Before the

Federal Communications Commission

Washington, DC 20554

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

To: The Commission

REPLY COMMENTS OF VODAFONE

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Summary

The record of comments filed in this proceeding evidences wide support for three basic propositions stated by Vodafone in its initial comments:

- Call termination rates in overseas markets are the subject of significant regulatory scrutiny by foreign regulators. Because mobile operators generally do not discriminate against international calls, if mobile termination rates are passed through to US consumers, they will benefit from such scrutiny. Attention to the issue in Europe will be increased following the inclusion of mobile call termination in the European Commission's *Recommendation on Relevant Markets*;

- No meaningful comparisons can be drawn from comparisons between overseas mobile termination rates and fixed termination rates, or other arbitrary and unsubstantiated assumptions about costs (which also tend to ignore differences in demand characteristics entirely);

- There are a number of reasons why intervention by the Commission seeking to change overseas mobile termination rates would be ineffective and problematic.

We believe that these points remain unchallenged by the initial comments.

With respect to the last item, we offer below some further thoughts as to how the Commission can better understand the legal and practical limitations of the variety of proposed remedies. In this regard, Vodafone notes the following:

- Applying the methods and rates utilized for fixed services in the *Benchmarks Order* will not work due to lack of reciprocal calling arrangements, and due to the current business structure (whereby mobile operators generally do not directly negotiate international settlements);

- Arbitrary benchmarks would show unwarranted disrespect to overseas regulators ability to regulate mobile termination costs where necessary and to make important policy choices about mobile market structure in those countries;

- The *Benchmarks Order* was never intended to apply to mobile termination, and, at a minimum, the Commission cannot apply the fixed-line benchmarks adopted in the *Benchmarks Order* to mobile termination without a separate proceeding and a more developed record.

Finally, Vodafone notes that constraints on the Commission's ability to address foreign mobile termination charges do not constrain the Commission's ability to examine surcharges assessed by US international carriers for fixed-to-mobile calling. The record contains evidence that the Commission should, in fact, continue to examine whether such charges genuinely reflect mobile termination charges.

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ON NOTICE OF PROPOSED RULEMAKING

Vodafone Americas, Inc., on behalf of itself and Vodafone Group Services Limited, ('Vodafone'), hereby responds to the initial comments filed in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.[1] Vodafone is the world's mobile telecommunications leader, with interests in mobile operators in 28 countries worldwide that, collectively, serve over 270 million customers. In the United States, Vodafone has a 44.2% interest in Verizon Wireless. As in the initial comments, Vodafone confines its replies to the issue of mobile termination rates in overseas markets with a 'Calling Party Pays' ('CPP') pricing structure.

[1]*In the Matter of International Settlements Policy Reform,* Notice of Proposed Rulemaking, IB Dockets No. 02-234, and No. 96-261, FCC 02-285, ¶¶ 45-51 (rel. October 11, 2002) ("NPRM"). As the Commission's offices were closed on February 18, 2003 due to adverse weather, this filing is timely submitted. *See* 47 C.F.R. § 1.4(e)(1).

DISCUSSION

I. The Record Strongly Suggests that the Commission Should Continue to Monitor Overseas Proceedings and Take No Action of Its Own With Respect to Foreign Mobile Termination Rates

A. The Comments Uniformly Explain that Foreign Regulatory Activity Regarding Mobile Termination Rates is Extensive and Ongoing

Vodafone noted in its initial comments the importance of recognizing the proper dimensions of the mobile termination issue. The proportion of US-originated traffic terminating on unregulated mobile networks which employ Calling Party Pays (CPP) charging structures is small and decreasing. The Commission should take note of the facts for US consumers as revealed by FCC and Telegeography data. Although approximately 22% of US originated traffic was terminated on foreign mobiles in 2001, approximately 30% of that was terminated in just 2 markets (Mexico and Canada) – both of which employ a Receiving Party Pays (RPP) charging structure for international calls to mobiles.[2] The rest of US-originated traffic terminating on overseas mobiles is largely terminated at regulated mobile termination rates (*e.g.* the UK and France). As a percentage of total international traffic originated by US consumers, international traffic to unregulated mobiles in CPP jurisdictions is very small. As a percentage of total traffic (national and international) originated by US consumers, calls to international unregulated CPP mobiles are de minimus.

