both carriers are subject to our jurisdiction, the second proviso of Section 201(b) limits our authority with regard to international settlement rate agreements. GTE states that this authority is "narrower than the authority to determine whether U.S. carriers' charges or other practices are 'just and reasonable' under the main body of Section 201(b)."[484] Both GTE and Telefónica de España assert that Section 201(b) limits our authority to determine whether settlement rate agreements

[480] *RCA Communications, Inc. v. United States*, 43 F.Supp. 851, 854 (S.D.N.Y. 1942).

[481] *Id.*

[482] *Id.* at 854. We note also that in an interdependent world economy, significant national regulations and policies for major markets have substantial indirect effects on other countries. As in this case, those unilateral choices can enhance global welfare. However, as a practical matter, countries look to see if they can find common approaches when possible. This is why we welcome continuing multilateral discussions of reform. The classic economic study of interdependence is Richard Cooper, The Economics of Interdependence (New York: McGraw Hill, 1971).

[483] AT&T Comments at 46-47 (noting that Section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the] Act").

[484] GTE Comments at A-12. *See also* Telefónica de España Reply at 26-27.

are contrary to the public interest and does not extend to the authority to prescribe or otherwise modify contract terms.[485] Argentina Telintar argues that the second proviso of Section 201(b) does not apply to contractual relations where one carrier compensates another for carrying its traffic in order to complete international calls. Argentina Telintar states that the plain meaning of the term "exchange of services" in Section 201(b) is a "barter arrangement or provision of one service in exchange for another service."[486]

ii. Discussion

283. Section 201 of the Act requires that "all charges, practices, classifications, and regulations for and in connection with [interstate or foreign communication by wire or radio] shall be just and reasonable . . . ." We find that, because an accounting rate is the charge negotiated between a U.S. international carrier and its foreign correspondent for handling one minute of international telephone service, the plain language of Section 201 gives us jurisdiction over such charges. "Charges" and "practices," as those terms are used in the Act, refer to more than just the end charges to customers. In *Louisiana Public Service Commission v. FCC*, the United States Supreme Court rejected such a narrow reading of the words "charges," "classifications," and "practices" in Section 2(b) of the Act, finding that such terms encompassed depreciation.[487] Similarly, we conclude that a U.S. international carrier's agreement to a particular settlement rate constitutes a "practice," as well as perhaps a "charge" subject to the just and reasonable requirement of Section 201. Section 201(b) declares any "charge" or "practice" that is "unjust or unreasonable . . . to be unlawful."[488]

284. We disagree with those commenters that argue that Section 201(b)'s requirement that "*[a]ll* charges, practices, classifications, and regulations for and in connection with [interstate or foreign communication by wire or radio] be just and reasonable"[489] excludes "charges" and "practices" agreed to by a U.S. international carrier in the form of an above-cost accounting rate just because the other party to the contract is a foreign carrier.[490] As discussed above, the Act defines "foreign communication" to include international telecommunications services that are settled under an accounting rate where such services

[485] GTE Comments at A-15; Telefónica de España Reply at 27-28.

[486] Argentina Telintar Comments at 27.

[487] *See Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890, 1900-01 (1986).

[488] 47 U.S.C. § 201(b).

[489] 47 U.S.C. § 201(b) (emphasis added).

[490] GTE Comments at A-12. *See also* Telefónica de España Reply at 26-27.

either originate or terminate in the United States. "Foreign communication" by its very nature requires one end of the communication to be handled outside of the United States, and thus rules regarding the U.S. end of the communication may have an impact on the foreign end as well. The reading of Section 201 suggested by some commenters would effectively negate Congress' inclusion of "foreign communication" in Section 201.

285. Moreover, we do not believe that the second proviso of Section 201 applies to settlement agreements between a U.S. international carrier and its foreign correspondent.[491] That proviso states that "nothing in this Act . . . shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with a common carrier not subject to this Act, *for the exchange of their services*, if [we are] of the opinion that such contract is not contrary to the public interest."[492] Congress designed the proviso, taken from the Interstate Commerce Act, to legitimize arrangements between telegraph carriers and railroads for the provision of free services to each other. As the Supreme Court has held, "'exchange' is barter and carries with it no implication of reduction to money as a common denominator."[493] A settlement agreement between a U.S. carrier and its foreign correspondent does not involve any type of barter arrangement or provision of one service in exchange for another. Instead, the agreed-upon settlement rate sets the monetary amount to be paid each carrier for handling one minute of international telephone service. Thus, we agree with Argentina Telintar that such an agreement does not constitute a "contract . . . for the exchange of services" covered by the second proviso of Section 201(b). Even if that proviso did apply to a settlement rate agreement, the language of the proviso "seems clearly to give us the authority to measure any applicable contract against the public interest and nullify or modify those that are found wanting."[494]

286. As we note above, in recent years, a multilateral consensus has developed that the traditional accounting rate system must be reformed in part because it results in settlement

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[491] *See* The Western Union Telegraph Co.: New Telex Service Arrangements Via Mexico and Canada, *Memorandum Opinion and Order*, 75 FCC 2d 461, n.13 (1979), *vacated on other grounds sum nom. ITT World Communications v. FCC*, 635 F.2d 32 (2nd Cir. 1980).

[492] 47 U.S.C. § 201(b)(emphasis added).

[493] *See Postal Telegraph-Cable Co. v. Tonopah and Tidewater Railroad Co.*, 248 U.S. 471, 475 (1919). *See also* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 5 (1934). Our Rules also distinguish exchange of services agreements from settlement rate agreements. *See* 47 C.F.R. §§ 43.51(a)(1) & (2).

