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

In The Matter of	)	
	)	
International Settlements Policy Reform	)	IB Docket No. 02-324
	)	
International Settlement Rates	)	IB Docket No. 96-261
	)	

COMMENTS OF
SPRINT COMMUNICATIONS COMPANY, L.P.

Kent Nakamura
Richard Juhnke
401 9th Street, NW, #400
Washington, DC 20004
(202) 585-1916

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Sprint Communications Company L.P. ("Sprint") in response to the Notice of Proposed Rulemaking (NPRM) released October 11, 2002 (FCC 02-285), as subsequently extended by Public Notice DA 02-3314 released December 2, 2002, hereby respectfully submits its comments in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

The market for international voice telephony has changed substantially in the past few years for several reasons, including the entry into force of the World Trade Organization's (WTO) Basic Telecom Agreement in countries that handle the vast majority of the world's telecommunications traffic, the Commission's own international regulatory policies, the increased availability of least cost routing for international calls, and the increased quality and availability of technological alternatives to the traditional circuit switched networks currently used to provide most international telephony.

These developments have led to a marked decline in the cost and price of international telephone calls. There are, however, new obstacles to additional public benefits, some of which are, ironically, a perverse consequence of the Commission's own policies. For example, the Commission's own settlement rate benchmarks have been seized upon by at least one foreign government to justify increased prices to U.S. carriers and consumers. In today's environment, it is apparent that the Commission's original settlement rate benchmarks are too high. They may actually be impeding further progress towards the Commission's long term goal of cost-based rates for international telephony.

Sprint recommends that the Commission refrain from regulating international telephony where low rates and broad choices are available to U.S. consumers and offers its suggestions for defining when rates are sufficiently low. On routes where rates are not low, however, or where foreign governmental action results in price increases, Sprint recommends that the Commission revisit its settlement rate benchmarks on a market specific basis.

Finally, Sprint believes that the practice of imposing above-cost charges for the termination of U.S.-originated international telephone calls is a large and growing problem. The best solution would be if foreign regulatory authorities recognized and addressed this problem, as has occurred in several countries. There are, however, countries where such regulatory intervention is not possible for various reasons. In these cases, Sprint reluctantly concludes that regulatory intervention by the Commission to establish limits on the permissible amounts of such surcharges is necessary.

II. THE INTERNATIONAL TELECOMMUNICATIONS MARKET

Paragraph 20 of the NPRM seeks comment on the status of the U.S.-international market. Although the Commission does not explicitly say so, the NPRM's focus is primarily on U.S.-originated international voice telephony. Accordingly, this is the market to which Sprint's comments are directed. Preliminarily, Sprint agrees with the Commission's tentative conclusions at para. 13 of the NPRM that a confluence of mutually reinforcing forces, including the Commission's seminal Benchmarks Order,[1] the WTO Basic Telecom Agreement, the increased ability to least-cost route, and technological bypass (such as voice over circuits employing Internet protocol) has forced international settlement rates[2] (and international calling prices) downward in recent years.

In addition, Sprint's current experience is that there are now more ways to terminate international voice telephone calls to a particular destination than existed even a few years ago. When competition first developed abroad, Sprint often duplicated with new foreign carriers the bilateral relationship it had with the incumbent. Now, Sprint increasingly purchases minutes in thriving U.S. wholesale markets as complements to or substitutes for existing bilateral arrangements. The slow but steady transition to open markets and competition around the world has also resulted in entry and competition through often unregulated media such as voice over Internet protocol circuits or callback even in the face of objections by de jure monopolists and governments.

However, continued progress towards a competitive international telephony market worldwide should not be assumed. As the Commission is aware, there are a number of large and important WTO member countries such as Mexico and Brazil where telecommunications competition is not faring particularly well. Similarly, China and India, large and important telecommunications markets that are also WTO members, are opening their telecommunications markets only gradually. The strength of their

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[1] International Settlement Rates, 12 FCC Rcd 19806 (1997), *aff'd sub nom.* Cable and Wireless plc v. FCC, 166 F.3rd 1224 (D.C. Cir. 1999) ("Benchmarks Order").

