

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
1998 Biennial Regulatory Review –) IB Docket No. 98-148
Reform of the International Settlements)
Policy and Associated Filing Requirements)
)
Regulation of International) CC Docket No. 90-337
Accounting Rates)

TO: The Commission

**COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

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September 16, 1998

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SUMMARY

In the instant Notice of Proposed Rulemaking, the Commission proposes to remove the International Settlements Policy (“ISP”) and related filing requirements for arrangements between U.S. carriers and non-dominant foreign carriers in WTO Member countries, and between U.S. carriers and foreign carriers in WTO Member countries to which the Commission has authorized international simple resale (“ISR”). CompTel supports the FCC’s initiatives, and urges the FCC to eliminate the ISP and related filing requirements wherever whipsawing is not a realistic concern as quickly as possible. Doing so will free U.S. international carriers to negotiate more competitive and innovative arrangements with foreign carriers, as well as lighten the regulatory compliance burden for U.S. carriers, thereby producing lower rates, more choices and increased product innovation for U.S. consumers.

In addition, CompTel urges the Commission to clarify that, under current FCC rules, the ISP does not apply to arrangements between U.S. carriers and foreign carriers from WTO Member countries where there are three or more facilities-based carriers. Further, in light of the development of ubiquitous third-country routing alternatives for U.S. carriers, CompTel recommends that the Commission inquire whether the ISP is necessary for any arrangements between U.S. carriers and foreign carriers from WTO Member countries. Lastly, despite the rapidly diminishing risk of whipsawing in the global telecommunications marketplace, CompTel believes it remains necessary for the Commission to impose the flexibility safeguards to all deals between U.S. carriers and foreign carriers that affect more than a threshold percentage of traffic on a particular route. While CompTel certainly does not object to continuing the 25% threshold under the FCC’s current policies, CompTel also would not oppose a somewhat higher threshold in recognition of increased liberalization and competition in the global market.

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TO: The Commission

**COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

The Competitive Telecommunications Association (“CompTel”), by its attorneys, hereby submits these comments regarding the Notice of Proposed Rulemaking released on August 6, 1998 in the above-captioned proceeding.¹ The NPRM proposes to remove the International Settlements Policy (“ISP”) and related filing requirements for arrangements between U.S. carriers and non-dominant foreign carriers in WTO Member countries, and between U.S. carriers and foreign carriers in WTO Member countries to which the Commission has authorized international simple resale (“ISR”). CompTel supports the FCC’s initiatives, and urges the FCC to eliminate the ISP and related filing requirements wherever whipsawing is not a realistic concern as quickly as possible. Doing so will free U.S. international carriers to negotiate more competitive and innovative arrangements with foreign carriers, as well as lighten the regulatory compliance burden for U.S. carriers, thereby producing lower rates, more choices and increased product innovation for U.S. consumers.

¹ 1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements and Regulation of International Accounting Rates, IB (continued...)

In addition, CompTel urges the Commission to clarify that, under current FCC rules, the ISP does not apply to arrangements between U.S. carriers and foreign carriers from WTO Member countries where there are three or more facilities-based carriers. Further, in light of the development of ubiquitous third-country routing alternatives for U.S. carriers, CompTel recommends that the Commission inquire whether the ISP is necessary for any arrangements between U.S. carriers and foreign carriers from WTO Member countries. Lastly, despite the rapidly diminishing risk of whipsawing in the global telecommunications marketplace, CompTel believes it remains necessary for the Commission to impose the flexibility safeguards to all deals between U.S. carriers and foreign carriers that affect more than a threshold percentage of traffic on a particular route. While CompTel certainly does not object to continuing the 25% threshold under the FCC's current policies, CompTel also would not oppose a somewhat higher threshold in recognition of increased liberalization and competition in the global market.

Last year, CompTel established an International Communications Committee ("ICC"), which comprises a diverse array of facilities-based and resale U.S. international carriers in virtually all segments of the U.S. international telecommunications market. Through the ICC, CompTel strongly supports FCC initiatives that are designed to make the FCC's processes as pro-competitive and user-friendly as possible for U.S. international carriers. Further, CompTel concurs with the FCC's assessment that removing unnecessary regulations will promote the U.S. public interest by encouraging new entry and increasing the ability of current market participants to compete in the marketplace unhindered by costly and burdensome requirements. Therefore, CompTel is pleased to support the FCC's proposal to remove unnecessary requirements

(...continued)

Docket No. 98-148, CC Docket No. 90-337, Notice of Proposed Rulemaking, (released August 6, 1998), FCC 98-148 ("NPRM").

regarding the ISP and related filing requirements.

I. Elimination Of The ISP And Related Filing Requirements Would Stimulate Competition, Prevent Whipsawing, Lower Prices, And Increase Product Choices.

