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 WORLDCOM, INC.

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SUMMARY

WorldCom commends the Commission for its efforts to reform the International Settlements Policy (ISP) and agrees that current Commission policies should reflect the existing, liberalized international telecommunications market. Even in a more liberalized environment, however, foreign carriers and governments maintain the ability to inhibit competition in certain instances. The Commission should ensure that enforcement mechanisms are in place to address anticompetitive practices on specific international routes.

The Commission has proposed three options for eliminating the ISP, on: (1) all U.S.-international routes; (2) benchmark-compliant routes; or (3) ISR-approved routes. WorldCom supports the second option, removal of the ISP on routes where settlement rates are at or below the relevant benchmark rate. WorldCom believes, however, that the Commission should retain its ability to act on a case-by-case basis in instances where anticompetitive harm exists.

WorldCom, therefore, recommends that the Commission adopt a rule that prohibits U.S. carriers from increasing any international termination rate above the existing commercially negotiated rate with a particular foreign carrier. In adopting such a rule, the Commission should provide clear standards for review so that there is an effective enforcement mechanism in place. Further, WorldCom believes that it is premature for the Commission to further narrow or eliminate the "No Special Concessions" rule and the benchmarks policy as they currently exist.

Finally, WorldCom urges the Commission to take steps to address the ongoing harm presented by mobile operators who abuse their market power for termination by charging rates that are far above cost. Specifically, the Commission should clarify that the *Benchmarks Order* applies to international mobile termination rates and should adopt "best practice" rates for mobile termination.

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I. Introduction

WorldCom, Inc. ("WorldCom") hereby submits Comments in response to the Commission's Notice of Proposed Rule Making ("NPRM") in the above-referenced proceeding.[1] WorldCom commends the Commission for recognizing the need to reform its policies in light of the changing international telecommunications market. The Commission is closer than it has ever been to achieving its longstanding goal of a competitive and market-based U.S. international telecommunication services market. The Commission's international settlement rate policies have played a critical role in that process.

While many of the Commission's existing policies have protected U.S. consumers from actual and potential harm "caused by instances of insufficient competition in the global telecommunications market,"[2] WorldCom believes that the market has evolved to a point where the Commission's International Settlements Policy ("ISP") should be modified to reflect the current, liberalized telecommunications environment. At the same time, however, foreign

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[1] *International Settlements Policy Reform; International Settlement Rates,* Docket Nos. 02-324 and 96-261, Notice of Proposed Rulemaking, FCC 02-285 (rel. October 11, 2002) (hereinafter "*NPRM*").

[2] *Id*. at ¶1.

carriers and governments maintain the ability to inhibit competition in certain instances. A recent trend has emerged where governments or foreign carriers with market power have attempted to thwart competition on international routes by unilaterally raising international termination rates. Similarly, mobile operators in many foreign markets have used their market power over call termination on their mobile networks in order to maintain international mobile termination rates at levels far above cost. As explained herein, the Commission should focus its regulatory efforts on these specific areas.

WorldCom operates in more than 65 countries, and possesses one of the most expansive, wholly owned Internet Protocol networks in the world. WorldCom has 71 in-country offices and is responsible for managing relationships with international telecom operators and distributors in non-U.S. markets. In addition, WorldCom has negotiated bilateral agreements with international carriers in 222 countries, and manages more than 67,000 international voice circuits worldwide.

II. Reforming the International Settlements Policy

A. The ISP has been successful

WorldCom believes that the ISP has been successful in protecting the public interest by promoting lower international calling rates for U.S. consumers. Competition has increased dramatically on most international routes. The ISP also has had important secondary benefits by promoting lower rates worldwide, to the benefit of all consumers of international telecommunications services. As noted in *Telegeography 2001*, "even though benchmarks directly affect only U.S. carriers and their foreign correspondents, the FCC's efforts may well be having a wider impact. Carriers in other countries can leverage these publicly-available rates—together with the threat of refile through the U.S.—to negotiate their own, lower rates”.[3]

WorldCom agrees with the Commission that the U.S. international telecommunications market has undergone changes since it last examined its application of the ISP.[4] For example, many signatories to the World Trade Organization’s Basic Agreement on Telecommunications have liberalized their markets. As a result, new, competitive forces have helped to drive down international settlement rates in these markets. Carriers now are able to terminate traffic on many routes that are market based and oriented towards cost, to the benefit of consumers worldwide.[5] These competitive forces also enable carriers to terminate traffic in ways beyond traditional, bilateral accounting rate arrangements.

WorldCom does not believe that the ISP has hindered carriers’ ability to achieve more cost-based termination rates, as is demonstrated by the fact that the Commission has authorized International Simple Resale on seventy-eight U.S.-international routes,[6] while removing the ISP on fourteen U.S.-international routes.[7] With the exception of a relatively few routes, carriers are able to negotiate rates that are market based and oriented towards cost. Where carriers are unable to achieve acceptable rates, then it is possible to find alternative means such as re-file and re-origination to deliver traffic to the foreign destination.

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[3] *Telegeography 2001*, at p. 31-32.

[4] *See* NPRM at ¶ 23.

[5] This does not mean that where international termination rates have dropped significantly all of the cost components of that rate are at incremental cost levels. To the contrary, the national extension component of those rates, including domestic interconnection and local access charges, remain above incremental cost levels in many markets.