[494] Interconnection Facilities Provided to the International Record Carriers, *Final Decision and Order*, 63 FCC 2d 761, 766 (1977) ("*IRC Interconnection Order*").

rates that are substantially above costs.[495] To the extent that the above-cost portion of settlement rates paid by U.S international carriers to their foreign correspondents leads to those settlement rates being "unjust or unreasonable," Section 201 requires us to declare such "charges" or "practices" unlawful. Settlement rates are in most cases substantially above cost-based levels because effective competitive market conditions do not exist in many foreign markets at this time. The lowest prevailing settlement rate between the United States and a carrier in a competitive overseas market is $0.08.[496] Yet, the average settlement rate U.S. carriers pay their foreign correspondents is approximately $0.35.[497] The benchmark settlement rates we adopt in this *Order* place a cap on the amount that U.S. international carriers can pay to their foreign correspondents to terminate U.S.-originated traffic. These benchmarks reduce the above-cost portion of settlement rates, but do not eliminate it entirely. In the discussion of our prescription of our benchmarks settlement rates under Section 205 below, we analyze in detail why the benchmark settlement rates we adopt in this *Order* represent the highest amount at which we consider a settlement rate to be presumptively just and reasonable. We find that any settlement rates that exceed the relevant benchmark constitute an unjust and unreasonable "charge" or "practice" under Section 201. As a result, we declare settlement rates in excess of the relevant benchmark to be unlawful and not in the public interest.

c. Section 205 Authority to Set Settlement Rate Benchmarks

i. Positions of the Parties

287. Finding settlement arrangements subject to our regulation, AT&T and Sprint argue that we have the power under Section 205 "to determine and prescribe what will be the just and reasonable charge . . . and what classification, regulation, or practice is or will be just, fair, and reasonable."[498] Argentina Telintar, however, argues that Section 205 only authorizes us to prescribe the rates those domestic carriers subject to our jurisdiction may charge their customers, not the prices that a U.S. carrier charges its foreign supplier.[499]

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[495] *See, e.g.*, ITU-T Recommendation D.140, "Accounting Rate Principles for International Telephone Services," Geneva (1992) (calling for cost-based, nondiscriminatory and transparent accounting rates). While we support multilateral efforts to reform the global accounting rate system, we limit our statutory analysis here to those settlement rates paid by U.S. international carriers to their foreign correspondents.

[496] *See* Section II.B.3., *supra*.

[497] This average settlement rate is a weighted average based on the total minutes of U.S.-outgoing traffic.

[498] AT&T Comments at 47; Sprint Comments at 6-7.

[499] Argentina Telintar Comments at 28-29.

288. AT&T states that our power under Section 205 includes the authority to order a carrier to "cease and desist" where we find that a charge or practice violates the Act.[500] Sprint contends that, while we cannot require a foreign carrier to agree to a particular settlement rate, we can find that a foreign carrier's refusal to exchange traffic at that rate renders the service provided by the U.S. carrier contrary to the public interest. In that circumstance, Sprint argues that we can refuse to allow a U.S. carrier to exchange traffic with the foreign carrier.[501]

289. Sprint does state, however, that the lack of cost data in the record could make it difficult to sustain a prescription of a particular benchmark rate or range of rates.[502] Sprint argues that we could use benchmarks as "presumptively reasonable settlement rates and . . . afford the public, including any foreign carriers who might be affected by such a prescription, an opportunity to rebut this presumption of reasonableness."[503] Sprint contends that such an approach would be similar to one implemented by the former Federal Power Commission ("FPC") for prescribing natural gas rates based on composite cost data and ultimately upheld by the Supreme Court in the *Permian Basin Area Rate Cases*.[504] Cable & Wireless and KDD contend that, while the FPC in *Permian Basin* lawfully prescribed natural gas rates based on composite cost data, we do not have any data, composite or otherwise, on the costs incurred by foreign carriers in terminating international switched traffic.[505]

ii. Discussion

290. We find that Section 205 of the Act gives us the authority to require U.S. international carriers to pay settlement rates at or below the relevant benchmark that we adopt in this *Order*.[506] We disagree with Argentina Telintar that Section 205 only gives us authority to prescribe the rates that U.S. international carriers charge their customers and not the charge

[500] AT&T Comments at 47.

[501] Sprint Comments at 7.

[502] *Id.* at 13.

[503] *Id.* at 19. Sprint goes on to argue that, if an interested party fails to rebut the presumption, then we could prescribe a settlement rate for use by a U.S. carrier or require the use of that settlement rate on an interim basis pending further negotiations. *Id.*

[504] 390 U.S. 747 (1968).

[505] Cable & Wireless Reply at 6-7; KDD Comments at 23-24.

