Before the
Federal Communications Commission
Washington, D.C. 20554

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

FIRST REPORT AND ORDER

Adopted: March 11, 2004 **Released: March 30, 2004**

By the Commission: Chairman Powell and Commissioners Copps and Adelstein issuing separate statements.

TABLE OF CONTENTS

Paragraph

I. INTRODUCTION

1. On October 10, 2002, the Commission adopted a Notice of Proposed Rulemaking (*NPRM*) initiating a review of its international regulatory policies governing the relationship between United States (U.S.) and foreign carriers in the provision of U.S.-international services.[1] Because of increasing competition in the U.S.-international marketplace, decreasing settlement and end-user rates, and growing liberalization and privatization in foreign markets, the

[1] *See International Settlements Policy Reform, International Settlement Rates*, IB Docket Nos. 02-324, 96-261, Notice of Proposed Rulemaking, FCC 02-285, 17 FCC Rcd 19954 (2002) (*NPRM*).

Commission sought comment in the *NPRM* on whether reform of existing international regulatory requirements would be appropriate to bring further benefits of more cost-based calling prices and innovative services to U.S. customers[2] of international telecommunications services.

2. In this Order, we find that the U.S.-international market has been undergoing changes in recent years. There has been increasing competition on many U.S.-international routes accompanied by lower settlement rates and calling prices to U.S. customers. There also exists the potential for further development of competition as a result of emerging means of routing international traffic that do not involve the traditional carrier settlement process. At the same time, settlement rates on most routes continue to be above cost and there exists the continued potential for anticompetitive conduct and other forms of market failure. On balance, we find that the changes now unfolding in the U.S.-international market permit us to adopt a more limited application of our regulatory framework accompanied by competitive safeguards to protect U.S. customers against anticompetitive behavior. We continue to believe that, where there is vigorous competition, market forces are causing international termination rates to move toward cost on many routes. We conclude that reforming our rules to remove our International Settlements Policy (ISP) from benchmark-compliant routes will give U.S. carriers greater flexibility to negotiate arrangements with foreign carriers. We believe that doing so will encourage market-based arrangements between U.S. and foreign carriers that will further our long-standing policy goals of greater competition in the U.S.-international market and more cost-based rates for U.S. customers. Moreover, we retain our benchmarks policy but plan to subject it to further evaluation as to whether future modifications are warranted. We are also concerned about the increasingly high mobile termination rates that are being charged to U.S. carriers and their effect on U.S. consumers. Accordingly, we believe it is imperative that we continue to evaluate the nature and effect of mobile termination rates on U.S. customers and what responses are available to the Commission. In addition, we will continue to respond to carrier complaints in this area if foreign mobile termination rates charged to U.S. carriers are not consistent with our general accounting rate principles.

II. BACKGROUND

3. The Commission requested comment in the *NPRM* to obtain further information about the competitive status of the U.S.-international marketplace and the current effectiveness of its International Settlements Policy (ISP) and its accounting rate policies,[3] including those of International Simple Resale (ISR) and the benchmarks policy.[4] Additionally, the Commission

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[2] For purposes of this proceeding, reference to "U.S. customers" includes residential, business, and government "end-users" of international telecommunications services. We recognize that the telecommunications costs of end-users such as business customers are passed on to final consumers of goods and services within the United States.

[3] An accounting rate is the price a U S. facilities-based carrier negotiates with a foreign carrier for handling one minute of international message telephone service, or IMTS Each carrier's portion of the accounting rate is referred to as the "settlement rate" that represents a terminating access charge. The settlement rate is equal to one-half of the negotiated accounting rate under the framework of the International Settlements Policy The settlement rate represents the bundled provision of an international half-circuit, international gateway switching, and the fee for domestic termination at either end point

[4] *See NPRM*, 17 FCC Rcd at 19977-78, ¶¶ 43 & 44; *In the Matter of International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280, 12 FCC Rcd 19806, 19904-05, ¶ 216 (1997) (*Benchmarks Order*); Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999) (*Benchmarks*

(continued....)

sought comment on proposals to reform the ISP, and on safeguards that may be necessary to accompany reform.[5] It also requested comment on whether foreign mobile termination rates pose harm to U.S. consumers, and what action, if any, the Commission should take to address the issue.[6]

4. In the *NPRM*, the Commission requested information about the U.S.-international market for International Message Telephone Services (IMTS) and requested comment on whether market changes make it possible for more limited Commission regulatory intervention. The Commission inquired whether competition has developed in both the U.S.-international and foreign-end markets to an extent sufficient to consider the Commission's regulatory policies ripe for reform; whether anticompetitive concerns continue to exist and if so, in what manner; and whether the development of new technologies and services have significantly changed the market for U.S.-international telecommunications services.