[6] As of November 20, 2002. A complete list of ISR-authorized routes is posted on the FCC International Bureau’s web site: http://www.fcc.gov/ib.

[7] As of November 27, 2001. A complete list of routes exempt from the ISP is posted on the FCC International Bureau’s web site: http://www.fcc.gov/ib.

B. Benchmark-compliant Routes

While the ISP continues to serve the public interest, WorldCom believes that there are ways in which it can be reformed to best promote lower overall rates for consumers. WorldCom believes that on most routes where U.S. carriers and their foreign correspondents are negotiating rates on a commercial basis, "one-way-bypass" and "whipsawing" are no longer a significant problem. In recent months, however, we have seen a trend toward whipsawing-type behavior where the carrier on the foreign end possesses market power, reflecting the characteristics of whipsawing.[8]

For example, on some routes where International Simple Resale (ISR) is approved, U.S. carriers are faced with foreign carriers possessing market power who extract high, near-benchmark rates for U.S.-international traffic that is terminated on the foreign end, while U.S.-international traffic terminated on the U.S. end is settled at cost-oriented rates. While ISR authorization permits U.S. carriers to negotiate asymmetric rates with foreign carriers, WorldCom believes that vast differences between rates for U.S-originated and U.S-terminated traffic have whipsawing, and thus, anti-competitive effects.

WorldCom believes that to the extent that these concerns remain, there should be some enforcement mechanism in place to ensure against anticompetitive practices on specific routes. Only if such mechanisms are enacted do the benefits of removing the ISP outweigh the burdens. As discussed in further detail below, WorldCom believes that the Commission should retain its ability to review "problem" routes on a case-by-case basis at the request of a petitioning carrier.

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[8] As noted in the NPRM: "whipsawing generally involves instances where a foreign carrier has the ability through pressure on multiple U.S. carriers to extract higher termination rates from the U.S. carriers than the foreign carrier is required to pay to terminate traffic on the U.S. end." NPRM at ¶ 2.

C. Removal of the ISP

1. The Commission should eliminate the ISP where rates are at or below Benchmark levels

WorldCom encourages the Commission to de-regulate and remove rules that market forces have shown are no longer necessary. WorldCom supports the Commission's efforts to eliminate regulations where they are no longer needed, and focus on enforcement of laws, rules and regulations in order to achieve the Commission's goals. To that end, WorldCom supports the Commission's efforts to further narrow the application of its ISP.

In the NPRM, the Commission proposes three options for eliminating the ISP on: (1) all U.S.-international routes; (2) benchmark-compliant routes; or (3) ISR-approved routes.[9] WorldCom supports the second option, removal of the ISP on routes where settlement rates are at or below the relevant benchmark rate. WorldCom agrees with the Commission that there has been a significant increase in commercially negotiated, market-based rates since the *ISP Reform Order* was released. This was due to a further decrease in settlement rates on numerous international routes, expanding liberalization in foreign markets, and an increase in the number of international carriers able to offer alternative routing at competitive wholesale rates to many foreign destinations.

Most international routes that are benchmark-compliant also are either ISR-authorized routes or meet the criteria for ISR authorization. In WorldCom's view, there is little practical difference between an ISR-authorized route and a route on which the ISP has been removed because ISR permits confidential, commercial negotiation of termination rates. Therefore, there is significant deviation from the ISP's non-discrimination, proportionate return and equal division of revenue requirements on ISR-authorized routes.

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[9] NPRM at ¶¶ 26-35.

As the Commission explains in the *NPRM*, removing the ISP from benchmark-compliant routes would eliminate the need for approval of ISR.[10] Given the practical similarity between ISR-authorized routes and those where the ISP has been removed, WorldCom believes removing the ISP, and therefore eliminating the need for ISR authorization, is a simpler and more deregulatory approach that will lessen burdens on U.S. carriers and the Commission staff than maintaining the ISR mechanism and only allowing for removal of the ISP in narrower circumstances.

Moreover, the greatest risk of anticompetitive and discriminatory conduct, such as "whipsawing" and "one-way bypass," by foreign carriers with market power is on those routes that are non-benchmark compliant and would remain subject to the ISP. Such routes tend to have monopoly and/or government-owned carriers on the foreign-end. Given the continued existence of these risks, WorldCom does not support the option to eliminate the ISP on *all* international routes. While some risks of competitive distortion would remain even on benchmark-compliant routes, those instances of anticompetitive behavior could be better addressed on a narrow, case-by-case basis as described below.

WorldCom recommends that the Commission simply eliminate the ISP on all international routes that are currently ISR-authorized, as U.S. carriers have already demonstrated that more than 50 percent of the traffic on those routes is at or below the benchmark rate. For international routes where 50 percent or more of the traffic is settled at or below the benchmark but where ISR has not been authorized, the Commission could identify such routes and remove the ISP on its own motion. WorldCom believe that this would be the least burdensome procedural approach.

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[10] *Id*.