[2] Sprint today regards international settlement rates and international termination rates as largely interchangeable for purposes of this proceeding, as does the Commission, and thus uses them interchangeably in its comments. *See* NPRM at n. 3, n. 57.

commitment to the principles in the reference paper annex to the WTO Basic Telecommunications Agreement has yet to be tested.[3]

The Commission's proposals for further deregulation of the international telephone business, however, appear to be premised upon the continued opening of markets and development of competition or, at a minimum, the expectation that things will stay as they are.[4] Especially in view of the difficult current environment for new entrants in many countries, it is unsurprising that important WTO member countries do not always share the Commission's enthusiasm for competition.[5] While the current period may only be a temporary detour on the road to the full flowering of competition worldwide, the Commission should not assume that this is the case. If the status quo does not persist, premature abandonment of the ISP might return the U.S. industry to the conditions that originally led to the establishment of the ISP almost seventy years ago.

III. THE COMMISSION'S PROPOSALS

In the instant NPRM, the Commission speculates that the ISP may be standing in the way of still more competition and lower settlement rates. It encourages commenters to provide information on alternatives for delivery of voice traffic abroad. Until quite recently, Sprint believed that the international voice telephony business was, with a few exceptions, sufficiently competitive that it could be almost totally deregulated by the

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[3] Sprint notes that the United States Trade Representative, in a December 2002 Report to Congress on China's WTO Compliance, observed at page 45 that China's Ministry of Information Industry (MII) has "used regulatory authority to disadvantage foreign firms during 2002" and that "[a]t times, MII has also changed applicable rules without notice and without transparency."

[4] *See, e.g.*, NPRM at para. 23.

[5] MII Minister Wu Jichuan in a speech given on December 2, 2002 and covered by Reuters reportedly said "Competition should take place orderly under government supervision. Monopolies are unacceptable. Too many licenses, which lead to too much competition and wasting of resources, are also unacceptable."

Commission. This was because even entrenched monopolists were finding it difficult to prevent telephone traffic from flowing into a country in undesirable (to the monopolist) ways such as through arbitrage or technological bypass.

Sprint's view has changed as a result of recent developments described further below that were not mentioned or considered in the NPRM. As a result of these developments, Sprint does not believe that competitive market forces have developed sufficiently to render regulation unnecessary on either U.S.-WTO member or U.S.- non-WTO member routes as the Commission proposes.

In Sprint's view, the most significant current threat to international competition and still lower consumer prices is a budding effort by foreign governments to institute floors on rates for terminating international telephone calls at rate levels they believe to be reasonable. These floors have to date always constituted increases from the prevailing, commercially established termination rates. This practice is the obverse of the Commission's own benchmarks: while the Commission has limited the amounts that U.S. carriers can pay to foreign carriers, foreign governments have established minimum amounts that offshore carriers can accept from U.S. carriers.

The Dominican Republic, for example, has issued Order 043-02[6] requiring the Dominican Republic's international carriers to charge a minimum of US $.08 per minute for the termination of all international telephone calls to the Dominican Republic. In a similar action, but undertaken with considerably less transparency, China's MII has

[6] A copy of the order of Indotel, the Dominican Republic's telecommunications regulator, is on Indotel's website at the following URL: http://www.indotel.org.do/Site/Marco_Legal/consejo/Resoluciones_2002/Resolucion_043-02.pdf.

apparently[7] required Chinese carriers to charge no less than US $.17 per minute for the termination of international telephone calls to China. Later press reports indicated that the MII subsequently decided to exempt calls between Hong Kong and China from this new rate. In the Philippines, the National Telecommunications Commission (NTC) issued a Memorandum Circular on April 3, 2002[8] requiring that public telecommunications entities (PTEs) "apply the same uniform Access Charge arrangements defined in these implementing rules and regulations for all network access and interconnect service types."[9] In response, Philippine carriers are raising their fixed termination rates to the level for mobile termination, an increase of approximately 50 percent.

All of these rates, while below the FCC's settlement rate benchmarks, are above – sometimes far above – the rates that Sprint had been paying.[10] Their successful implementation translates directly into higher prices for U.S. consumers. The new rates are defended as reasonable because they are below the Commission's own benchmarks even if they are substantial increases over existing prices.[11]

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[7] Despite widespread acknowledgment of the order's existence, including by Chinese Premier Zhu Rongji, Sprint knows of no one, including within the U.S. Government, who has obtained a copy of this order.

[8] A copy of the Memorandum Circular is available on the NTC's website at the following URL: http://www.ntc.gov.ph/whatsnew-frame.html.

[9] Memorandum Circular, Article IV, para. 9 (e) at 6.

[10] The actual rates that Sprint pays for international termination are confidential and proprietary. Sprint nevertheless notes that with respect to China, for example, press reports stated that carriers were able to terminate voice traffic into China for as little as two or three cents a minute prior to the MII order.