In many cases mobile termination rates in these markets have been subject to regulation for the past 5 years. Both the NPRM, and the comments in the record, reflect that regulatory activity on the issue of mobile termination rates is extensive and ongoing.[3] The inclusion of the market for "Voice Call Termination on Individual Mobile Networks" in the European Commission's *Recommendation on Relevant Product and*

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[2] Telegeography 2003 (on 2001 data) at 5.

[3] See NPRM at para.50, n.111; see, e.g., Comments of Asociacion Hispanoamericana de Centros de Investigación y Empresas de Telecomunicaciones at 10; Comments of Cable and Wireless at 20; Comments of WorldCom at 22 (mobile operators deemed to have market power by local regulators); Comments of CompTel at 5, n.10 (foreign regulators have concluded that mobile termination regulation is warranted).

Service Markets[4] will ensure further and consistent regulatory attention to European mobile rates. There is no disagreement that termination is receiving and will continue to receive substantial local attention; the only point of contention in the record is whether the Commission also needs to act and, if so, what actions it should take.

With respect to mobile termination rates, there are a number of reasons why Commission action would be unlawful, unwise and ineffective; Vodafone expands upon these reasons in these replies. With respect to the mobile termination surcharges assessed by US international carriers, there may be cause for the Commission to investigate further.

B. The Record Underscores the Reasons Why the Commission Should Not Undertake to Unilaterally Regulate Foreign Mobile Termination Rates

The record indicates broad support among a variety of industry sectors for the conclusion that it would be unwise for the Commission to attempt to address mobile termination rates, as overseas regulators are already addressing the matter.[5] The incentives and abilities of overseas regulators to address mobile termination rates are not in issue.[6] A number of parties have attested to the ability of overseas regulators to deal with these questions effectively, including major fixed-line international carriers.[7] All of the actions proposed for the Commission, such as applying the *Benchmarks Order* to fixed-to-mobile calls, have very serious limitations, both in terms of the Commission's domestic procedures, lawful extraterritorial jurisdiction and in terms of their practical

[4] C(2003)497 COMMISSION RECOMMENDATION of 11/02/2003 On Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (Text with EEA relevance).

[5] See generally Comments of Verizon, Comments of Cable and Wireless, Comments of ETNO, Comments of ACIEL.

[6] AT&T and WorldCom refer to "market conditions" in overseas markets, effectively ignoring the presence of domestic regulators in those markets and their actions. See, e.g., Comments of AT&T at 33; Comments of WorldCom at 23.

[7] See, e.g., Comments of Cable and Wireless at 16; Comments of Verizon at 8-10; Comments of Vodafone at 9 (noting alignment between interests of US and foreign regulators and consumers).

effectiveness. Given the presence of ongoing action by foreign regulators to examine questions related to mobile termination rates, pursuing the proposed actions would be unwise.

1. The Record is Widely Divided On Proposed Remedies

The record reflects that the parties are divided as to both the need for Commission action and the nature of any such action. As noted earlier, this is true even among the international fixed-line carriers who have submitted comments in this proceeding. Neither Verizon, Cable and Wireless, nor PCCW support Commission action on foreign mobile termination rates; Sprint is skeptical and believes effective action by foreign regulators is preferable. Cable and Wireless notes that as the proportion of international traffic destined for foreign mobile users increases, foreign mobile operators will come under further pressure to reduce rates.[8] Verizon makes the additional point that Commission intervention, particularly action that is perceived as extraterritorial, could well interfere in the process of foreign regulators' examination of mobile termination issues.[9]

Other carriers are less convinced that overseas regulators will be effective in every case, though there is disagreement here as well. AT&T would have the Commission add mobile carriers to the list of carriers with market power and apply benchmark rates to all mobile terminating traffic, regardless of whether it terminates directly with a mobile carrier or not.[10] WorldCom would both apply the benchmark rates and, conceding that the benchmark rates do not reflect actual costs of mobile termination, also have the Commission adopt "best practices" for mobile termination rates.[11]

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[8]Comments of Cable and Wireless at 16.

[9]Comments of Verizon at 10.

[10]Comments of AT&T at 35; see also Comments of CompTel at 6 (advocating application of the benchmarks framework to mobile termination rates).

[11]Comments of WorldCom at 24.