2. Standards for Reimposing the ISP

WorldCom believes that it is important for the Commission to retain its ability to act on a case-by-case basis. This is especially important in instances where carriers threaten to take unilateral action to raise rates or otherwise change terms of bilateral agreements to the detriment of U.S. consumers and carriers or to engage in "whipsawing". The Commission has consistently reserved its right to impose safeguards on non-ISP agreements where there is a need to prevent market distortions. WorldCom supports continuation of this policy.[11]

In the *NPRM*, the Commission asks what standard or demonstration may be necessary to take remedial action and reimpose the ISP to protect the public interest.[12] WorldCom believes that a U.S. carrier requesting Commission action should show that the impact of the proposed anticompetitive action or regulation will harm U.S. carriers, and therefore, U.S. consumers. While "whipsawing" represents one act of anticompetitive behavior, there are other ways in which carriers (or governments) can act anti-competitively. Any showing that demonstrates potential or real harm to U.S. consumers sufficiently mandates the reinstatement of the ISP on a U.S.-international route.

3. Use of section 43.61 data

The current annual and quarterly traffic and revenue reporting requirements in Section 43.61 of the Commission's rules provide important information to enable carriers to seek various enforcement measures to address abuse of market power or competitive distortion. WorldCom believes, however, that the information is often outdated by the time it is used. There is an

[11] *See In the Matter of International Accounting Rates,* CC Docket No. 90-337 (Phase II), Fourth Report and Order, 11 FCC Rcd 20,063, at 20,084 ¶ 50 (1996)("Flexibility Order"); *See also In the Matter of 1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements,* IB Docket Nos. 98-148 and 95-22, CC Docket No. 90-337 (Phase II), Report and Order and Order on Reconsideration, 14 FCC Rcd 7963, at 7973, ¶ 30 (1999) ("ISP Reform Order").

[12] *See* NPRM at ¶ 37.

inherent lag in the filing of Section 43.61 traffic data reports that makes it difficult to rely on these reports for swift review and enforcement.

The Commission's Section 43.61 traffic data reports are filed on July 31 of each year for services offered during the preceding calendar year. As a result, even assuming that the Commission staff has the necessary resources to diligently monitor and analyze these reports, many months would pass before a significant shift in traffic or revenue patters would be detected. Several more months would pass before enforcement proceedings were commenced and concluded. By this time, the harm would be irreversible. In sum, Section 43.61 reporting requirements should not be considered an adequate substitute for the effective regulation in place today.

D. The Commission should adopt rules that forbid U.S. carriers from paying any increase in rates above the existing commercial rates

1. The number of "problem routes" is growing

Recently, several countries have passed resolutions or are considering adopting measures that would increase rates for U.S. carriers and consumers. While these rates are below the Commission's mandated benchmark rates and do not violate the Commission's *Benchmarks Order*, they are significantly higher than the existing commercially negotiated rates. These higher rates are anticompetitive and threaten to erode the effective competition that has taken place on these routes and, in effect, reverses the success of the Commission's international settlement rate policies. Such anticompetitive behavior is detrimental to both U.S. and international consumers.

Below is a summary of recent attempts by several governments or incumbent foreign carriers to unilaterally push settlement rates paid by U.S. carriers to rates *above* cost-based levels:

a) China

On October 28, 2002, Chinese international carriers announced that China's Ministry of Information Industry (MII) had issued a decree requiring all Chinese telecommunications carriers to settle international traffic at no less that US$0.17 per minute, effective November 1, 2002. The Commission's benchmark settlement rate with China Telecom, the carrier with market power in China, is US$0.19 per minute. At the time of the decree, many U.S. and other international carriers were settling traffic at rates as low as US$0.02 per minute. The required change represents a nearly 900 percent increase in the cost of payouts from U.S. to Chinese carriers, a cost that inevitably would be passed on to U.S. consumers.

While it appears that in early December 2002, the Chinese government decided not to enforce the decree, the incident demonstrates that governments are willing to unilaterally attempt to resist competitive forces that move international termination rates closer to cost.

b) Philippines

Nearly all of the nine fixed line carriers in the Philippines, including the incumbent PLDT, are simultaneously attempting to increase the inbound settlement rates paid by U.S. carriers. WorldCom has received notification from the carriers that they would be unilaterally increasing the existing agreed international termination rate paid by WorldCom by over 50 percent. WorldCom understands that these carriers have made similar demands of their other U.S. correspondents. These attempts to raise the agreed rates violate bilateral agreements with U.S. carriers and represent an effort on the part of the Philippine carriers to unilaterally impose rates on the U.S. carriers and consumers.

This action raises a risk of anti-competitive harm in the U.S. international services market. The Philippines carriers PLDT, Digitel, Philcom and ETPI have section 214 authorizations to provide international services in the United States through their U.S. affiliates. Given their control over an essential input at the Philippines-end (i.e. international termination), these carriers would have the incentive and the ability to execute a price squeeze against its U.S. competitors on the U.S.-Philippines route.

c) Jamaica

On August 30, 2002, Jamaica's Office of Utilities Regulation (OUR) issued a Consultative Document that proposes the imposition of subsidies called "Access-Deficit Charges" (ADCs) on inbound international calls. Cable & Wireless Jamaica, the carrier with market power in Jamaica, asked OUR to adopt the ADC and impose it on each minute of inbound international traffic. The rate is set at US$0.07-0.08 per minute, which would effectively establish a rate floor below which U.S. and other international carriers could not pay to terminate traffic in Jamaica. If implemented, the ADC would be passed on to U.S. consumers, significantly increasing the rates of Jamaican citizens residing in the United States to call family and friends back home and for consumers and businesses in Jamaica to call clients, relatives and friends in the United States.