[506] 47 U.S.C. § 205.

that a U.S. carrier agrees to pay its foreign correspondent for handling one minute of international telephone service.[507] For the same reasons discussed in our analysis of Section 201 above, we find that an accounting rate constitutes a "practice" or "charge" under Section 205. As such, we have the authority to "determine and prescribe what will be the just and reasonable charge or the maximum or minimum or maximum and minimum charge or charges to be thereafter observed, and what . . . practice is or will be just, fair, and reasonable, to be thereafter followed . . . ."[508] Section 205 authorizes such action "under order for investigation and hearing made by [us] on [our] own initiative."[509] Under the *Sierra-Mobile* doctrine, established by judicial decisions interpreting analogous provisions of the Federal Power Act and the Natural Gas Act, we find that we have the "undoubted power" to prescribe a change in contract rates -- such as settlement rates -- "whenever [we] determine[] such rates to be unlawful."[510]

291. We have concluded in this *Order* that it would be an unjust and unreasonable "practice" or "charge" for a U.S. international carrier to pay settlement rates above the relevant benchmark rate. The relevant settlement rate benchmark represents the highest presumptively just and reasonable amount a U.S. international carrier can pay its foreign correspondent for handling one minute of an international call under Sections 201 and 205. Thus, we prescribe under Section 205 that U.S. international carriers adhere to the benchmarks we adopt in this *Order*. As discussed in Section II.B.2. of this *Order*, we have established procedures whereby any affected party can rebut this presumption by demonstrating that the relevant benchmark fails to allow a carrier to collect its incremental costs for providing international termination services.

292. We agree with Sprint that the Supreme Court's decision in *Permian Basin*[511] lends support for our approach of using tariffed components prices. In *Permian Basin*, the Court rejected the argument that the FPC had to derive its maximum natural gas rates from prevailing field prices, instead allowing the FPC to rely on "composite cost data, obtained

507 Argentina Telintar Comments at 28-29.

508 47 U.S.C. § 205.

509 *Id.*

510 *FPC v. Sierra Pac. Power Co.*, 350 U.S. at 353 (1956). *See also United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. at 339-41 (1956).

511 390 U.S. 747 (1968).

from published sources and from producers through a series of cost questionnaires."[512] Similarly, our TCP methodology uses publicly available tariff and ITU data for the three elements of international termination service identified by the ITU in Recommendation D.140. Thus, the TCP methodology relies in large part on the same rates that foreign correspondents charge their domestic customers. We see no justifiable economic basis for allowing our U.S. international carriers to pay foreign carriers more than those carriers charge their domestic customers for the same service, and thus the relevant benchmark rate represents the maximum reasonable "practice" or "charge" for a U.S. international carrier.

293. We agree with Cable & Wireless, KDD, and Sprint that our TCP data are not pure composite cost data. We do not have such cost data because we do not have the ability to compel foreign correspondent carriers to provide us with data about their costs. We note that, despite our invitation to do so in the *Notice*, foreign correspondent carriers have not submitted such information in this proceeding. We do, however, have an obligation under the Act, because of our oversight of rates charged to U.S. consumers, to ensure that U.S. carriers do not pay unjust and unreasonable settlement rates to their foreign correspondents. We emphasize that we do not attempt to set foreign carriers' costs in this *Order*. Rather, we set a cap on the amount U.S. carriers may pay for a component of providing international service that is directly reflected in U.S. consumer rates for that service. This cap is based primarily on foreign carriers' tariffed rates. Because a foreign carrier's rates in almost all cases reflect a foreign carrier's incremental costs plus a significant contribution to common costs, settlement rate benchmarks based on those rates will still be substantially above the costs incurred by foreign carriers to terminate international traffic. Nonetheless, they will significantly reduce the above-cost portion of most current settlement rates. We thus believe that our use of the publicly-available tariff and ITU data to establish our benchmark rates will produce settlement "charges" or "practices" that satisfy the "just and reasonable" requirement of Section 205.

294. As described in more detail in Section II.B.2. of this *Order*, we adopt an averaging approach for establishing settlement rate benchmarks instead of adopting country-specific benchmarks based on the TCP data. We find that the averaging approach we adopt for our TCP methodology produces a just and reasonable amount for the benchmark rates. We adopt an averaging approach for two reasons. First, because our TCP methodology relies in large part on foreign carriers' tariffs to calculate benchmarks, any inefficiencies captured in those tariffs will be captured in an individual country benchmark. These inefficiencies reflect the fact that many countries use long distance and international rates to cross-subsidize rates

[512] *Id.* at 761. We also note that in *Permian Basin* the FPC had placed the burden on the gas producer to show that, in an individual case, the maximum natural gas rate that was derived from the composite cost data would cause the producer hardship. *Id.* at 764. The FPC also stated that it would not stay enforcement of the maximum rates pending disposition of individual petitions for special relief. *Id.* at 771. We have instituted a similar mechanism. *See* discussion in Section II.B.2 above.

for local service and because telephone service in many countries is provided by monopoly or dominant carriers whose tariffed rates may reflect protected market positions and an ability to charge prices not related to underlying costs. An averaging approach will mitigate the impact of these inefficiencies on our benchmark settlement rates. Second, an averaging approach is necessary to counter the incentive of a carrier to influence the level of its benchmark by raising its tariffs. Using the average as the basis for our benchmark rates will reduce the above-cost portion of the U.S. international carriers' settlement payments, but still permit all foreign carriers to recover their incremental cost of terminating international traffic plus a substantial contribution to common costs. Thus, we are confident that the benchmark rates come nowhere close to going below the "just and reasonable" level required by Section 205.[513]

295. Courts have recognized that "non-cost" factors may play a legitimate role in the setting of just and reasonable rates.[514] We believe that non-cost factors are relevant in evaluating a carrier's "practices" and "charges" as well. This provides the basis for the actions we take in this *Order* in two areas: (1) establishing benchmark rates based on countries' level of economic development; and (2) establishing different transition periods based on countries' economic development. With regard to the former, we begin by recognizing that lower income countries have on average significantly higher TCPs than upper income countries. Thus, if we averaged the TCPs of lower income countries with those of upper income countries to establish one benchmark rate, lower income countries would experience a much greater differential between the new benchmark rate and current settlement rates than would a higher income country. We believe that such extreme differentials would be unfair and could prove too difficult for some foreign carriers to absorb -- creating a risk of harm to some lower and middle income countries' overall economic welfare as well as increasing the chance of disruptions to their telecommunications networks. Establishing separate benchmarks rates based on level of economic development would mitigate this effect. We therefore set different rates based on the World Bank's classification of countries by GNP per capita, which we believe to be an objective and administrable measurement of countries' levels of economic development.