CompTel believes that deregulation under most circumstances is in the public interest because it reduces the regulatory burdens that prevent U.S. international carriers, particularly smaller carriers, from competing as vigorously as possible. Freed of the regulatory burdens associated with the ISP, U.S. international carriers will be able to negotiate new and novel arrangements that more accurately reflect consumer demand and technological innovation. By allowing carriers to tailor services based on market forces rather than regulatory compliance, the Commission would encourage them to compete to provide services of the type, in the quantity and at the price that the public wants, which is the essence of competition.

CompTel submits that fostering competition in foreign markets is perhaps the most effective way to prevent whipsawing and other discriminatory conduct through the erosion of foreign market power. Whipsawing and other discriminatory conduct cannot occur in open markets. Removing the ISP where it is no longer needed would promote new entry and competition in foreign markets by encouraging U.S. carriers to enter into new arrangements with non-dominant foreign carriers. Not burdened by the requirements of the ISP, U.S. carriers would have the ability and incentive to reach creative and pro-competitive arrangements with non-dominant foreign carriers (and possibly even with dominant foreign carriers as well).

Further, CompTel agrees with the Commission that the ISP in many cases actually can inhibit competition and deter market entry in the United States.² The ISP serves as a kind of regulatory strait-jacket that hampers new entrants from negotiating the types of

² NPRM at ¶20.

agreements that will permit them to compete most effectively against more established carriers. Consequently, eliminating the ISP would encourage more carriers to enter the U.S. international market as well as reduce the costs of providing service, both of which should result in lower prices for consumers.

II. The Commission Should Clarify That The ISP Does Not Apply To Arrangements Between U.S. Carriers And Foreign Carriers From WTO Member Countries Where There Are Three Or More Facilities-Based International Carriers.

CompTel submits that a useful starting point for analyzing whether and under what circumstances the FCC should remove the ISP is to identify those situations where the ISP has already effectively ceased to apply today. In its rules implementing the WTO Agreement, the FCC created a presumption in favor of alternative payment arrangements (*i.e.*, settlement arrangements which do not comply with the ISP) between U.S. carriers and carriers in WTO Member countries.³ Further, the FCC stated that the presumption could not be rebutted where the incumbent foreign carrier (whether dominant or non-dominant) faced two or more facilities-based competitors.⁴ Therefore, under the FCC's current policies, the ISP effectively no longer governs settlement or other payment arrangements between U.S. and foreign carriers on WTO country routes where the incumbent foreign carrier faces two or more facilities-based competitors. CompTel submits that the FCC, at a minimum, should clarify that the ISP no longer applies in these circumstances.

³ Foreign Participation in the U.S. Telecommunications Market, Report and Order and Order on Reconsideration, IB Docket Nos. 97-142 & 95-22, 10 CR 750, ¶307 (1997) (the "WTO Order").

⁴ *Id.* ("We conclude that, in order to rebut the presumption in favor of permitting flexibility, a party must demonstrate that the foreign carrier is not subject to competition in its home market from multiple (more than one) facilities-based carriers that possess the ability to terminate international traffic and serve existing customers in the foreign market.")

Removing the ISP on WTO country routes with multiple facilities-based foreign carriers is clearly justified. The FCC adopted the ISP to prevent discriminatory conduct such as whipsawing, and whipsawing is not a realistic concern on routes where U.S. carriers can choose among three or more facilities-based carriers to terminate U.S.-billed traffic. In such markets, even a foreign carrier that may retain some market power cannot engage in whipsawing. If a foreign carrier in such a market tried to play competing U.S. carriers against each other, the foreign carrier would face losing some or all of U.S.-originating traffic to its facilities-based competitors. Further, given the increasing pervasiveness of third-country routing, the U.S. carriers would have the option of routing traffic to the foreign carrier through intermediate carriers in other countries. Consequently, imposing the ISP in those circumstances would serve no positive purpose, but would only inhibit competition, deter market entry, and prevent U.S. carriers from entering into creative arrangements that serve the public interest.

In sum, CompTel urges the Commission to clarify that the ISP does not apply to any arrangements between U.S. carriers and foreign carriers that face competition from two or more facilities-based carriers on WTO country routes.⁵ This standard is effective, bright-lined, easy for the industry to follow, and easy for the Commission to administer.

III. The ISP Should Not Be Applied To Arrangements Between U.S. Carriers And Foreign Carriers In WTO Member Countries That Lack Market Power.