d) Dominican Republic

In July 2002, the Dominican Republic's Instituto Dominicano de Telecomunicaciones (INDOTEL) issued a resolution that fixes at US$0.08 per minute the minimum per minute rate paid by international telecommunications carriers to terminate traffic in the Dominican Republic. The U.S-Dominican Republic route is highly competitive and consumers in both the U.S. and Dominican Republic enjoy competitive rates. Any termination rate increases would be passed along to consumers. While INDOTEL had delayed implementation of its resolution, to the benefit of consumers in both the U.S. and the Dominican Republic, INDOTEL recently indicated that it will now enforce the anti-competitive resolution retroactive to January 1, 2003.

e) Ecuador

In late 2002, the two government-owned monopoly carriers in Ecuador informed U.S. carriers that the government of Ecuador had passed a resolution that would effectively establish a minimum rate of US$0.13 to terminate calls in Ecuador. While neither the carriers nor the government of Ecuador have publicized or produced proof of such a resolution, the carriers continue to insist that a unilateral settlement rate floor exists. This is a transparent attempt by Ecuador to resist competitive forces in order to extract monopoly subsidies from U.S. consumers.

2. The Commission should adopt a rule prohibiting U.S. carriers from agreeing to increase existing settlement rates

To address these types of anticompetitive actions, WorldCom recommends that the Commission adopt a rule that prohibits U.S. carriers from paying settlement rates that are higher than the existing commercially negotiated rates with a particular foreign carrier. There are rarely circumstances under which a U.S. carrier would voluntarily agree to increase international termination rates that it pays to a foreign carrier. In the vast majority of such cases, the rate increase is a direct result of abuse of market power by the foreign carrier, or unilateral action by the foreign government, rather than a consequence of commercial negotiations. Such a rule would advance the Commission's existing policy that it will deny any "non-cost-based increases in, or surcharges to, the accounting rate," unless such increases are in the public interest.[13]

In adopting such a rule, the Commission should provide clear standards for review so that there is an effective enforcement mechanism in place. For example, the Commission should permit any U.S. carrier to file a petition with the Commission if a foreign carrier, on its own or

[13] *Regulation of International Accounting Rates*, 6 FCC Rcd 3552, at ¶ 16, n.30 (1991).

through government regulation, threatens to increase rates. Along with the petition, the petitioning carrier should be required to file its existing commercial agreement. Such agreements would be filed on a confidential basis because in most cases where the ISP has been removed, existing commercial arrangements would not be on file with the Commission. If only one carrier files a petition, then the Commission could request, on its own motion, that other carriers file similar rate information. This would ensure that the Commission has sufficient information to act in order to prevent competitive harm. The Commission should act as expeditiously as possible on these petitions. In rare circumstances where a rate increase is consistent with market changes or is pursuant to a bilaterally agreed arrangement, the U.S. carrier would need not file a petition for enforcement of the rule.

The Commission should give all interested parties, including the foreign carrier and its government, an opportunity to comment on or oppose the petition. Moreover, the Commission could permit interested parties to rebut the presumption that the rate increase is against the public interest by submitting a written response, augmented by cost data, demonstrating that the termination rate increase is required to ensure the recovery of its long run incremental cost. This would be consistent with the *Benchmarks Order*, which permits a petitioner to demonstrate that the relevant benchmark rate does not permit recovery of incremental cost.[14]

WorldCom believes that by adopting such rules, the Commission will be empowered to act quickly and formally when benchmark-compliant carriers raise international termination rates through abuse of market power or unilateral government action.

[14] *Benchmarks Order* 12 FCC Rcd at 19,849-850, ¶¶ 88-89.

E. Filing of international rate agreements and modifications

The Commission should maintain public filing requirements on routes where foreign carriers possess market power, but only where the ISP has not been removed. On those benchmark-compliant routes where the ISP has been eliminated, neither public nor confidential filing of international termination agreements is necessary. Filing requirements are unnecessary in a competitive environment and are burdensome. Where rates are commercially negotiated, which is the case on most routes where the ISP would be eliminated, those rates can change frequently in response to market conditions. Keeping up with filing requirements on such routes, therefore, is becoming more difficult. Moreover, on competitive routes where the ISP has been removed, there is little risk of discriminatory behavior that needs to be monitored by the Commission.

In any event, the Commission would always maintain the ability to request that any U.S. carrier file a specific international termination rate agreement pursuant to Section 211 of the Communications Act. WorldCom also notes that a U.S. carrier will have an incentive to file confidentially its international termination rate agreements where it is petitioning the Commission to take action in response to anticompetitive behavior by foreign governments or carriers, as suggested in the previous section.

III. The Commission Should Maintain the "No Special Concessions" Requirement

Under existing Commission rules, where the ISP has been lifted from an international route, the "No Special Concessions" rule does not apply to the terms and conditions under which traffic is settled, but does apply to terms and conditions unrelated to the settlement of traffic, such as private line provisioning and maintenance.[15] In the *NPRM*, the Commission asks

[15] 47 C.F.R. § 63.14.

whether it should maintain the "No Special Concessions" rule, or whether the danger of discriminatory behavior has decreased sufficiently to narrow or further eliminate the rule.[16] WorldCom urges the Commission to maintain the "No Special Concessions" rule in its current form.