[11] *See, e.g.*, Indotel Order 043-02 at 5: "[B]asta senalar que conforme a las recomendaciones de la FCC en su aludida resolucion de *Benchmark*, la tasa de referencia para el ano 2001, para el pais seria de unos 19 centavos de dolar por minuto de llamada internacional entrante..." (It is sufficient to point out that [the new termination rate] conforms with the recommendations of the FCC's referenced *Benchmarks* order, the

As the NPRM recognizes at para. 44, however, the Commission's benchmark settlement rates are still "considerably above actual cost-based rates." The benchmark rates are also, in almost all cases, higher – in some cases much higher – than the per-minute wholesale spot rates for termination of international telephone service that appear to be widely available from a number of Internet websites.[12] The widespread availability of termination rates below the Commission's benchmarks suggests that while the Commission's original settlement rate benchmarks were important and useful in moving settlement rates towards costs, after more than half a decade, the rate levels are outdated, no longer accomplish the Commission's goals, and may interfere with them.

External evidence tends to confirm the conclusion that the benchmark rates are outdated and excessive. The New Zealand Commerce Commission very recently (September 2002) published an "Interconnection Benchmarking Study," an extensive survey of domestic inter-carrier local interconnection rates using a forward looking cost based methodology in countries similar to New Zealand ("New Zealand Study").[13] The

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reference rate for 2001 for the country would be one of $.19 per minute for incoming international calls…")

[12] *See, e.g.*, http://www.mjscheele.com, http://www.arbinet.com/market/axcessrate.asp, and http://www.band-x.com/en/. This does not always include the significant surcharges for terminating to mobile telephones, however, which sometimes cause the termination rates to exceed the Commission's benchmarks.

[13] The fact that the New Zealand Study surveyed rates based upon forward-looking cost is important, as in the original Benchmarks notice of proposed rulemaking, the Commission said "[W]e believe that the appropriate cost standard for establishing benchmark settlement rates is the incremental cost of terminating international traffic because rates in competitive markets would tend towards that cost." 12 FCC Rcd at 6204. The New Zealand Commerce Commission regards total service long run incremental costs as a subset of forward-looking cost based rates. *See* New Zealand Study at para. 22, page 9.

New Zealand Study found all such rates to be lower – sometimes considerably lower – than NZ$ .03 per minute (about US$ .015).[14]

For example, the New Zealand Study found that Telstra's rate for domestic interconnection in Australia (exclusive of access deficit charges) ranged between NZ$ .0074 and NZ$ .0216 per minute, at most a little over a penny a minute in U.S. currency. By contrast, the "national extension tariffed component price" for Australia, a close analog to the upper end of the local interconnection rates in the New Zealand Study employed in the Benchmarks Order, was twelve U.S. cents per minute.[15] In Ireland, another country covered by the New Zealand Study, local interconnection rates charged by Eircom, the Irish incumbent, ranged between NZ$ .0088 and NZ$ .0187 per minute, less than a U.S. penny a minute. The Commission's price in the Benchmarks Order for national extension pricing in Ireland, by contrast, was 13.4 U.S. cents per minute.[16]

While long haul transmission and international switching costs must be added to the New Zealand Study's figures to arrive at the equivalent of the Commission's benchmarks originally developed in 1996, it is in long haul transmission where recent technological developments such as dense wave division multiplexing have caused per-minute costs (and prices) to fall most rapidly.

For example, the Commission's original benchmark order used France Telecom's price for an international 2.048 Mbps E-1 half circuit between France and the U.S. to

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[14] *See* www.comcom.govt.nz/telecommunications/Benchmarking.cfm.com ("New Zealand Study"). The New Zealand Study incorporated where available "double tandem" interconnection rates that have a significant long distance transport component. See New Zealand Study at n. 41. This suggests that those particular charges, where available, are the closest analog to the Commission's own national extension tariffed component price as defined in the Benchmarks Order.

[15] 12 FCC Rcd at 19981.

[16] *Id.*

derive per-minute prices for the international transmission facility component of its benchmark. 12 FCC Rcd at 19974. The Commission calculated the rate for such a half circuit at 142,205 French francs (FF) per month, or 1,706,460 FF per annum. At the exchange rate of 5.16FF= US$1 used by the Commission, the annual rate for an E-1 half circuit between the U.S. and France was $330,709.30.