296. In establishing different transition periods for the different economic development categories, we also factored in that adoption of our benchmarks will, in many cases, substantially reduce the amount a U.S. international carrier can pay its foreign correspondent to terminate a call. An immediate move to such a lower rate could produce the same result that we are trying to avoid by establishing different TCPs averages for the

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513 47 U.S.C. § 205.

514 *See, e.g., Consumers Union v. FPC*, 510 F.2d 656, 660 (D.C.Cir. 1974) (identifying the need to stimulate additional supplies as one such "non-cost" factor).

benchmark rates depending on a country's economic development category--disruptions to the telecommunications networks in foreign countries. Such disruptions would likely prove harmful to U.S. carriers and consumers. We conclude that economic development level, as determined by reference to the World Bank categories, provides a reasonable measure of a country's ability to transition to a more cost-based system of accounting rates without undue disruption to its network. Thus, to safeguard against such disruptions, we have established transition periods based on the economic development category of a country. Although this will delay the movement to a settlement rate at or below the relevant benchmark rate, we believe that the use of transition periods will likely serve the public interest more than an immediate move to the relevant benchmark rates.

297. In addition to our settlement rate benchmarks, we adopt a "best practice rate" that is closer to a cost-based level than our settlement rate benchmarks that we will apply to prevent market distorting behavior. As discussed in the *Notice*, and in Section II.C. of this *Order*, above-cost settlement rates create certain distortions in the U.S. market for IMTS. However, if settlement rates are at cost-based levels, carriers will not have the ability to engage in market distorting behavior. The best practice rate will be applied only to the extent carriers seek authorization to provide facilities-based service from the United States to affiliated markets and to provide private line resale service, as discussed in Sec. II.C., *infra*, and only if the Commission detects market distortion on the route or routes in question.

298. The use of our "best practice" rate in cases where we detect market distortions also satisfies the just and reasonable requirement of Section 205. Because we do not have data to establish an accurate cost-based rate, we use a market-based rate as a substitute. We look to competitive markets to find a rate that can be applied in cases of market distortion in lieu of a rate based on an estimate of incremental costs. We adopt a "best practice" rate that is based on the lowest settlement rate paid by U.S. carriers to an overseas carrier from a competitive market. We will consider, on a case-by-case basis, other factors that may influence the level of the best practices rate as applied to individual carriers.

d. Benchmarks Proceeding Satisfies Section 205's Procedural Requirements

i. Positions of the Parties

299. Argentina Telintar and Telefónica de España argue that this proceeding fails to satisfy the procedural requirements of Section 205 that we must afford an opportunity for a hearing and make a finding that a prescribed rate is just and reasonable.[515] Telefónica de

[515] Telefónica de España Reply at 29; Argentina Telintar Comments at 29 (citing *AT&T v. FCC*, 487 F.2d 865, 874-75 (2d Cir. 1973)).

España cites the decision of the Court of Appeals for the Second Circuit in *AT&T v. FCC*[516] for the proposition that we may not "circumvent the statutory hearing requirements on the basis of [our] claimed broad inherent regulatory power."[517]

ii. **Discussion**

300. We disagree with the contentions of Argentina Telintar and Telefónica de España that establishing our settlement rate benchmarks and "best practice" rate in the context of this rulemaking violates the procedural requirements of Section 205 of the Act.[518] Section 205 requires that a rate prescription take place "after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by [us] on [our] own initiative."[519] In *United States v. Florida East Coast Railway*,[520] the Supreme Court held that such language does not trigger the detailed oral hearing requirements of Section 556 and 557 of the Administrative Procedures Act.[521] Instead, the Court held that the notice and comment provisions of Section 553 of the APA satisfy a general hearing requirement such as that contained in Section 205.[522] Because this proceeding satisfies the procedural requirements of Section 553 of the APA, we find it to be fully consistent with the Court's decision in *Florida East Coast Railway*.

301. We are also not persuaded by the argument of Telefónica de España that adoption of settlement rate benchmarks and "best practice" rates in this proceeding is inconsistent with the decision of the Second Circuit in *AT&T v. FCC*.[523] The *AT&T* case involved a requirement -- which we based on our inherent regulatory power under Section 4(j) of the Act -- for prior Commission permission to file new rates. The Second Circuit held that such a requirement violated the procedural requirements of Section 205 because it amounted to a Section 205 rate prescription without following the statutory requirements of a full

516 487 F.2d 865, 874-75 (2nd Cir. 1973).

517 Telefónica de España Reply at 29.

518 Argentina Telintar Comments at 28-29; Telefónica de España Reply at 28-29.

519 47 U.S.C. § 205.

520 410 U.S. 224 (1973).

521 5 U.S.C. §§ 556, 557.

522 *U.S. v. Florida East Coast Railway*, 410 U.S. 224. *See also United States v. Allegheny-Ludlum Steel*, 406 U.S. 742 (1972).