Finally, Sprint, in contrast to AT&T and WorldCom, acknowledges that the question of remedies is "difficult," and proposes that the Commission rely primarily, but not exclusively, on overseas regulators to address issues regarding mobile termination. Where overseas regulators are not effective, Sprint proposes that the Commission both encourage arbitrage in overseas markets, and cap the rates that US international carriers may pay for mobile termination, though not at the same level as adopted in the *Benchmarks Order* for international fixed-line traffic. Rather, Sprint suggests the FCC should set the benchmark at a level that allows mobile to recover their costs, as calculated on a carrier specific basis.[12]

This degree of division on the record of this proceeding suggests that the preferable course of action would be to continue to monitor regulatory proceedings overseas and not undertake any other action at this time. At the very most, the Commission should be extremely cautious before taking any unilateral action attempting to address issues related to overseas mobile termination rates.

2. The Proposed Remedies Are Unnecessary and Unworkable

AT&T and WorldCom both suggest, in different ways, that the Commission could address international mobile termination rates by either clarifying that the *Benchmarks Order* applies to international mobile termination rates negotiated by US carriers or by adopting a new rule to similar effect.[13] But their comments fail to explain the justification for either of these actions.

Neither the letter nor the spirit of the *Benchmarks Order* indicate that the Commission should take any further regulatory action here for international calls terminating on mobile networks. Moreover, the Commission cannot simply incorporate mobile termination rates under the framework adopted in the *Benchmarks Order* as some commentators propose without also (1) re-visiting its prior conclusion that overseas mobile network operators do not possess market power in the international

[12]Comments of Sprint at 21.

[13]See Comments of WorldCom (clarify the *Benchmarks Order*); Comments of AT&T at 35 (not clear - AT&T supports adding mobile carriers to list of foreign carriers with market power. As explained below, this would require a separate rulemaking proceeding).

marketplace, and (2) directing parties seeking to add to the list of carriers with market power to submit a petition for declaratory ruling.

To begin with, mobile termination rates were not an issue considered by the Commission when it adopted the *Benchmarks Order* in 1997. As explained in Vodafone's comments, for example, at the time, low international mobile call volumes were insufficient to justify the investment in billing systems necessary to differentiate between different types of traffic. Growing arbitrage activity in the late 1990s prompted foreign international carriers to begin to identify mobile terminated traffic explicitly, but this was precisely because international rates were usually below domestic rates for call termination. Today, mobile termination rates in Vodafone's markets are generally the same for international and domestic traffic (or discriminate in *favor* of international calls), and such rates are the subject of numerous domestic regulatory proceedings. The higher profile of this issue, however, does not warrant Commission micromanagement of its sister regulators' processes.

Indeed, Commission rules and precedents suggest that the current benchmarks and dominant carrier regulatory framework cannot simply be lifted whole out of its current context and applied to foreign mobile carriers. The Commission's "primary concern in the context of international telecommunications is that a foreign carrier with market power on the foreign end of an international route may have the ability to leverage that market power into the U.S. market to the detriment of competition and consumers."[14] The Commission has expressly determined that a foreign carrier with solely mobile wireless facilities is "unlikely to raise market power concerns" and nothing in the record (other than AT&T's off-the-cuff proposal) remotely suggests there is any reason for the Commission to revisit this conclusion.[15]

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[14] 1998 Biennial Regulatory Review —Review of International Common Carrier Regulations 14 FCC Rcd 4909, ¶ 20 (1999) ("*1998 Streamlining Order*").

[15] The Commission's rules presume that a foreign carrier does not possess market power on the foreign end of a U.S. international route if it possesses less than 50 percent market share in what the Commission has deemed the three relevant foreign product markets: international transport facilities, including cable landing station access and backhaul facilities; intercity facilities and services; and local access facilities and services on the foreign end. *See* 47 C.F.R. § 63.10(a).

AT&T's proposed solution – deeming foreign mobile wireless carriers as "presumed to have market power" – is untimely and unsubstantiated. The Commission concluded that "parties may challenge the . . . exclusion of any carrier on the list by submitting a petition for declaratory ruling and the appropriate supporting documentation to demonstrate that a carrier . . . excluded from the list has market power."[16] No credible argument or relevant documentation pertaining to any foreign mobile operator's ability to adversely affect the U.S. marketplace has been submitted for the Commission's consideration, nor was any requested in the *NPRM*. AT&T's concluding statements fall well short of the burden imposed by the Commission, and its proposed remedy would only create mischief by imposing heavy-handed regulation on competitive, non-dominant U.S. carriers.