5. The Commission additionally sought comment on reform of its accounting rate policies, including ISR and the benchmarks policy.[7] It asked whether further reform of the Commission's ISR or benchmarks policy would be appropriate, as the Commission was at that time completing the final transition period of the benchmarks policy. Specifically, the Commission sought comment on whether it should consider revision or elimination of the benchmarks policy, as the benchmark rates are considerably above actual cost-based rates, in order to encourage more cost-based settlement rates. The Commission adopted its accounting rate policies to complement the ISP to protect U.S. consumers from anticompetitive conduct and abuses of market power by foreign carriers.[8] In particular, because termination rates are a major component of consumer calling prices, the Commission's accounting rate policies' goal is to achieve more cost-based termination rates for U.S.-international traffic. As discussed below, these regulatory efforts, along with the progress of market forces internationally and the development of new technologies, have resulted in lower average U.S.-international termination rates and lower consumer calling prices.[9]

6. Furthermore, the Commission inquired in the *NPRM* whether foreign carriers may

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Reconsideration Order), *aff'd sub nom Cable & Wireless P L C. v FCC*, 166 F.3d 1224 (D.C. Cir. 1999). In 1991, the Commission concluded that through the encouragement of International Simple Resale, or ISR, it could introduce competitive forces on routes that would place downward pressure on U.S -international settlement rates *See Regulation of International Accounting Rates*, CC Docket No. 90-337, Notice of Proposed Rulemaking, FCC 90-265, 5 FCC Rcd 4948 (1990) (*ISR NPRM*); Further Notice of Proposed Rulemaking, FCC 91-158, 6 FCC Rcd 3434 (1991) (*ISR FNPRM*); First Report and Order, FCC 91-401, 7 FCC Rcd 559 (1991) (*ISR Order*). ISR involves the provision of switched services over resold or facilities-based private lines that connect to the public switched network at either end-point. Instead of U.S carriers paying for the use of half of a shared circuit to a foreign point through traditional settlement payments, U.S. carriers under ISR arrangements may connect or lease a complete or whole circuit end-to-end to the corresponding foreign carrier's network and pay a negotiated rate for termination of services on the foreign network that does not comply with the strict requirements of the ISP *See* 47 C.F.R. § 63.16.

5 *See NPRM*, 17 FCC Rcd at 19968-77, ¶¶ 22-42.

6 *See NPRM*, 17 FCC Rcd at 19979-81, ¶¶ 45-51.

7 *See NPRM*, 17 FCC Rcd at 19977-78, ¶¶ 43-44

8 *Benchmarks Order*, 12 FCC Rcd at 19863, ¶ 116.

9 *See infra* § III

be exercising market power in their pricing of termination services on foreign mobile networks, thus eroding the benefits of lower international termination rates to U.S. consumers.[10] The Commission noted the increasing concern about the general issue of high mobile termination rates among foreign regulatory authorities, as foreign mobile services and the number of international calls terminating on mobile networks continue to grow.[11] As the result of different regulatory frameworks governing payments among countries for originating and terminating calls on mobile phones,[12] the Commission also expressed concern that U.S. consumers may be unaware that they may incur surcharges associated with the cost of terminating U.S.-international calls on foreign mobile phones. The Commission inquired on ways it may improve consumer awareness.

7. In the *NPRM*, the Commission requested initial comments by December 10, 2002 and replies by January 9, 2003. Subsequent to the release of the *NPRM*, the Commission became aware of actions taken by several foreign administrations to impose potential rate floors on international termination rates, including U.S.-international accounting rates. Because the *NPRM* specifically asked for comment on potential anticompetitive harms to U.S. carriers and consumers from foreign carriers with market power, the International Bureau (Bureau) extended the pleading cycle in order to allow interested parties an opportunity to include in their initial comments any response to those developments and their effect on the policies under consideration in the proceeding.[13] The Bureau further extended the deadline for replies to February 18, 2003 in light of the fact that foreign carriers and administrations filed a substantial number of the initial comments in the proceeding and the electronic record at the time was incomplete.[14] In response to the *NPRM*, the Commission received twenty initial comments and sixteen replies, along with several *ex parte* filings during the course of the proceeding.[15]

III. REFORMING THE INTERNATIONAL SETTLEMENTS POLICY

8. As discussed below, we reform our U.S.-international regulatory policies to reflect more appropriately market realities, including a recognition that the development of competition varies from country to country and the potential still exists for abuses that could harm competition and impede further benefits to U.S. customers.