523 487 F.2d at 874-75.

hearing and specific findings.[524] We find that case inapplicable to the circumstances here. In the *AT&T* case, our action rested on our inherent regulatory power under Section 4(j) of the Act. We do not in this instance dispute that Section 205 governs our action in this proceeding, but rather find that the notice and comment provisions of Section 553 of the APA, under which this proceeding is conducted, satisfy the hearing requirement of Section 205.

e. Contractual Nature of Settlement Rates Does Not Insulate Them from Requirements of the Act

i. Positions of the Parties

302. AT&T argues that the fact that settlement arrangements are memorialized in inter-carrier contracts does not insulate them from our review.[525] AT&T notes that Section 211 of the Act requires "[e]very carrier subject to this chapter [to] file with [us] copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter." Because of that requirement, AT&T asserts that we can review settlement arrangements and, where the public interest requires it, modify them.[526]

303. According to AT&T, the fact that one party to an agreement establishing an accounting rate is a foreign carrier not subject to our jurisdiction does not diminish our authority to require the other carrier subject to our jurisdiction to comply with the requirements of Section 201 of the Act.[527] Sprint notes that we previously exercised our jurisdiction over AT&T to ensure that it did not pay excessive prices for goods it purchased from its Western Electric affiliate without ever exercising jurisdiction over Western Electric itself.[528] Both AT&T and Sprint cite *RCA Communications, Inc. v. United States*[529] for the

[524] *Id.*

[525] AT&T Comments at 48-52. *See also* Sprint Reply at 3 (citing *MCI v. FCC*, 665 F.2d 1300).

[526] AT&T Reply at 40 (citing *American Broadcasting Co. v. FCC*, 643 F.2d 818, 824 (D.C. Cir. 1980)).

[527] AT&T Comments at 53. AT&T also argues that our prior orders regulating facilities used for foreign communication do not limit our jurisdiction over contracts with foreign correspondents. AT&T notes that in a case cited by commenters, *AT&T Application for Authority Under Section 214 of the Communications Act to Construct and Operate a Third Florida-St. Thomas Cable*, 88 FCC 2d 1630 (1982), we concluded that we had authority to review the "whole facility," even though part of that facility was outside the physical boundaries of the United States. AT&T Reply at 43-44.

[528] *AT&T*, 64 FCC 2d 1, 80 (1977).

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

proposition that we have the authority to regulate the rates of U.S. carriers even where those rates are established by agreements with foreign correspondents.[530]

304. Certain commenters attempt to distinguish the *RCA Communications* case cited by AT&T and Sprint from the proposals made in this proceeding. GTE states that *RCA Communications* cannot be relied on as authority to adopt our benchmarks proposals because that case involved regulations that limited the rates U.S. carriers could charge U.S. consumers, not what they could pay foreign carriers.[531] Several foreign carriers contend that *RCA Communications* stands for the proposition that if we find that a U.S. carrier has entered into an agreement with a foreign correspondent at an excessive rate, our only recourse is to adopt a prescription lowering the rates a U.S. carrier charges its U.S. customers for the service.[532]

305. Several commenters cite to the Supreme Court's decision in *Regents of the University System of Georgia v. Carroll*[533] for the proposition that the Act does not "give authority to [us] to determine the validity of contracts between [entities subject to our jurisdiction] and others."[534] AT&T responds by arguing that the Court in *Carroll* actually held that we did not have the authority "to determine the validity of contracts between [Title III] licensees and others," not between Title II common carriers and others.[535] AT&T notes that the Court stated that its conclusion "was the inevitable result of the statutory scheme of licensing."[536]

ii. Discussion

306. We agree with AT&T that the fact the settlement arrangements agreed to by U.S. international carriers are memorialized in inter-carrier contracts does not insulate them

[530] AT&T Comments at 53-54; Sprint Comments at 6.

[531] GTE Reply at 8-9.

[532] *See, e.g.*, Cable & Wireless Comments at 8; KDD Comments at 19; Panama Comments at 19; Portugal Telecom International Comments at 6-8; Argentina Telintar Comments at 7-10. Argentina Telintar argues that the court in *RCA Communications* expressly recognized that any change in accounting rates could occur only through bilateral agreements. Argentina Telintar Comments at 29-30.

[533] 338 U.S. 586, 602 (1950).

[534] *See, e.g.*, COMTELCA Reply at 15-16; Telefónica del Perú Comments at 7-8.

[535] AT&T Reply at 44 (*citing Regents v. Carroll*, 338 U.S. at 602).

[536] 338 U.S. at 601.

from our review.[537] Section 211 of the Act requires "[e]very carrier subject to this chapter [to] file with [us] copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter." We find that Section 211's filing requirement gives us the means by which to ensure that the settlement arrangements agreed to by U.S. international carriers serve the public interest--allowing us to review and modify them where necessary such as here, where we find that they are in violation of Section 201.[538] We have long held that we have the authority to determine whether the terms and conditions of contracts filed pursuant to Section 211's requirement are consistent with other provisions of the Act.[539] If we did not have the "authority to pass on the contracts which must be filed . . . , [Section 211's] filing requirement would be a meaningless exercise."[540]

307. With the statutory powers discussed above, it is not surprising that the one court to consider the issue found that the Act allows us to regulate the charges of U.S. carriers even where those charges are established by agreements with foreign correspondents. As we discuss above, the district court in *RCA Communications* recognized that our order in that case had an indirect impact on foreign carriers, but found that such an impact did not preclude us from issuing an order that "operate[d] directly only on persons within the United States."[541]

308. We disagree with those commenters that contend that the Supreme Court's decision in *Carroll* in any way limits our ability to take such action. At the time of the Court's decision in *Carroll*, we had no power under Title III of the Act to issue "cease and desist" orders.[542] Instead, we had "at [our] disposal only the cumbersome weapons of criminal penalties and license refusal and revocation."[543] Title II of the Act gives us much more

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[537] AT&T Comments at 48-52. *See also* Sprint Reply at 3 (citing *MCI v. FCC*, 665 F.2d 1300).