Moreover, as Vodafone explained in its comments, one simply cannot draw a meaningful parallel with the approach adopted in benchmark settlement rates – in which US carriers could exert reciprocal bargaining power in bi-lateral relationships - in contemplating a US response to the issue of overseas mobile termination rates. Mobile termination rates do not exhibit the reciprocal characteristics that apply in the fixed-line context, which were a key incentive in making the approach utilized in the *Benchmarks Order* possible as a practical matter.[17] A number of international carriers have acknowledged this fact in the record of this proceeding.[18] Indeed, one carrier cautions that "[a]ggressive implementation of the benchmark policy would put that international carrier in an untenable position, as it would face losses from the carriage of mobile-

[16] *1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements; Regulation of International Accounting Rates; Market Entry and Regulation of Foreign-affiliated Entities*, 14 FCC Rcd 7963, ¶ 43 (1999).

[17] <u>See, e.g.</u>, Comments of Vodafone at 14; <u>see also</u> Comments of *Asociación Nacional de Industrias Electrónicas y de Telecomunicaciones* ("ANIEL") at 5 (noting differences between present situation and 1996 context in which the Benchmarks Order was considered).

[18] *See, e.g.*, Cable & Wireless at 18 ("[t]his situation is decidedly different from the international settlements rate regime" and "not convinced that direct action by the Commission would necessarily be effective in reducing foreign mobile termination rates"); Sprint Comments at 18-19 ("in 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").

terminating traffic if it could not convince the mobile operator to lower its termination rates."[19]

WorldCom alleges, curiously, that US carriers who are affiliated with foreign mobile operators could "use their affiliates' subsidies to obtain a competitive advantage in the US at the expense of US carriers who are not affiliated with a foreign mobile operator."[20] This is simply not possible. A foreign mobile carrier cannot negotiate a different termination rate with a US-affiliated carrier than it charges to a non-affiliated carrier, because mobile termination rates are in many cases regulated and subject to a non-discrimination principle, and because the mobile carrier does not generally negotiate directly with the international carrier. Moreover, it cannot be assumed that there is any "subsidy" which arises from termination rates that could be deployed elsewhere. Determining whether any such "subsidy" exists requires a detailed understanding of mobile cost structures and the efficient allocation of fixed and common costs under CPP demand conditions. There is no evidence on the record that any such subsidy exists. There is no evidence on the record that any subsidy has been transferred to US affiliates for competitive advantage in the US market. Again, the concerns that animated the *Benchmarks Order* are simply not present in the case of overseas mobile termination rates.[21]

Finally, the Commission cannot simply apply any set of international benchmarks to cap rates paid by US international carriers for mobile termination without re-introducing rate discrimination (and the associated incentives for arbitrage) between international and domestic calling (since domestic mobile termination rates would remain unaffected). The introduction of such discrimination would create distortions in the global market for international calling, particularly where non-US international carriers and overseas domestic carriers paid one mobile termination charge, and US international carriers paid another, lower charge.

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[19]Comments of PCCW at 6.

[20]Comments of WorldCom at 23.

[21] In any event, WorldCom provides no evidence – only inapposite, anecdotal assertions -- to suggest that foreign mobile termination rates are recovering costs inappropriately for the CPP environment in which they apply.

3. International Comity Also Counsels Restraint

Even were the Commission to resolve all of these legal and practical concerns, action to regulate mobile termination rates in the manner proposed by AT&T, WorldCom, and CompTel would strike foreign regulators as inappropriate extraterritorial regulation. This is particularly true where - as is the case in the majority of CPP countries to which US international carriers terminate traffic - a regulator is already engaged in the process of determining appropriate domestic mobile termination rates.[22]

By re-introducing arbitrage incentives, US action could risk significant interference with overseas regulators' lawful exercise of jurisdiction to regulate mobile termination rates in a manner appropriate to their markets and to their national policy goals. US action would, inherently, also interfere with foreign regulators' choices with respect to mobile market structure, including the choice to adopt a CPP approach to mobile services. There is no reason why the Commission needs to engage in such aggressive and unilateral action.

C. The Commission Has Not Undertaken Any of the Analysis Necessary to Properly Assess Foreign Mobile Termination Rates

Many of the initial comments on mobile termination rates confuse matters by jumping too quickly to the question of whether mobile termination rates are "reasonable" (and then fail to explore any rational economic basis on which it could be concluded that they are not). More importantly, they fail to address the threshold question of whether the Commission can and should act in the first place. Moreover, and as discussed below, this bypasses the question of whether mobile termination rates are in fact responsible for the level of surcharges paid on international fixed-to-mobile calls. But most seriously, this approach attempts to short-cut the serious analysis in which overseas regulators are engaging to identify optimal, economically efficient mobile termination rates and to substitute that analysis with glib comparisons.