A. Background

9. The Commission's long-standing policy goals of regulation of the U.S. international telecommunications market continue to be: (1) promoting competition in the global

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10 *See NPRM*, 17 FCC Rcd at 19979-81, ¶¶ 45-51

11 *See NPRM*, 17 FCC Rcd at 19980-81, ¶¶ 48-50.

12 For example, in the United States, the common regulatory framework for payment of calls placed to mobile phones is "Receiving Party Pays" or RPP Under RPP, the mobile phone subscriber pays for both outgoing and incoming calls to a mobile phone. Whereas, in a "Calling Party Pays" framework, the "calling party" is responsible for payment of calls placed to mobile phones, and mobile subscribers are responsible only for their outgoing calls.

13 *See* Public Notice, DA 02-3314 (rel December 2, 2002)

14 *See* Public Notice, DA 03-212 (rel January 28, 2003). Additionally, on February 18, 2003, the FCC was physically closed due to inclement weather; as a result, replies became due February 19, 2003.

15 *See* Appendix A

market; (2) preventing anticompetitive conduct in the provision of U.S.-international services and facilities; and (3) encouraging foreign governments to open their markets, where competitive market pressures exist.[16] The Commission has consistently maintained that effective competition in the global market will bring the greatest benefits to U.S. customers, including lower international calling prices, and better service quality and options. As the Commission has previously concluded, competition mitigates anticompetitive harm and permits the Commission to rely more on market solutions and less upon regulatory requirements.[17] Competition also promotes more cost-based international calling prices; stimulates technological and commercial innovation; prevents inefficiencies in markets; and, encourages better service quality and options.[18]

10. On U.S.-international routes where the risk of foreign market power abuse is low, the Commission has made efforts to remove unnecessary regulations to further encourage the development of market forces on those routes. To the extent that competition has not developed sufficiently on some routes, the Commission has structured its rules to prevent foreign carriers with market power from harming U.S. carriers and their customers.

11. The Commission also has made efforts to bring international settlement rates closer to cost. In 1997, the Commission established benchmarks that govern the international settlement rates that U.S. carriers may pay foreign carriers to terminate international traffic from the United States.[19] The policy requires U.S. carriers to negotiate settlement rates at or below benchmark levels established by the Commission. The Commission established its benchmarks policy with the goal of reducing above-cost settlement rates paid by U.S. carriers to foreign carriers for the termination of international traffic, where market forces had not led to that result.[20] The Commission's intent has been that U.S. customers receive the benefit of settlement rate savings by carriers.[21] Currently, of a total of 203 U.S.-international routes, 173 routes (representing approximately 94 percent of U.S.-outbound international minutes) are in compliance with the Commission's prescribed benchmark rates.[22] Of the 173 benchmark-compliant routes, 91 routes (representing approximately 65 percent of U.S.-outbound international minutes) are ISR-approved, as described more fully below.[23] Also, of the 173

16 *In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities,* IB Docket No. 95-22, Report and Order, FCC 95-475, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*) at 3877, ¶ 6. *See also NPRM,* 17 FCC Rcd at 19955, ¶ 1 n.1

17 *See Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes,* Report and Order, CC Docket No. 85-204, 51 Fed. Reg. 4736 (1986) (*ISP Order*); *Foreign Carrier Entry Order,* 11 FCC Rcd 3873 (1995).

18 *See NPRM,* 17 FCC Rcd at 19964, ¶ 15.

19 *See, e.g., Benchmarks Order,* 12 FCC Rcd at 19806, ¶ 1.

20 *Benchmarks Order,* 12 FCC Rcd at 19862-63, ¶ 115. The Commission concluded that the benchmark rates are necessary because, under the current international accounting rate system, the settlement rates U.S. carriers pay foreign carriers to terminate U.S.-originated traffic are, in most cases, substantially above the costs foreign carriers incur to terminate that traffic. *Benchmarks Reconsideration Order,* 14 FCC Rcd at 9256, ¶ 3.

21 *Benchmarks Order,* 12 FCC Rcd at 19930-32, ¶¶ 270-74.