The staff of the European Union conducted a study ("EU Study") of international leased line prices of its member states, including France, as of 1 August 2001.[17] One of the prices it studied was for E-1 half circuits between the U.S. and France provided by France Telecom. The EU Study found that France Telecom's standard undiscounted annual price of such an E-1 in Euros (VAT excluded) was 160,620 Euros per annum.[18] Assuming rough parity between the Euro and the dollar, it appears that E-1 half circuit prices in France have fallen by more than half since the Commission calculated the international transmission tariff component price for France. This estimate is confirmed by an earlier EU Study, which also shows that those prices had dropped by more than half between 1997 and August 2000.[19] These figures suggest that the Commission's calculations for international transmission are far too generous.

That the Commission's own benchmarks are so badly outdated raises a number of concerns. It should be remembered that the benchmark rates were not ends in themselves, but rather tools in the Commission's longstanding quest for competitive,

[17] A copy of the EU Study can be found at the following URL: http://europa.eu.int/information_society/topics/telecoms/implementation/annual_report/7report/documents/finalannex1.pdf.

[18] EU Study at Chart 24.

[19] A copy of the earlier study can be found at the following URL: **http://europa.eu.int/ISPO/infosoc/telecompolicy/implrep6/Leasedlines-en.pdf**

cost-based settlement and termination rates.[20] If the benchmark rates are inflated, the Commission's proposal at para. 32 of the NPRM to remove the ISP from benchmark-compliant routes means that its benchmarks may become permanent floors, never declining regardless of underlying costs. As mentioned previously, foreign governments have already justified increasing prices for U.S. consumers because they are below the Commission's benchmarks, an ironic outcome in view of the benchmarks' original purpose.

The Commission's alternate proposal to remove the ISP from routes approved for international simple resale (ISR) presents similar problems because the standard for achieving ISR on a route is tied in substantial part to the existing benchmark rates. Again, the risk is that tying increased deregulation to the Commission's existing benchmarks could deny consumers additional benefits.

Policies tying deregulation to existing benchmarks would allow a country to maintain settlement rates at or increase them to levels significantly above cost by any reasonable measure of the latter. Foreign governments or carriers who implement minimum termination rates can then capture these economic rents. Such efforts, while detrimental to U.S. consumers, have little adverse effect (aside from suppression of demand due to higher prices) on foreign carriers and can affirmatively benefit them even after some suppression of demand. Such behavior is the economic equivalent of taxing offshore consumers, much as some jurisdictions in the U.S. find it politically expedient to heavily tax those who rent cars at airports or who stay in hotels.

The institutionalization of above-cost benchmarks has another pernicious effect: it damages U.S. competition. As the Commission recognized in its original Benchmarks

[20] *See, e.g.*, Benchmarks Order at para. 6, 12 FCC Rcd 19809.

Order, 12 FCC Rcd at 19821, to a facilities-based U.S. carrier affiliated with a foreign carrier, above-cost settlement rates are an internal bookkeeping matter to the firm as a whole: the increased "costs" incurred by the U.S. affiliate to terminate its voice traffic are counterbalanced by the increased revenue received by the foreign parent. To Sprint and other U.S. carriers, however, these additional costs cannot be easily internalized.[21]

The imposition by foreign governments of such below-benchmark minimum termination rates is not addressed or even contemplated by the ISP, and the maintenance or elimination of the ISP either selectively or in total would have little or no effect on such foreign governmental actions.[22] Nor are the forces of competition and technological substitution always effective counterweights to governmental power, as demonstrated by the Panamanian regulator's shutdown of IP ports suspected of carrying voice traffic[23] or the action by Telkom Kenya last month to block IP traffic in an asserted effort to thwart the use of VOIP.[24]

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[21] The NPRM observes at n. 75 that the Commission has not found anticompetitive "one way bypass" to have occurred on any U.S.-international routes. However, as the Commission observed at para. 11 of its Benchmarks Order, 12 FCC Rcd at 19812, calls made over the Internet are not subject to the accounting rate system. Many providers take the position that voice telephony employing Internet protocol is an enhanced service not subject to FCC regulation or reporting requirements. *Compare* AT&T Petition for Declaratory Ruling on IP Telephony, filed October 18, 2002. Thus, the Commission's ability to identify such one way bypass is tenuous. Sprint's own experience is that the amount of voice traffic traveling via Internet protocol is considerable and increasing.

[22] Collective private efforts by offshore foreign carriers to establish price floors for the termination of international voice traffic present similar problems. While such collusion might violate foreign competition laws (and U.S. antitrust law if it has a substantial effect on U.S. commerce, see Hartford Fire Insurance Co. v. California, 509 U.S. 793 (1993),) there are substantial practical difficulties associated with counteracting such collusive action.