While many foreign carriers with market power face competitive pressure for settlement of international traffic due to factors such as alternative routing mechanisms, those foreign carriers maintain market power or monopoly power over access to essential facilities in their home markets. There is still a significant risk of anticompetitive conduct for arrangements with foreign carriers with market power with respect to interconnection of international facilities, private line provisioning and maintenance, and quality of service and other similar issues. Elimination of the "No Special Concessions" rule would enable foreign carriers with market power to discriminate in favor of certain U.S. carriers, including their U.S. affiliates, for access to critical facilities in foreign markets. WorldCom believes, therefore, it would be premature for the Commission to further narrow or eliminate the rule as it currently exists.

IV. International Simple Resale and Benchmark Policies

In the *NPRM*, the Commission notes that pursuant to the *Benchmarks Order*[17] the final transition to the benchmark rates was expected to be complete on January 1, 2003. The Commission asks, therefore, whether it should consider revision to the benchmark policy or make no changes to the policy as it currently exists.[18]

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[16] NPRM at ¶ 39.

[17] *International Settlement Rates*, IB Docket No. 96-261, Report and Order, 12 FCC Rcd 19,806 (1997); Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999); *aff'd sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

[18] NPRM at ¶ 44.

The *Benchmarks Order* should be retained. While WorldCom agrees with the Commission that the benchmark rates are well above actual cost, there is no justification for eliminating the Benchmarks policy. First, while the majority of U.S.-originated international traffic is terminated in foreign destinations at rates that are below the benchmarks, the Commission itself indicates that nearly 50 routes remain non-compliant with the benchmarks policy.[19] So long as many international routes remain non-compliant, the need for the Benchmarks policy continues to exist.

Furthermore, even where international traffic is settled at or below the benchmark rates, the benchmarks policy will continue to serve an important purpose as a "ceiling" for U.S. carriers' settlement rate negotiations. As the Commission has repeatedly recognized, the benchmark rates are considerably above actual cost-based levels.[20] Indeed, when it adopted the *Benchmarks Order,* the Commission clearly intended the benchmarks rates to represent a ceiling for settlement rates, and not an indication of the actual cost of terminating international traffic. Indeed, the Commission concluded in that decision that "any settlement rate that exceeds the relevant benchmark constitutes an unjust and unreasonable 'charge' or 'practice' under Section 201 [of the Telecommunications Act]."[21]

As we indicated above, several foreign governments and carriers have attempted recently unilaterally to raise international termination rates above cost-based levels. Eliminating the Benchmarks policy might send the erroneous message to foreign governments and carriers that the Commission no longer sees the benchmark rates as the highest lawful settlement rates under

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[19] See NPRM at note 97, noting that 154 of 203 international routes are benchmark-compliant.

[20] *Id*. at ¶ 44. *See also Benchmarks Order*, 12 FCC Rcd at 19, 855-56, ¶ 102.

[21] *Benchmarks Order*, 12 FCC Rcd at 19,939, ¶ 286. The Commission's finding was specifically upheld on appeal. *See Cable & Wireless P.L.C. v.* FCC, 166 F.3d 1224, 1231 (D.C. Cir. 1999).

the Communications Act. It would be premature, therefore, for the Commission to eliminate or narrow the policies and rules adopted in the *Benchmarks Order*.

V. Foreign Mobile Termination Rates

In the *NPRM*, the Commission states that it has sought to promote competition in international services by encouraging more cost-based international settlement rates. The Commission correctly notes that liberalization in foreign markets and its *Benchmarks Order* have led to significant decreases in average international settlement rates paid by U.S. carriers.[22] This positive development has been most pronounced on highly competitive international routes, such as those between the U.S. and the European Union, Japan, and Australia. Such significant decreases in average settlement rates and cheaper rates for U.S. consumers on many of these routes, however, are being increasingly undermined by excessive settlement rates for calls terminating on foreign mobile telecommunications networks.

The settlement rate decreases specified by the Commission on competitive routes are for calls terminating on fixed lines in many foreign markets. As the Commission aptly recognizes in the *NPRM*, however, U.S. carriers currently pay settlement rates on competitive ISR routes that are far higher for calls terminating on mobile networks than calls terminating on fixed networks. The Commission correctly asks whether: (1) foreign carriers are abusing market power; (2) mobile termination rates are detrimentally affecting U.S. consumers and competition; and (3) the Commission should take steps to address any harm to U.S. consumers.[23]

[22] *Id*. at ¶ 17-19.

[23] *Id*. at ¶ 51.

As set forth in this section, WorldCom answers all three queries in the affirmative. It is clearly evident that foreign mobile carriers are abusing their market power to the detriment of U.S. consumers. WorldCom urges the Commission to take steps to address this ongoing harm.