CompTel strongly supports the Commission's proposal to remove the ISP for arrangements between U.S. carriers and foreign carriers from WTO Member countries that lack

⁵ Although the FCC has proposed to remove the ISP only for WTO country routes, CompTel would note that where there are two or more facilities-based competitors to an incumbent foreign carrier, the ISP would appear to serve no useful purpose even on non-WTO country routes.

market power on the relevant route.⁶ The ISP was designed to prevent whipsawing by monopoly foreign carriers, which by definition have market power.⁷ Carriers lacking market power cannot whipsaw or otherwise discriminate harmfully against U.S. carriers. In order to whipsaw, a foreign carrier would have to possess market power to enable it to demand unfavorable terms and conditions from U.S. carriers by pitting one U.S. carrier against another. If a non-dominant foreign carrier attempted to whipsaw U.S. carriers, the U.S. carriers would move their traffic to other carriers in the foreign country or route their traffic through third-country arrangements. Accordingly, the ISP serves no purpose with respect to arrangements between U.S. carriers and foreign carriers that lack market power, and the FCC should adopt its proposal to remove the ISP for such arrangements.

IV. The ISP Should Remove the ISP on WTO Country Routes Where ISR Is Authorized

CompTel also supports removing the ISP on all WTO country routes where the FCC has authorized ISR. Whether because the foreign country offers “equivalent” ISR opportunities to U.S. carriers, or because foreign competition has driven settlement rates down to benchmark levels, the FCC’s determination that ISR should be permitted with a particular country should lay to rest any concern about possible whipsawing or other discriminatory conduct by foreign carriers on the route. Further, if, as CompTel understands may be the case, U.S. carriers may route a substantial percentage (even 100%) of their facilities-based and resold switched minutes pursuant to ISR arrangements on routes where ISR is authorized, then

⁶ NPRM at ¶20. Similar to its comment in the preceding footnote, CompTel questions the need to retain the ISP for arrangements between U.S. and non-dominant carriers on non-WTO country routes since there is no realistic possibility that such foreign carriers can engage in whipsawing or other harmful discriminatory conduct.

⁷ NPRM at ¶18.

CompTel submits that retaining the ISP in such circumstances would appear to serve no useful purpose.

V. The Commission Should Study Whether The ISP Is Necessary For Any Arrangements Between U.S. Carriers And Foreign Carriers From WTO Member Countries.

CompTel submits that the ISP should never be applied where whipsawing is not a realistic concern. As the FCC has recognized, there has been an explosion in third-country routing services – refile, switched hubbing, reorigination, etc. – during the 1990s.⁸ This market segment has become sufficiently large, ubiquitous and sophisticated over the past 18 months that so-called “spot markets” have developed for routing voice traffic to virtually all foreign countries.⁹ The development of third-country routing raises the question whether any foreign carrier – even a dominant carrier which does not face facilities-based competitors – has the ability to whipsaw or otherwise discriminate among U.S. carriers. How can discrimination succeed if U.S. carriers can route their traffic via intermediate countries at competitive spot-market rates? CompTel is not formally proposing that the FCC remove the ISP broadly for WTO countries at this time because the FCC did not seek comment on such a measure and, therefore, the record may not be sufficiently well-developed on the extent to which third-country

⁸ As a result of these competitive pressures, an increasing amount of international traffic will migrate from the traditional accounting rate system to least cost routes through the use of practices such as hubbing, refile, and reorigination. *See, e.g., International Settlement Rates*, 12 FCC Rcd 19806, n.13 (1997), *citing* "Report Of The Informal Expert Group On International Telecommunications Settlements," International Telecommunication Union, April 1997 (the implementation of the WTO Basic Telecom Agreement "may, unless there is adequate price reform, result in an increasing proportion of the world's international traffic flowing outside the traditional international settlements system").

⁹ For example, RateXchange, located in San Francisco, is one of the first web-based U.S. wholesale bandwidth exchanges for the spot market. According to RateXchange, it provides “the best available spot rates on given country-to-country routes.” Mayfield, Ross, *RateXchange and its Effective Liberalization of the Telecommunications Industry*, <<http://www.rateexchange.com/market/perspective.html>>

routing inhibits whipsawing. However, CompTel encourages the FCC to initiate an inquiry on this issue, either in this rulemaking or a separate proceeding, to determine whether there is any realistic need for the ISP on any WTO country routes.

VI. Filing Requirements Should Be Eliminated Where The ISP Is Eliminated.

CompTel strongly supports the Commission's proposal to amend the Section 43.51 contract filing requirement and the Section 64.1001 accounting rate filing requirements so that contracts and accounting rate information for arrangements that are not subject to the ISP would not need to be filed with the Commission.¹⁰ To the extent that the general ISP restrictions are lifted, the Sections 43.51 and 64.1001 requirements should also be lifted, because the benefits to be gained from lifting the requirements overwhelmingly outnumber any theoretical justification for their retention.

The pro-competitive benefits to be gained from lifting the Sections 43.51 and 64.1001 requirements are substantial. First, lifting the filing requirements would reduce transaction costs for carriers and reduce the administrative burden on service providers and the Commission itself.¹¹ The Commission has frequently recognized that affirmative filing requirements impose an administrative burden that should be avoided where unnecessary¹² Second, lifting the filing requirements would facilitate market entry by not requiring carriers to

¹⁰ NPRM at ¶¶21, 30.