[23] Until its decision was reversed by the Supreme Court of Panama, the Panamanian regulator ordered the shutdown of certain IP circuits in an effort to stem the use of VOIP for international communications in violation of the incumbent's franchise. See http://www.regulateonline.org/intelecon/A-Panama-021114.htm.

[24] *See* www.dfn.org/news/kenya/poll.htm.

IV. SPRINT'S RECOMMENDATIONS

Sprint believes that the Commission should presumptively forbear from application of the ISP on routes where "low" (as defined below) wholesale prices for voice termination are available in U.S. spot markets.[25] The focus should be on wholesale prices available in the U.S. spot market for termination of material amounts of voice traffic and not on competition on the foreign end. This is because technological bypass and arbitrage can enable good price performance even in the absence of foreign competition. Sprint's proposal is not very different from the Commission's existing rules for lifting the ISP on a particular route. However, instead of placing the burden on U.S. carriers to affirmatively demonstrate certain facts, the Commission would rely instead on third party information. Reliance on current spot market rates also carries the benefit of using current data rather than the Commission's 43.61 data, which is often outdated by the time it is published.

The absence of "low" termination prices on a route would mean the continuance of the ISP on that route. The elimination of "low" prices on a route where they previously existed would result in automatic Commission scrutiny of the route. Routes that are performing well would be left alone, with the ISP, including its burdensome filing requirements, lifted entirely. This approach has the advantage of conserving the Commission's and carriers' scarce resources and concentrating them on cases where U.S. consumer welfare is at stake.

[25] Sprint believes the Commission should focus on wholesale rates associated with commercially meaningful volumes of service in order to provide some assurance that a material amount of U.S. traffic can flow at these favorable rates. In Sprint's experience, small carriers often can provide limited amounts of termination to foreign destinations at attractive rates, but quality and the quantity of service available are often issues.

As for the acquisition of such termination price information, the Commission could consult the various websites that provide such information.[26] It could request such information on a confidential basis from carriers who specialize in providing such wholesale services.[27]

"Low" wholesale prices could be defined in several ways. The key is that they be reasonably related to costs, for much of the harm to the U.S. public interest is avoided and substantial regulatory effort becomes unnecessary when voice termination prices are not far from current costs. For example, low prices could be defined in terms of current settlement rate benchmarks: if a sampling of spot market rates for voice termination on a route remained, say, 75% below the Commission's existing settlement rate benchmarks (rates which are readily achievable on many routes today) for at least six months, the route would be exempted from the ISP.[28]

Another approach would define a "low" price annually in terms of a weighted average of termination rates of a basket of routes where vibrant competition exists on both the U.S. and foreign ends for international telephony. Using a number of competitive routes to establish the basket and weighting them would prevent aberrations on a particular route from unduly affecting the "low" price. The Commission already maintains a list of routes where the ISP has been lifted, see http://www.fcc.gov/ib/pd/pf/isp_exempt.html, which could serve as a workable proxy for

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[26] *See* n. 13, *supra.*

[27] *See, e.g.*, IDT Corporation's website, http://www.idt.net/products/carrier/, which says "With a geographically diverse customer base of over 200 carrier relationships, we have reciprocal routing agreements with the telecommunications industry's top-tier carriers. In fact, 19 of the top 25 global carriers are IDT customers, and our other customers include PTTs, U.S. RBOCs, and multinational and competitive carriers."

[28] As para. 6 of the NPRM observes, settlement rates that are 25% below the relevant benchmark are one the current triggers for reduced regulation on a particular international route.

routes where sufficient competition or other market conditions exist that have driven settlement rates reasonably close to cost.

Routes with "low" prices would be added to the Commission's existing list of routes where the ISP has been lifted. A sustained rise in prices, say for six consecutive months, would cause routes to come off the unregulated list and result in automatic scrutiny of the route by the Commission for possible additional action as described further below. Sprint believes that a six month period would be sufficient to avoid premature re-regulation resulting from temporary price spikes.

Governmentally mandated price floors payable by U.S. carriers present a special case. When Sprint has tried to resist these edicts, it has been told that the increased rates for voice termination are required by law, that the foreign carriers must charge them or risk being penalized, that Sprint has no choice but to pay them, and that there is no point in trying to resist. When governmental compulsion requires identical payments from all foreign carriers, the termination charges cannot be arbitraged away. Technological substitution and increasingly open markets may be able to undermine even government-mandated above-cost settlement and termination rates in the long run, but the long run may be very long. In the meantime, substantial economic rents would be extracted from U.S. consumers. Sprint therefore believes that the Commission can and should ensure that this does not occur.