A. Foreign mobile operators maintain significant market power over mobile termination rates

The existence of above-cost mobile settlement rates is a byproduct of the Calling Party Pays ("CPP") system, whereby the party initiating a call that terminates on a mobile phone pays for the call. The CPP system is used throughout the European Union, Latin America, the Caribbean and in numerous other countries including Japan. In a CPP system, the parties responsible for choosing their mobile service providers (i.e., retail customers) do not take into account the prices that callers to their mobile phones will actually pay to make the call. As a result, there is no competitive pressure for mobile operators to lower their mobile termination charges because their end-user customers are not paying to receive calls. Those mobile termination charges are passed on to U.S. carriers, and ultimately U.S. consumers, through mobile international settlement rates.

Indeed, the majority of foreign regulators that have considered the issue of mobile termination have found that each mobile operator has market power in the market for terminating calls on its own mobile network. These include the national regulators in Belgium, Spain, France, Ireland, Italy, Sweden, and the United Kingdom,[24] as well as Jamaica.[25] As the UK regulator OFTEL, among others, correctly states, the choice of a mobile handset and the price of outgoing services are the two most important factors when consumers choose a network, while

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[24] *See* European Commission*, Eighth Report from the Commission on the Implementation of the Telecommunications Regulatory Package*, COM(2002), December 12, 2002 ("*8th Implementation Report*") at 22-23.

[25] *See* Jamaica Office of Utilities Regulation, *Consultative Document on Dominant Public Voice Carriers No. 2*, November 2002 (concluding that "all mobile carriers are dominant with respect to the termination service offered" and "the OUR is of the opinion that … there is a separate market for terminating calls on each mobile network.")

the rates for calling mobile phones are not a factor at all for most consumers.[26] In reviewing OFTEL's findings, the UK Competition Commission has noted that the mobile operators in a CPP system "are monopolists in relation to the supply of termination services on their own networks."[27] The Competition Commission concludes, therefore, that "there are insufficient incentives for the [mobile operators] to reduce such charges and moreover that, in the absence of regulation, there would be incentives for [mobile operators] to increase them."[28]

In sum, it is well established by regulators and competition authorities that have considered the issue, that mobile operators in countries with a CPP system have market power for termination of calls on their networks.

B. Foreign mobile operators are abusing their market power to maintain international mobile termination rates far above cost

1. Mobile termination rates in Europe are far above cost

As a result of their market power over mobile termination, all mobile operators large and small maintain termination rates that are far above actual cost. Unfortunately, while some regulators have begun to address the issue, none have actually required that mobile interconnection costs be tied to long run incremental cost (LRIC) despite the fact that fixed line interconnection provided by dominant carriers in those countries is price-regulated to LRIC levels. Indeed, according to the European Commission the EU weighted average per-minute interconnection charge for call termination is US$ 0.1982.[29] The average charge for mobile operators that have been formally declared as having significant market power for mobile

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[26] OFTEL, *Review of the Charge Control on Calls to Mobiles***,** September 26, 2001 ("*Oftel Mobile Consultation*").

[27] UK Competition Commission, *Mobile Phones Inquiry*, Remedies Statement, July 23, 2002 (available at http://www.competition-commission.org.uk/pressreleases/39-02REM.pdf) at 4.

[28] *Id*.

[29] *8th Implementation Report*, Annex 1, Chart 38 (using an exchange rate of $US 1 = 0.96 Euros).

termination is only slightly lower at US$ 0.1935.[30] Some mobile operators in the EU charge rates as high as US$ 0.25 per minute.[31]

By contrast, fixed line interconnection rates offered by dominant carriers in the EU, which are required to be offered at LRIC levels, range from an average of US$ 0.0081 for local interconnection to US$ 0.0182 for "double transit", or nationwide, interconnection.[32] Mobile termination rates in the EU, therefore, are on average more than ten times the fixed rate levels. There is no rational economic argument that the actual LRIC cost of terminating a call on a mobile network is much different than the cost of terminating on a fixed network. It is clear that mobile operators are abusing their market power for termination to charge rates that are far above cost.

2. LRIC cost studies demonstrate that actual cost is far below existing mobile termination charges

Existing LRIC cost studies that attempt to develop the per-minute cost of terminating on a mobile network have resulted in cost levels that are far below the mobile termination rates being charged in the EU and other markets. For example, OFTEL did a LRIC analysis with assistance from the consulting firm Analysys. OFTEL found that LRIC before mark-ups for mobile termination should range between US$ 0.059 and US$ 0.075 per minute.[33]

Moreover, Sprint PCS did two separate LRIC cost-studies for submission to the Public Service Commissions of New York and Florida. In the New York study, Sprint PCS argued that, based on a detailed LRIC study it submitted to the PSC, the cost for terminating one minute of

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[30] *Id*.

[31] *Id*.

[32] *Id*., Annex 1, Charts 25-27.

[33] *See OFTEL Mobile Consultation*, Annex 3, Table A3.1.

traffic on its mobile network in New York should be US$ 0.039 per minute.[34] Similarly, in the Florida study Sprint PCS argued that based on its cost study the LRIC rate should be $US 0.066 per minute.[35] WorldCom assumes that these rates are actually inflated because in both proceedings Sprint PCS was seeking a higher rate for traffic terminating on its mobile network than it was required to pay for traffic terminating on the relevant Bell Operating Company's fixed network. In other words, Sprint PCS had an incentive to come up with the *highest* per minute costs that it could. Even taking this incentive into account, Sprint PCS' cost studies resulted in rates that are as much as 80 percent lower than the *average* mobile termination rate in the EU.