[538] *See, e.g., United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. at 339.

[539] *See* Bell System Tariff Offerings, 46 FCC 2d 413 (1974), *aff'd on other grounds sub nom. Bell Telephone Co. of Pennsylvania v. FCC*, 502 F.2d 1250 (3d Cir. 1974), *cert. denied, AT&T v. FCC*, 423 U.S. 886 (1975). *See also* Southern Pacific Communications Co., 66 FCC 2d 199 (1977).

[540] *IRC Interconnection Order*, 63 FCC 2d at 766.

[541] *RCA Communications*, 43 F.Supp. at 854. *See* Section II.E.1.a, *infra*.

[542] Congress amended Section 312 of the Act in 1952 to give us the power to issue "cease and desist" orders to regulate broadcasting. *See Southwestern Cable Co. v. FCC*, 378 F.2d 118, 121 (9th Cir. 1967).

[543] *Carroll*, 338 U.S. at 602.

expansive powers than we had over broadcast licensees when the Court decided *Carroll.* These powers include the power to issue "cease and desist" orders found lacking in *Carroll.* As a result, we conclude that the Court's holding that we did not have the authority "to determine the validity of contracts between [Title III] licensees and others" does not apply to our enforcement powers against common carriers under Title II at issue here.[544]

2. International Regulations

a. Positions of the Parties

309. Many foreign commenters argue that our settlement rate benchmark proposals violate the regulations of the International Telecommunication Union ("ITU") as well as general international law principles of comity and national sovereignty.[545] These parties argue that our proposals represent unilateral action by the United States and contradict ITU regulations, such as Articles 1.5 and 6.2.1 of the International Telecommunication Regulations ("ITR"),[546] that require accounting rates to be negotiated pursuant to mutual agreement.[547] Several foreign commenters argue that adoption of benchmarks would amount to an extraterritorial assertion of our jurisdiction.[548] They urge us to seek a negotiated, multilateral solution to accounting rate reform issues within the framework of the ITU.[549]

310. In contrast, U.S.-owned carriers generally support the Commission's proposal and argue that we possess sufficient authority to review negotiated agreements. They point out that nothing in the obligations of the United States under the ITU precludes us from

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[544] *Id.*

[545] *See, e.g.*, Cable & Wireless Comments at 4; GTE Comments at 12-13, A-4; HKTI Comments at 21-22; Jamaica Comments at 2. *See also* TSTT Comments at 2 (arguing that adoption of our proposals would be "tantamount to tyranny").

[546] ITU Regulations, §§ 1.5, 6.2.1. *See, e.g.*, Cable & Wireless Comments at 4-5; GTE Reply at 12-16; Telintar Comments at 13-14.

[547] Cable & Wireless Comments at 5 (citing Article 6.2.1 of the International Telecommunication Regulations (Melbourne, 1988)). *See also* Argentina Telintar Comments at 11-17 (discussing ITU-T Recommendation D.140, "Accounting Rate Principles for International Telephone Services" (approved September 28, 1995) ("Recommendation D.140")); GTE Comments at 12-13; Panama Comments at 20-21; Telefónica del Perú Comments at 7-9.

[548] VSNL Comments at 3; Telmex Comments at 20.

[549] *See, e.g.*, AHCIET Comments at 6; KDD Comments at 15-17.

exercising oversight over agreements negotiated by U.S. carriers to determine whether such agreements are in the public interest.[550]

b. Discussion

311. We find that requiring U.S. carriers to pay no more than a benchmark settlement rate is consistent with international law and the regulations of the ITU. Many foreign governments and carriers argue that adoption of our benchmark proposals would violate sections 1.5[551] and 6.2.1[552] of the ITR.[553] We reject these arguments. Although the sections cited require administrations to negotiate accounting rates "pursuant to mutual agreement," the ITR do not suggest that governments cede sovereignty over telecommunication carriers that operate in their markets. The preamble to the ITR recognizes that "it is the sovereign right of each country to regulate its telecommunications." Indeed, Article 1.7(a) of the ITR states "[t]hese regulations recognize the right of any member, subject to national law and should it decide to do so, to require that administrations and private operating agencies, which operate in its territory and provide an international telecommunication service to the public, be authorized by that member."[554] The right to authorize a carrier to provide service in a given country necessarily includes the right to attach reasonable conditions to such authorization to ensure that the actions of such carriers are consistent with the public interest. We cannot accept the view of certain foreign governments and carriers that the U.S. government must agree to allow U.S. carriers to settle their traffic at whatever rates the foreign carrier deems appropriate regardless of the impact on the U.S. public interest.[555]

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[550] *See* Sprint Reply at 5-6; AT&T Comments at 56-57.

[551] ITU Regulations, § 1.5; "Within the framework of the present regulations, the provision and operation of international telecommunication services is pursuant to mutual agreement between administrations." *Id.*

[552] ITU Regulations, § 6.2.1, "For each applicable service in a given relation, administrations (or recognized private operating agencies) shall by mutual agreement establish and revise accounting rates to be applied between them . . .taking into account relevant CCITT [currently ITU-T] recommendations and relevant cost trends." *Id.*

[553] *See, e.g.*, Argentina Telintar Comments at 13-14; Telefónica del Perú Comments at 8-9; Singapore Telecom Comments at 2-3; Cable & Wireless Comments at 4-5.