¹¹ *See, e.g., Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, 12 FCC Rcd 8596, 8610 (1997).

¹² *See, e.g., Closed Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Rcd 3272, 3375 (1997); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 12 FCC Rcd 11266, 11275 (1997); *Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8831-32 (1997); *Regulatory Reform for LECs Subject to Rate of Return Regulation*, Order on Reconsideration, 12 FCC 2259, 2275 (1997).

disclose the details of their arrangements with foreign carriers. These filing requirements are particularly burdensome for small and foreign carriers, which increases the chilling effect on their entry into the U.S. international services market.¹³ Third, CompTel agrees with the Commission that such filing requirements inhibit U.S. carriers from entering into innovative arrangements that are pro-competitive and that could reduce rates for U.S. customers.¹⁴

Nothing of material consequence is gained by retaining the filing requirements. The Commission can always require the filing of specific arrangements about which it is concerned. Moreover, CompTel believes that industry participants who believe that other carriers are engaging in anti-competitive conduct will not hesitate to inform the Commission.¹⁵ Therefore, CompTel urges the Commission to remove filing requirements where the ISP is removed in order to eliminate unnecessary regulatory burdens which hinder the development of vigorous competition.¹⁶

VII. The Commission Should Apply The Flexibility Safeguards To All Deals Between U.S. Carriers And Foreign Carriers That Affect More Than A Specified Threshold Of Traffic On A Particular Route.

The FCC's current policies establish certain safeguards on routes where the ISP does not apply and ISR is not authorized. In particular, the FCC has established approval procedures for alternative payment arrangements, and it requires that such arrangements affecting more than 25% of inbound or outbound traffic on a route must be publicly filed and

¹³ *Cf. Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, 12 FCC Rcd 8596, 8610 (1997).

¹⁴ NPRM at ¶21.

¹⁵ *See, e.g.*, 47 U.S.C. §208.

¹⁶ As noted below, the one exception to removing the filing requirement where the ISP has been lifted is that carriers who are subject to flexibility safeguards should be required to submit copies of their contracts to the FCC.

may not contain unreasonably discriminatory rates, terms and conditions. CompTel submits that the Commission should clarify that these so-called flexibility safeguards, as modified below, apply on all non-ISR routes in situations where the ISP has been removed.

CompTel submits that this proceeding is an appropriate time for the FCC to fine-tune its flexibility safeguards. In particular, CompTel proposes that the FCC eliminate the requirement that carriers obtain advance approval of their payment arrangements or submit copies of contracts in situations where the ISP does not apply. As noted above, such a requirement is not needed to promote the U.S. public interest, but in fact would undermine the FCC's interest in competition, innovation and lower consumer prices. At the same time, CompTel supports retaining the policy that any U.S. carrier's arrangements which individually or in the aggregate involve more than a specified percentage of inbound or outbound traffic on a route should be submitted publicly to the FCC and subjected to the safeguard against unreasonably discriminatory rates, terms and conditions. While CompTel does not oppose retaining the current threshold level of 25%, the FCC also may wish to consider whether raising the threshold (say, to 40%) more appropriately balances the need to safeguard U.S. consumers versus the pro-competitive benefits to be gained by lifting the flexibility safeguards in an environment characterized by increasingly open and competitive foreign markets. CompTel submits that these modest, minimum safeguards remain necessary due to the possibility that carriers with large traffic volumes could negotiate preferential or otherwise discriminatory arrangements that could undermine competitive conditions in the U.S. international telecommunications marketplace.

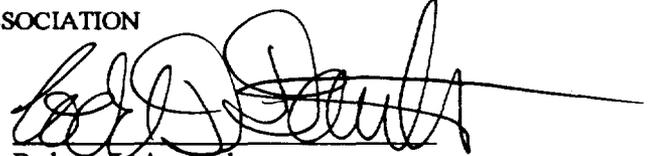
CONCLUSION

In sum, CompTel appreciates and supports the FCC's efforts to eliminate the ISP and related filing requirements where unnecessary, and urges the FCC to remove such rules as quickly as possible.

Respectfully submitted,

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September 16, 1998

Its Attorneys

CERTIFICATE OF SERVICE

I, Lorretto J. Scott, hereby certify that on this 16th day of September, 1998, I caused true and correct copies of the COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION to be served via hand delivery, upon those persons listed below.

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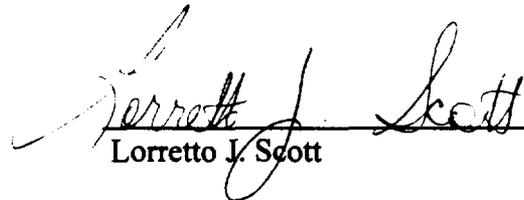
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