In sum, under the most conservative estimates, LRIC-based mobile termination rates should be no higher than 3.9 – 7.5 cents per minute. The only explanation for actual mobile termination rates charged by foreign mobile operators being three to five times higher than the most conservative LRIC estimates is the existence of market power in the markets for mobile termination. As explained below, these excessive domestic mobile termination rates are being passed through to U.S. consumers as a significant component of the international mobile settlement rates paid by U.S. international carriers.

C. High mobile termination rates are negatively impacting U.S. consumers and carriers

The high mobile termination rates charged by mobile operators in CPP markets are passed through to U.S. consumers via the mobile settlement rates paid by U.S. international

[34] *See* New York Public Service Commission, *Petition of Sprint Spectrum L.P. d/b/a Sprint PCS, Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York, Inc.*, Case 01-C-0767, Order on Petition for Rehearing, December 3, 2002, at 2.

[35] *See* Florida Public Service Commission, *In re: Petition of Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252 of the Telecommunications Act*, Docket No. 000761-TP, Prehearing Order, Order No. PSC-00-2535-PHO-TP, December 28, 2000, at 9.

carriers. U.S. international carriers typically do not have a direct termination agreement with foreign mobile operators. More frequently, each U.S. carrier has a negotiated rate with a foreign wireline carrier to terminate U.S.-originated traffic on the public switched network in the foreign country. For calls terminating on the network of a mobile operator in the foreign country, therefore, the foreign wireline carrier passes through an additional termination charge to U.S. carriers.[36]

The mobile settlement rates paid by U.S. carriers correspond closely to the domestic mobile termination charges in each country, such as the mobile termination rates publicized by the European Commission in the its *8th Implementation Report*. Because the international settlement rate is the most significant cost component of an international call, U.S. consumers pay far higher rates to call mobile customers than fixed customers on those routes where U.S. carriers are charged separate, higher mobile settlement rates.[37]

For example, the domestic mobile termination rate charged by four mobile operators in the UK range between 20 and 25 cents per minute. The mobile settlement rate that UK international carriers turn around and charge to U.S. carriers for terminating U.S. originated calls on mobile networks in the UK corresponds closely to these levels. This forces U.S. carriers to cover those costs by charging customers a per-minute surcharge in *addition* to the underlying

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[36] The charge can come in the form of a surcharge added to the fixed line termination rate, or in the form of a separate total termination rate for mobile traffic that covers the entire cost of terminating the international call on a mobile network (i.e., covering international facilities and switching, national network extension, and the domestic mobile termination charge).

[37] U.S. carriers are unable to offset the outpayments made for excessive mobile termination rates with inpayments for inbound calls to mobile numbers in the U.S. Because we have a "Receiving Party Pays" system in the U.S., inbound settlement rates are the same for fixed and mobile calls terminating in the U.S.

fixed line rate for calls to mobile subscribers in the UK.[38] U.S. carriers are forced to include similar mobile surcharges to their customers for calls to 74 different international destinations.

The mobile surcharges paid by U.S. consumers are a direct result of the above-cost mobile termination rates charged by domestic mobile operators in those 74 countries. A significant percentage of the per-minute mobile surcharges paid by U.S. consumers represent a pure subsidy to the mobile operators as a result of those mobile operators' market power for termination on their own networks. WorldCom estimates that the excessive international mobile termination rates cost U.S. consumers and carriers more than $368 million per year.[39] The subsidies transferred from the U.S. to Germany, France, the United Kingdom and Japan carriers ranges from $14-25 million a year for each route alone.

Moreover, the impact of above-cost mobile termination rates has intensified as mobile penetration has increased over the past several years, a trend that will continue. Global mobile subscribership grew at a compound annual growth rate of 51.3 percent between 1995 and 2000.[40] In the EU alone, where mobile termination rates are the most excessive, the average mobile penetration rate has grown from 18 percent in 1998 to 75 percent in 2002.[41] It is estimated that 21 percent of international calls are terminating on mobile networks.[42] According to Telegeography, the combined effect of high penetration and excessive mobile termination rates

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[38] See http://www.mci.com/international/english/resources/icp_mobile_surcharge.jsp. AT&T and Sprint also impose international mobile surcharges. See http://www.consumer.att.com/global/english/consumer_information/mobileterminatingnumber.html and http://shop.sprint.com/residential/voiceservices/popups/legalIntlSurchrg/legalIntlSurchrg.jsp respectively.

[39] This estimate was derived using publicly available FCC section 43.61 traffic volume data and an assumption that 21% of global calls terminate on mobile networks, and then by comparing mobile settlement rates to existing LRIC cost studies for mobile termination (i.e. what actual mobile termination cost should be).

[40] *Telegeography 2002* at 78.

[41] *8th Implementation Report*, Annex 1, Chart 42.