22 *See* Commission's annual Section 43.61 report "International Telecommunications Data" *available at* http://www.fcc.gov/wcb/iatd/intl.html (*Section 43.61 data* or *Section 43.61 annual report*)

23 U.S. carriers on ISR-approved routes may enter into contracts for the exchange of traffic with foreign incumbents outside the ISP

benchmark-complaint routes, 16 routes (representing approximately 31 percent of U.S.-outbound international minutes) are fully exempt from the ISP.[24]

12. The ISP, which governs how U.S. carriers negotiate with foreign carriers for the exchange of international traffic, is the structure by which the Commission has sought to respond to concerns that foreign carriers with market power are able to take advantage of the presence of multiple U.S. carriers serving a particular market.[25] The Commission established the ISP in order to prevent foreign carriers with market power from discriminating or using threats of discrimination or other anticompetitive actions, against competing U.S. carriers as a strategy to obtain pricing concessions regarding the exchange of international traffic ("whipsawing"). Specifically, the ISP requires that: (1) all U.S. carriers must be offered the same effective accounting rate and same effective date for the rate ("nondiscrimination"); (2) all U.S. carriers are entitled to a proportionate share of U.S.-inbound, or return traffic based upon their proportion of U.S.-outbound traffic ("proportionate return"); and (3) the accounting rate is divided evenly 50-50 between U.S. and foreign carriers for U.S.-inbound and outbound traffic so that inbound and outbound settlement rates are identical ("symmetrical settlement rates").[26] In addition, the "No Special Concessions" rule and certain filing requirements serve as safeguards against non-price discrimination and reinforce the ISP conditions.[27] Over time, the ISP and related

[24] Of the 16 routes, 11 routes (representing slightly less than 31 percent of U.S -outbound minutes) were also approved as ISR routes.

[25] *See NPRM,* 17 FCC Rcd at 19956-60, ¶¶ 2-6. The ISP was formerly termed the Uniform Settlements Policy, or USP. The USP initially applied to telegraph and telex services and evolved through Commission decisions and practices. The intent of the USP was to ensure that U.S. carriers were treated fairly and that U.S. customers received the benefits that result from the provision of international services on a competitive basis. Among other things, the policy required uniform accounting rates and uniform terms for sharing of tolls. *See, e.g., Mackay Radio and Telegraph Co.,* 2 FCC 592 (Telegraph Committee 1936), *aff'd sub nom Mackay Radio v FCC,* 97 F 2d 641 (D.C. Cir. 1938) (In the 1936 decision, the Commission denied an application for Section 214 authority to serve Norway because the settlement terms would have permitted the Norwegian carrier to "whipsaw," or engage in anticompetitive behavior against, U.S. carriers by manipulating traffic flows and retaining a greater percentage of the accounting rate.); *Modifications of Licenses in the Fixed Public and Fixed Public Press Services,* 11 FCC 1445 (1946); *Mackay Radio and Telegraph Company,* 25 FCC 690 (1951), *rev'd on other grounds sub nom. RCA Communications, Inc v FCC,* 210 F.2d 694 (D.C. Cir. 1952), *vacated and remanded,* 346 U.S. 86 (1953); *TRT Telecommunications Corp.,* 46 FCC 2d 1042 (1974). In 1986, the Commission termed the USP the "ISP" and extended its application to International Message Telephone Service (IMTS) in response to significantly greater reported instances of "whipsawing." The Commission also streamlined the filing of accounting rate modifications and chose not to apply the ISP to enhanced services. *See ISP Order,* 51 Fed. Reg. 4736; *modified in part on recon.,* Order on Reconsideration, 2 FCC Rcd 1118 (1987) (*ISP Recon Order*); Further Reconsideration, 3 FCC Rcd 1614 (1988) (*ISP Further Recon*)

[26] 47 C.F.R. § 43.51 (2002). *See NPRM,* 17 FCC Rcd at 19957, ¶ 3.

[27] 47 C.F.R. § 63.14 (2002). Generally, special concessions between U.S. and foreign carriers with market power pose an unacceptable risk of anticompetitive harm in the U.S.-international services market, whereas, special concessions between U.S carriers and foreign carriers that lack market power may permit carriers to offer innovative services that result in lower rates to U.S. customers. *Policies on Foreign Participation in the U S. Telecommunications Market,* Report and Order and Order on Reconsideration, IB Docket Nos 97-142 and 95-22, FCC 97-398, 12 FCC Rcd 23891 at 23957-65, ¶¶ 156-170 (1997)(*Foreign Participation Order*). The Commission further narrowed the application of the "No Special Concessions" rule in the *ISP Reform Order* by partially removing the rule as it applies to terms and conditions *under which traffic is settled,* including the allocation of return traffic or "grooming" arrangements, on a route where the Commission removes the ISP. For example, the "No Special Concessions" rule still applies to terms and conditions unrelated to the settlement of traffic, such as interconnection of international facilities, private line provisioning and maintenance, and quality of service on routes where the ISP is lifted. *See 1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and*