[22] *See* Comments of Vodafone at Annex B.

As Vodafone noted in its comments, it is a serious mistake to attempt to derive or judge mobile termination rates by reference to fixed interconnection rates or models of fixed network costs. Many of the commenting parties nonetheless seek to make this comparison. CompTel for example, contends that the cost differences between fixed and mobile carriers are "relatively minor".[23] AT&T arbitrarily assumes that fixed network costs are the relevant benchmark, and then presumes that the issue is whether there is a "legitimate justification for the difference between fixed and mobile termination rates."[24]

This is simply the wrong way to proceed. Not only are there significant cost differences between fixed and mobile networks that render such comparisons pointless, but different demand conditions and differing competitive environments pertain in the fixed and mobile markets. No party addresses these points with any detailed analysis, yet it is impossible to properly assess mobile termination rates without taking these factors into account. Moreover, in some cases, the authorities cited do not support the proposition with respect to a comparison of fixed and mobile costs. The INTUG submission, for example, provides <u>price</u> information, not costs.[25]

For the same reasons, the LRIC cost studies submitted to US state regulators by Sprint PCS that are cited in the comments,[26] are an inappropriate basis for action. The model and its input data are not public and have not been verified by independent analysis. In the US, the demand conditions associated with a Receiving Party Pays ("RPP") market are very different from those that pertain in CPP markets. Even with common demand conditions for outbound calling and subscription, efficient pricing structures under CPP and RPP arrangements will be very different. The optimal pricing structure for such markets is the subject of a number of complex regulatory proceedings in overseas markets. Yet those commentators favoring Commission action on mobile termination rates do not propose that the Commission undertake, for itself, the analysis required to properly assess the situation.

[23]Comments of CompTel at 3.

[24]<u>See, e.g.,</u>, Comments of AT&T at 31.

[25]<u>See, e.g.</u>, Comments of CompTel at 3, citing, "INTUG, *Termination of International Calls to Mobile Networks*, Submission of INTUG to ITU-T SG3 (rel. June 2002), at pp. 3-7.

[26]<u>See, e.g.</u>, Comments of WorldCom at 19; Comments of Sprint at 18.

II. The Record Raises Significant Issues As To Whether International Carrier End-User Charges for Fixed-To-Mobile Calls Genuinely Reflect Foreign Mobile Termination Charges

Several submissions state that the charges paid by US consumers are a direct result of the charges international carriers must pay to foreign mobile carriers.[27] U.S. consumers are, however, charged *by their international service providers,* not by foreign mobile carriers, for calls that terminate on wireless networks. This fact underscores the point that the Commission must consider more than foreign mobile carriers' termination rates in determining whether consumers have been harmed.

In this regard, Vodafone, based on the Ovum analysis annexed to its initial comments, and a number of other commentators have raised significant questions as to whether the rates charged to U.S. end-user customers genuinely reflect the input costs of foreign mobile termination rates in all instances, as those operators have claimed.[28] Mobile termination rates in many markets, including many in which Vodafone operates, have decreased substantially in recent years. However, mobile termination surcharges for the same countries have in some cases increased in the same period. It is not clear that there is "a penny for penny" pass-through as the commenting IXCs imply.[29] The record does not indicate whether the mark-up between the mobile termination rate and the end-user surcharge is levied by the wireline foreign correspondent carrier or the U.S. IXC. It is clear, however, that the Commission must consider these factors in determining the real impact of foreign mobile termination rates on U.S. consumers.

III. CONCLUSION

The initial comments in this proceeding provide strong support for the proposition that the Commission should defer to its foreign counterparts to take any necessary actions to ensure that foreign mobile termination rates are reasonable. That approach is

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[27] Eg, Comments of CompTel at 2.

[28] Comments of Vodafone at 14-15; Comments of NTT DoCoMo, Inc. at 4-6; Comments of ANIEL at 6; *see also* Comments of Telefonica at 5 (questioning whether rates of US IXCs have reflected reductions in international settlement rates generally).

supported by a number of parties, including major fixed-line international carriers. In any event, the Commission must proceed cautiously, given that even those parties favoring Commission action on this matter are divided, have not explained fully the factual basis for Commission action, and have failed to address other major legal and economic considerations.

Respectfully submitted,

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[29] *See* Comments of DoCoMo at 6.