[42] See NPRM at paragraph 48, citing *Telegeography 2002*.

in Western Europe in particular "is stunning: though mobile calls account for only 31.8 percent of all incoming international traffic, they represent 80.2 percent of the total cost of terminating international traffic."[43]

Put simply, foreign mobile operators are abusing their market power to extract monopoly rents and subsidies from U.S. consumers and carriers. The anticompetitive impact on U.S. consumers and competition in the U.S. international services market is significant and will continue to grow in the absence of regulatory action. Moreover, such competitive harm is exacerbated by the fact that several U.S. carriers are affiliated with the foreign mobile operators that are being subsidized by U.S. consumers. Those U.S. carriers could use their affiliates' subsidies to obtain a competitive advantage in the U.S. at the expense of U.S. carriers who are not affiliated with a foreign mobile operator.[44]

D. The Commission cannot rely on market forces alone to protect U.S. consumers from high mobile termination rates.

Given the obvious anti-competitive impact that excessive mobile termination rates have on U.S. consumers and competition in the U.S. international services market, the Commission should take steps to address the problem. The Commission cannot rely on market forces alone to address excessive international mobile termination rates because, as explained above, market forces do not exist for mobile termination in CPP markets. If left unchecked, excessive international mobile settlement rates will further undermine the significant success the Commission has had in encouraging competitive cost-oriented fixed line international termination rates. For these reasons, the Commission should take the following steps.

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[43] *Telegeography 2002* at 77.

[44] As the Commission noted in the *Benchmarks Order*, above-cost settlement rates permit foreign carriers with market power to manipulate price-cost margins that enable them to engage in a price squeeze against U.S. carriers where the foreign carrier also has an affiliate in the United States. *Benchmarks Order* at 19,904-905, ¶ 216.

1. *The Commission should clarify that the* Benchmarks Order *applies to international mobile termination rates*

At a minimum, the Commission should explicitly clarify that international termination rates negotiated by U.S. carriers for terminating on foreign mobile networks may not be higher than the rates set forth in the *Benchmarks Order*.[45] Nowhere in that decision does the Commission state that the Benchmark rates do not apply to calls terminating on foreign mobile networks. As the Commission explained in the *Benchmarks Order*,

> 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 rate that exceeds the relevant benchmark constitutes an unjust and unreasonable 'charge' or 'practice' under Section 201 [of the Communications Act].[46]

The Commission, therefore, should explicitly clarify that it is unlawful for any U.S. carrier to agree to an international mobile termination rate that exceeds the relevant benchmark for a particular route.

2. *The Commission should adopt "best practice" rates for mobile termination*

While clarifying that the benchmark rates apply to mobile termination is an important first step, the benchmark rates do not reflect the actual cost of terminating international calls on mobile networks. As explained above, LRIC-based cost studies demonstrate that the *maximum* level of actual cost for mobile termination is in the 3.9 to 7.5 cent range. In fact, these are

[45] *See Benchmarks Order* at 19,860, ¶ 111 (setting maximum rates of 15, 19 and 23 cents per minute depending on level of economic development).

[46] *Id*. at 19,939, ¶ 286. The Commission's finding was specifically upheld on appeal. *See Cable & Wireless P.L.C. v.* FCC, 166 F.3d 1224, 1231 (D.C. Cir. 1999).

conservative estimates and the actual cost of the mobile termination component is likely lower.[47] The Commission, therefore, should adopt this range as a "best practice" and should explicitly encourage U.S. carriers to negotiate international mobile termination rates that are no higher than these best practice levels.

3. The Commission should consider further measures to ensure cost-oriented international mobile termination rates

The Commission should also consider, either in this proceeding or by initiating another proceeding, taking further action to move excessive mobile termination rates paid by U.S. carriers closer to cost. For example, the Commission should consider adopting a rule that would prohibit U.S. carriers from paying any international mobile termination rate that is more than 5-10 percent higher than the rate paid to any foreign carrier for terminating calls to fixed lines, subject to the absolute cap of the relevant benchmark rate.[48] Although the rates could still be well above cost, such a rule would appropriately tie mobile termination rates, which are not subject to competitive pressure, to fixed line termination rates which are subject to competitive pressure in many countries.

Any carrier could waive the rule by submitting a written request, bolstered by cost data, to the Commission demonstrating that the long run incremental cost of terminating on a particular mobile network is more than 5-10 percent higher than the relevant fixed line termination rate. This procedure would be consistent with the *Benchmarks Order*, which permits a petitioner to demonstrate that the relevant benchmark rate does not permit recovery of incremental cost.[49]

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[47] WorldCom recognizes that there are additional costs incurred for international termination, including international facilities and switching, and the national extension. Based on fixed line international termination rates currently available in the market, however, those additional costs represent 2-3 cents per minute or less.

[48] Pursuant to the clarification in section VI.D.1 above.

[49] *Benchmarks Order* at 19,849-850, ¶¶ 88-89.

VI. Conclusion

The Commission is closer than it has ever been to achieving its longstanding goal of a competitive and cost-based U.S. international services market. WorldCom applauds the Commission for carefully crafting international settlement rate policies that have played a critical role in that process. Indeed, WorldCom believes that the international telecommunications market has become competitive enough generally that the Commission should eliminate the ISP on most international routes. Instead, the Commission should narrowly focus its regulatory efforts on those areas in the international telecommunications market, such as unilateral termination rate increases and above-cost mobile termination rates, where market power or government fiat have prevented competition from taking hold.

Respectfully submitted,

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