[554] ITU Regulations, § 1.7(a).

[555] We note that section 3.3.1 of Appendix 1 of the ITU regulations states that "[p]ayment of balances of account shall be effected as promptly as possible, but in no case later than two calendar months after the day on which the settlement statement is dispatched by the creditor administration." Although this section calls for the timely payment of settlements for termination services provided by a correspondent

312. Several commenters also argue that our adoption of settlement rate benchmarks would violate national sovereignty by dictating the rate that a foreign carrier may charge for termination of traffic on the foreign network. The Philippines notes that Article 6.1.1 of the ITR recognizes the level of toll charges as a "national matter."[556] We agree that toll charges are a national matter and note that the rules we adopt here place no constraints on the rates that foreign carriers charge foreign end-user customers. We at no time in this *Order* assert that we have the authority to compel directly a foreign carrier to charge a certain rate for terminating U.S.-originated traffic. Instead, the rules we adopt here apply only to the settlement rates that carriers subject to our jurisdiction may pay for termination of U.S.-originated traffic. We recognize that our settlement rate benchmarks may over time reduce the settlement revenues that many foreign carriers receive from U.S. carriers, and this could in turn lead some foreign carriers to change the rates they charge their consumers. However, our responsibility must be to address the inequity and inefficiency of an accounting rate system that subsidizes foreign carriers at the expense of U.S. consumers. We believe it is fundamentally unfair and inconsistent with the public interest for U.S. consumers to continue to pay high IMTS rates because of above-cost settlement rate payments to foreign carriers.

313. We note that Article 6.2.1 of the ITR requires carriers to negotiate accounting rates "taking into account relevant CCITT recommendations and relevant cost trends."[557] ITU Recommendation D.140 goes further to state that "accounting rates for international telephone services should be cost-oriented and should take into account relevant cost trends."[558] We find that these sections support the action that we take here.

314. Many commenters argue that we should reject our benchmarks proposals and, instead, wait until a negotiated solution to above-cost accounting rates can be reached within the structures established by the ITU.[559] The U.S. Government has contributed actively to the work of the ITU and other multilateral fora on accounting rate issues for many years. While we have seen some progress in these fora, the movement toward fundamental reform has been

carrier, we find nothing in its language to preclude a member country from directing one of its licensed carriers to cease operation under an existing contract.

556 *See, e.g.*, Cable & Wireless Reply at 4-8; GTE Comments at A-4; Philippines Comments at 29. It is important to note that the language of Article 6.1.1. refers not to underlying settlement rates, but to "charges to be collected from . . . customers."

557 Article 6.2.1, ITR.

558 "Accounting Rate Principles for International Telephone Services," ITU-T Recommendation D.140.

559 *See, e.g.*, Communications Authority of Thailand Comments at 3; GTE Comments at A-4; RPOAs of Korea Comments at 5-6.

very slow. We believe that we must take action now to fulfill our statutory mandate to ensure that U.S. consumers receive telecommunications services at reasonable rates and to address the potential for competitive distortions in the U.S. market for international services as we move forward with implementation of the U.S. commitments made in the WTO Basic Telecom Agreement. We would prefer to achieve a multilateral solution to the problem of above-cost settlement rates. Thus, we will continue our efforts to achieve reform of the accounting rate system in the ITU and other multilateral organizations. We emphasize that if, in the future, meaningful progress is made in a multilateral forum to achieve significant reform of the accounting rate system and reduce settlement rates to a more cost-based level, we will reconsider at that time the need to enforce our settlement rate benchmarks.

III. Conclusion

315. In this *Order* we establish settlement rate benchmarks that will govern the international settlement rates that U.S. carriers may pay to terminate international traffic originating in the United States. Our action is necessary to reduce the inflated margins on international termination fees that contribute to high international calling prices in the United States and create competitive distortions in the U.S. market for IMTS. We will continue, however, to work in the ITU and other international organizations to achieve multilateral agreement on reforming the international accounting rate system and encourage other countries that have expressed interest in achieving reform to work with the United States toward achieving that goal. We emphasize that if a multilateral agreement is reached that achieves substantially equivalent results as the benchmarks policy we adopt in this *Order*, we could waive enforcement of our benchmark settlement rates.

IV. Procedural Issues

A. Final Regulatory Flexibility Analysis

316. Pursuant to the Regulatory Flexibility Act of 1990, 5 U.S.C. §§ 601-612, the Commission's Final Regulatory Flexibility Analysis with respect to the *Report and Order* is as follows:

317. *Reason for Action:* The Commission issues this *Report and Order* adopting changes in the benchmark settlement rates for international message telephone service between U.S. facilities-based carriers and foreign carriers and related issues. The Commission believes that its benchmark rates should be revised to reflect recent technological improvements, their associated cost reductions, and the market structure changes occurring in the global telecommunications market. We also believe these revisions, and related actions taken here, are necessary to move settlement rates closer to the actual costs of providing international termination services.

318. *Objectives*: The objective of this proceeding is to attain reform in the international accounting rate system and thereby help ensure lower international calling prices for consumers and protect competition in the U.S. IMTS market. The Commission will achieve this objective by revising its benchmark settlement rates so that they more closely resemble the underlying costs of providing international termination services.