To that end, the Commission should automatically scrutinize any route where a foreign government has mandated minimum termination fees that increase rates previously available to U.S. carriers and consumers. Such scrutiny should occur whether or not the mandated termination rates on the route are below existing benchmarks and regardless of whether prices on the route are "low" even after the edict becomes effective. Foreign governmental action that raises termination rates for U.S. carriers and consumers deserves special scrutiny by the Commission. Governmental compulsion with its associated threat of punishment in case of disobedience is likely to be much more effective in keeping prices high compared to a voluntary cartel, where members have the incentive to cheat.

As to how the Commission should deal with the disappearance of low prices or a foreign government's attempt to mandate increased termination rates, one possibility suggested in the NPRM is for the Commission to revise its benchmarks, presumably downward by substantial amounts. Sprint believes that such a major, long term undertaking is unnecessary. Many routes, including most with substantial traffic, are performing well even though competition on the foreign end may not be robust: U.S.-end competition is vibrant with substantial U.S. consumer choice. It would waste Commission resources and disserve the public interest to establish new benchmarks for such routes.

Instead, the Commission should respond by updating its settlement rate benchmarks only for those routes where prices are no longer "low" or where governmental action has resulted in price increases to U.S. carriers. While updating its benchmarks for every country would be a major undertaking, updating them for a particular country or even a small group of problem countries should be far less burdensome. Indeed, the Commission's indication that it is prepared to take this step might be sufficient to dissuade governments or foreign carriers from raising prices or establishing price floors in the first place.[29]

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[29] The Commission need not proceed by rulemaking to revise its benchmarks on an individualized, as-needed basis. Such particularized matters are well suited to the

Sprint believes that the Commission's tariff component pricing model remains a useful methodology for updating benchmark rates with respect to particular countries. However, Sprint urges the Commission to consider other types of potentially useful cost information that has come to light since the original benchmarks proceeding such as the New Zealand Study. Also potentially useful are the termination rates available in both wholesale and retail[30] spot markets that have developed since the original benchmarks proceeding. If rates are generally available on spot markets, that is a strong indication that they are compensatory. So long as foreign carriers and governments have the ability to credibly show that the Commission's proposed rates prohibit them from recovering their termination costs, Sprint perceives no legal infirmity in considering such additional information in formulating revised, country-specific benchmarks.[31]

V. MOBILE TERMINATION SURCHARGES

The Commission seeks comment on whether foreign mobile termination rates are detrimentally affecting U.S. consumers and competition in the U.S.-international services market. Sprint believes foreign mobile termination rates that exceed the costs associated with such termination harm U.S. consumers and competition, just as above-cost landline termination or settlement rates do. Because of the "calling party pays" pricing scheme that is commonly employed abroad rather than the "called party pays" regime that prevails in the U.S., the called mobile subscriber in most foreign countries does not incur a discrete charge to receive calls. Rather, these costs are incurred by the calling party. In

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adjudicatory process, and the Commission has broad discretion to proceed by adjudication or rulemaking. *See* SEC v. Chenery Corp., 332 U.S. 194, 201-203 (1947).

[30] *See, e.g.*, www.1st-usa.com. As of this writing, that website was offering prepaid calling cards from the U.S. to China at rates as low as US$.085 or $.09 per minute and rates to the Dominican Republic as low as US$.07 per minute.

[31] *Accord*, Cable and Wireless plc v. FCC, *supra* n. 1.

the case of calls terminating to foreign mobile subscribers by U.S. callers, these termination charges are, as the Commission recognized, ultimately passed back to and paid by U.S. consumers,

As the NPRM also recognized at n. 111, a number of foreign regulators are actively examining these mobile surcharges. In Sprint's view, the key question in analyzing the issue of mobile surcharges is whether there is a separate market for termination of calls to each mobile operator. Sprint's conclusion, which is supported by the U.K.'s Competition Commission and OPTA, the Dutch regulator, is that there is such a separate market. As OPTA stated in its 19 December 2001 Consultation Document entitled "The Regulation of Mobile Terminating Tariffs" at 11:[32]

> [It] is clear that a mobile provider has almost complete control over access to the end users connected to its network – and hence over the conditions of that access. Providers of telecommunications services who want to set up a call between their own customer and an end user of a mobile network have no choice. They must use the mobile provider's terminating service, essentially irrespective of the price demanded for it.