319. *Legal basis*: The *Report and Order* is adopted pursuant to §§ 1, 2, 4(i), 201, 205, 214 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201, 205, 214, 303(r).

320. *Description, potential impact, and number of small entities affected*: The Commission has not developed a definition of small entities applicable to international common carriers. We therefore have used as the applicable definition of small entity the definition under the Small Business Administration (SBA) rules applicable to Communications Services, Not Elsewhere Classified. This definition provides that a small entity is expressed as one with $11.0 million or less in annual receipts.[560] Based on preliminary 1995 data, at present there are 29 international facilities-based common carriers that qualify as small entities pursuant to the SBA's definition. The number of small international facilities-based common carriers has been growing significantly, and by the end of 1996 that number could increase to approximately 50. The revised benchmark rates will apply to all international facilities-based common carriers, including small entities, that enter into an operating agreement with a foreign carrier that provides for the payment of settlement rates. We note that the revised benchmark rates should result in lower settlement rates for carriers. This *Report and Order* also requires that a foreign carrier's settlement rates be at or below the relevant benchmark as a condition of Section 214 authorization for that carrier, or an affiliate, to provide U.S. international facilities-based services between the United States and the affiliated destination country. This condition will apply to all U.S. international facilities-based carriers, including small entities, that are affiliated with foreign carriers. The Commission has concluded that this condition is necessary to prevent potential anticompetitive distortions in the IMTS market.

321. The *Order* also imposes an additional requirement on carriers that seek to provide switched services using resold or facilities-based private lines. Carriers must demonstrate that settlement rates for 50 percent of the settled traffic between the United States and the country at the foreign end of the private line are at or below the relevant benchmark for that country. The Commission believes that at most 635 small international carriers, both facilities-based and resale carriers, could be affected by this requirement. The Commission has concluded this requirement is necessary to prevent potential anticompetitive distortions in the IMTS market. We base our estimate of the number of small entities potentially affected

[560] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4899.

on the number of toll carriers filing Telecommunications Relay Service Fund (TRS) worksheets. In 1995, 445 toll carriers filed TRS fund worksheets. We believe that between 50 and 200 carriers failed to file TRS fund worksheets. We also believe that fewer than 10 toll carriers were not small entities (based on the SBA's definition of small entity as one with fewer than 1,500 employees). Thus, at most 635 international carriers would be classified as small entities. The Secretary shall send a copy of this *Report and Order* to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601, *et seq.* (1981).

322. *Reporting, recordkeeping and other compliance requirements*: In its Initial Regulatory Flexibility Analysis the Commission did not propose any reporting requirements. The *Notice*, however, raised the issues of possible anticompetitive behavior and market distortions, and sought comment on how the Commission's reporting system could be modified in order to make monitoring and enforcement more effective. To address the concerns of commenters, the *Report and Order* contains certain mechanisms to detect potential market distortions. In this regard, the Commission amends its rules to impose an additional reporting requirement. Section 43.61 of the Commissions rules currently requires that carriers file annual reports that include actual traffic and revenue data. Common carriers subject to the existing Section 43.61 requirements will be required to file traffic reports for each quarter in which their traffic meets any of the following thresholds: (i) their aggregate U.S.-billed minutes of switched telephone traffic exceeds 1% of the total of such minutes of international traffic for all U.S. carriers (as published in the most recent Section 43.61 traffic data report); (ii) their aggregate foreign-billed minutes of switched telephone traffic exceeds 1% of the total of such minutes of international traffic for all U.S. carriers; (iii) their aggregate U.S.-billed minutes of switched telephone traffic for any country exceeds 1.5% of the total of such minutes for that country for all U.S. carriers; or (iv) their aggregate foreign-billed minutes of switched telephone traffic for any foreign country exceeds 2.5% of the total of such minutes for that country for all U.S. carriers. Limiting the quarterly filing requirement to carriers that meet these criteria will reduce the burden on small carriers, while enabling us to identify distortions in the balance of payments. The *Report and Order* only imposes an increase in the frequency with which the report must be filed. It will contain the same data that must be included in the current required annual report. Thus, the reporting requirement should not impose a significant economic burden, and no additional outside professional skills should be required in complying with this requirement.

323. *Federal rules which overlap, duplicate or conflict with the Commission's proposal:* None.

324. *Any significant alternatives minimizing impact on small entities and consistent with stated objectives:* The *Notice* solicited comments on a variety of alternative methodologies for calculating benchmark settlement rates, but these have no impact on small

entities. The *Notice* also solicited comments on enforcement mechanisms that may be necessary to support U.S. carriers, including small entities, in their negotiations with foreign carriers and in their provision of international service. We did not receive any comments on the impact of these alternatives on small entities.

325. *Comments solicited*: Written comments were requested on the Initial Regulatory Flexibility Analysis in accordance with the same filing deadlines set for comments on the other issues in the *Notice*, but we did not receive any comments.

B. Paperwork Reduction Act of 1995 Analysis

326. This Report and Order contains either a new or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this order, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from date of publication of this Order in the Federal Register. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Written comments must be submitted on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov. For additional information concerning the information collections contained in the Report and Order contact Judy Boley at 202-418-0214.

V. Ordering Clauses

327. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 2, 4(i), 201, 205, 214 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201, 205, 214, 303(r), the rules, requirements and policies discussed in this *Order* ARE ADOPTED and Part 43 and 63 of the Commission's Rules, 47 C.F.R. Parts 43 & 63, ARE AMENDED as set forth in Appendix B.