The U.K. Competition Commission agrees:

> The Commission's current view is that there is a separate market for termination of calls on the network of each of the four mobile network operators (MNOs); and that calls can be terminated only on the network of the MNO to which the called party subscribes. The evidence available to the Commission to date suggests that there are at best only rather weak demand- or supply-side substitutes for termination on the network of the operator to which the calling party subscribes.[33]

Any terminating carrier – wireline or wireless – has a bottleneck over calls transmitted to its own subscribers, as the Commission recognized in its own proceedings

[32] This document is available on OPTA's website at the following URL: http://www.opta.nl/download/codo_mobile_tariffs_201201.pdf.

[33] Mobile Phones Inquiry – Remedies Statement at 3, available at http://www.competition-commission.org.uk/pressreleases/39-02REM.pdf.

concerning competitive local exchange carrier (CLEC) access charges.[34] Therefore, it is unsurprising that foreign mobile providers can exert market power in the mobile termination market. As with settlement and termination rates generally, rates in excess of cost for mobile termination create similar problems: they result in economic rents that are appropriated by mobile providers. They can also damage competition, as can occur when the fixed provider who terminates Sprint's international voice telephone calls and the mobile provider are commonly owned.

To be sure, the traffic-sensitive cost of terminating wireless calls likely exceeds that of wireline calls in most cases because of the different technologies employed. And Sprint has no quarrel, in principle, with foreign wireless termination surcharges, so long as those surcharges are cost-based. However, many such surcharges in effect today appear to far exceed costs. Sprint's PCS Division has conducted and filed extensive studies of the cost of terminating mobile traffic in conjunction with reciprocal compensation regulatory proceedings in New York and Florida. Sprint PCS found that its costs of terminating mobile traffic were 6.6 cents a minute in Florida and 3.9 cents a minute in New York. Sprint PCS is currently conducting additional studies. These figures are substantially less than the surcharges the Commission cited in para. 46 of the NPRM. Because similar types of mobile systems are sold worldwide by a small number of vendors, this suggests that mobile termination surcharges of $.20 or $.30 a minute or more may be substantially above cost.

As for potential remedies, Sprint acknowledges that this is a more difficult problem to resolve than that of generally inflated settlement or termination rates. In

[34] *See* Access Charge Reform, 16 FCC Rcd 9923 (2001), *appeal pending sub nom.* AT&T, *et al.*, v. FCC, No. 01-1244, D.C. Circuit,

many cases (but not all), the foreign carriers with whom Sprint interconnects for termination of U.S.-originating international telephone calls are not affiliated with the mobile carrier(s) who ultimately terminate those calls.

Sprint is encouraged by the actions of foreign regulators such as OPTA and the U.K. Competition Commission who have recognized the problem posed by above-cost mobile termination surcharges and who seem to be taking action to resolve it. However, there are many other countries where the only fixed line carrier, the only mobile carrier, and the government are one or where the monopoly fixed line carrier can use its control over all incoming international telephone calls to extract high mobile termination surcharges.[35]

Without an independent regulator, there is little or no likelihood that the problem of high mobile termination surcharges will be solved offshore. The problem of inflated settlement rates is likely to become a problem of inflated mobile termination surcharges as Posts, Telephone and Telegraph Ministries realize that they can recover some or all of their losses of settlement revenues by increasing mobile termination surcharges to compensate.

Sprint believes that effective action by offshore regulators, assuming they exist and are willing to take action, is the best solution to this problem. Other solutions are possible but less satisfactory. In countries where rates for mobile-to-mobile calls or domestic fixed-to-mobile rates are lower than the international mobile surcharges,

[35] For example, Sprint understands that the Sierra Leone Telecommunications Company (Sierratel) is demanding a $.46 surcharge for international calls terminated to the three mobile carriers operating in that country. Sierratel is the government owned monopoly in Sierra Leone that provides all fixed telecommunications there.

arbitrageurs will strip off the ANI codes identifying incoming calls as international, thereby disguising incoming international calls as domestic calls. This enables them to offer mobile termination rates lower than the surcharge imposed by the terminating mobile carrier.

This arbitrage solution has significant drawbacks, however. One is that it requires originating carriers like Sprint to incur significant expense and inefficiency to separate fixed and mobile terminating traffic, which ultimately raises prices to consumers. It also requires Sprint to know which telephone numbers are associated with mobiles, which is not simple. Lastly, the terminating mobile carrier has a strong financial incentive to find and block these kinds of arrangements when they involve meaningful amounts of traffic. Thus, they are not dependable. Nevertheless, the Commission should encourage its regulatory counterparts to do everything possible to promote such arbitrage arrangements.

In order to ensure at least some effective check on this vexing problem, Sprint urges the Commission to presumptively limit the amounts that U.S. carriers (and ultimately U.S. consumers) are permitted to pay in per-minute mobile surcharges, much as it did with its original settlement rate benchmarks. This solution must be formulated carefully to try to ensure that it does not result in the blocking of calls terminating to mobiles. However, as long as the permitted surcharge is at least equal to the terminating mobile carrier's costs, there should be no rational incentive to block. To that end, the Commission should set the presumptive[36] upper limit that can be paid for mobile surcharges at a level that generously covers the mobile carrier's costs.[37] In this manner, the mobile carrier has an incentive to accept the incoming international call rather than block it even if the rate is less than the mobile carrier would set on its own.

As for an appropriate rate level, the surcharge should be based on the mobile carrier's costs calculated on a carrier specific basis. In the alternative, the Commission could set a surcharge limit based upon cost studies by other wireless carriers, such as those that Sprint has submitted in various state regulatory proceedings, with an opportunity for foreign mobile carriers to rebut the presumptive reasonableness of these surcharges. In the alternative, where a carrier has no cost support for its rates, Sprint believes that there are other proxies that could be employed. One is to presumptively use a rate that is employed by the mobile carrier for outgoing calls. These rates have the advantage of being easily obtainable. Although there may be many such rates as most mobile carriers have multiple pricing plans,[38] an average of end user pricing plans would

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[36] Foreign mobile carriers should always have the opportunity to demonstrate that their costs are higher than the Commission's presumptive limit.

[37] Sprint does not believe that anyone would disagree with the proposition that the foreign mobile carrier should be able to recover its cost of terminating an international telephone call to its customer, but does believe that the Commission should err on the side of generosity in order to increase the likelihood that mobile carriers around the world will be able to recover their costs, just as it did in its original Benchmarks Order. *See, e.g.*, 12 FCC Rcd at 19845, para. 80.

[38] Calculation of a presumptively compensatory per-minute rate would require further analysis in the case of wireless telephony pricing plans featuring large blocks of minutes, unlimited night and weekend calling, free long distance, and where carriers make assumptions about the number of minutes that a customer will forfeit by failing to use them within a month.

presumably compensate the wireless provider its costs. Moreover, the carrier would have the opportunity to rebut this presumption if it believed this rate was not compensatory. Presumptively capping the mobile surcharge at the rate for outgoing calls provides the proper incentive to the mobile carrier to not discriminate against international callers and to minimize prices to those callers to the same extent it minimizes prices for its own mobile customers.

VI. CONCLUSION

The Commission's NPRM raises a number of important and timely issues. The original 1997 Benchmark Order was a seminal step in bringing the benefits of greater competition to U.S. consumers. However, it is now time to take the next steps to ensure that these benefits continue to flow. As Sprint has described, the successes of the original Benchmarks Order have created their own new and unique issues that will continue to require the Commission's attention for at least some period going forward. These issues cannot be solved by competitive market forces within the near term. As such, Sprint urges the Commission to continue its oversight of the international telecommunications marketplace, stepping away from regulation where unnecessary but nonetheless willing to exercise its regulatory powers in circumstances where the market cannot function or does not function well.

Sprint has made a number of concrete suggestions to the Commission in its comments. It looks forward to working with the Commission to solve some of the difficult problems that continue to retard the development of full competition in the international telephony market.

Respectfully submitted,

SPRINT COMMUNICATIONS COMPANY L.P.

By ______________________ /sr

Kent Nakamura
Richard Juhnke
401 9th Street, NW, #400
Washington, DC 20004
(202) 585-1916

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Sprint Comments
IB Docket Nos. 02-324 and 96-261
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of Sprint Communications Company L.P. in IB Docket Nos. 02-324 and 96-261, International Settlements Policy Reform/International Settlement Rates, was delivered by electronic mail on this 14th day of January 2003 to the parties listed below.

Sharon Kirby

Sharon Kirby

VIA ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

VIA E-MAIL

James Ball, Chief
Policy Division, International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
jball@fcc.gov

Lisa Choi, Senior Legal Advisor
Policy Division, International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
lchoi@fcc.gov

Gardner Foster, Attorney
Policy Division, International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
gfoster@fcc.gov

Qualex International
445 12th Street, SW
Room CY-B402
Washington, DC 20554
qualexint@aol.com