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safeguards have proven successful in increasing the effectiveness of the Commission's pro-competitive policies and in protecting the public interest.[28]

13. As the U.S.-international market and foreign markets have become more competitive, the Commission has become progressively more deregulatory in its application of the ISP. As the Commission recognized in the 1999 *ISP Reform* proceeding, the restrictions of the ISP that are intended to protect the public interest may in reality hinder the ability of U.S. carriers to negotiate more cost-based settlement rates and efficient terms in their agreements with foreign carriers.[29] Indeed, because the ISP focuses on creating a unified bargaining position for U.S. carriers, it denies U.S. carriers the ability to respond quickly to changing conditions in the global telecommunications marketplace by preventing carriers from negotiating responsive and flexible agreements with individualized rates and terms.[30]

14. The Commission sought to address these concerns regarding the potential problems with the ISP structure by looking to where the benefits of the ISP structure appeared to be outweighed by the potential harms and regulatory burdens. As a result, the Commission lifted the ISP for agreements involving foreign carriers that did not have market power or on routes where the termination rates for U.S.-international services were below a certain threshold.[31] The Commission found that in these cases, market forces were sufficiently competitive to justify removing the strict requirements of the ISP on U.S. carriers.[32] Consequently, under our current rules, there are certain circumstances under which U.S. carriers can engage in flexible, commercial arrangements with foreign carriers with market power on both U.S.-WTO and U.S.-non-WTO routes[33] through either International Simple Resale (ISR) arrangements or arrangements wholly outside the ISP. For a carrier to offer ISR on a WTO-member route, the Commission must find that carriers have demonstrated that at least 50 percent of the traffic is being settled at or below the relevant benchmark level. On a non-WTO route, the Commission must find that carriers have demonstrated that at least 50 percent of the traffic is being settled at or below the relevant threshold and that U.S. carriers have equivalent opportunities to compete in that market. Because the telecommunications markets in many of the non-WTO countries have not yet been fully liberalized, few non-WTO countries are able to meet this high standard.[34]

15. Alternatively, a carrier can seek to have the ISP completely removed from a route

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Associated Filing Requirements, IB Docket 98-148 and 95-22, CC Docket 90-337 (Phase II), Report and Order and Order on Reconsideration, FCC 99-73, 14 FCC Rcd 7963 (1999) (*ISP Reform Order*) at 7994-98, ¶¶ 82-94. *See also Rules and Policies on Foreign Participation in the U S Telecommunications Market*, Order on Reconsideration, IB Docket No. 97-142, 15 FCC Rcd 18158 (2000)(*Foreign Participation Recon Order*).

28 *See NPRM,* 17 FCC Rcd at 19970-71, ¶ 23-25; MCI Comments at 2; Telecom Italia Comments at 5.

29 *See, e g., Flexibility Order,* 11 FCC Rcd 20069-73, ¶13-27; *ISP Reform NPRM,* 13 FCC Rcd 15320, ¶¶ 9-11; *ISP Reform Order,* 14 FCC Rcd 7972-73, ¶¶ 24-28.

30 *NPRM*, 17 FCC Rcd at 19968, ¶ 21

31 *See ISP Reform Order*, 14 FCC Rcd at 7982, ¶ 52.

32 *See ISP Reform Order,* 14 FCC Rcd at 7982-83, ¶ 52-53.

33 For the purposes of this Order, the term "WTO route" refers to a route to a country that is a member of the World Trade Organization (WTO).

34 *See* 47 C.F.R. § 63.16. *See also* AT&T Comments at 17; AT&T Reply at 5.

by demonstrating that at least 50 percent of the traffic is being settled at least 25% below the relevant benchmark level. To make this demonstration, the carrier must file a petition for declaratory ruling that at least 50 percent of U.S.-billed traffic on the route is terminated in the foreign market at rates that are 25 percent below the benchmark rate, or less.[35] Carriers must include appropriate supporting documentation demonstrating that the route qualifies for exemption from the ISP. The Commission issues a public notice upon the filing of such a petition, and may, in each case, determine an appropriate deadline for filing comments. In some cases, a carrier seeking to make a demonstration that 50% of traffic on a route is being settled at or below the benchmark rates must rely on filings submitted by other carriers.[36]

16. In October 2002, the Commission initiated this proceeding to determine, among other things, if it is timely to revise the current standards for the application of the ISP. The Commission sought comment in the *NPRM* on the effectiveness of its current application of the ISP to U.S. carrier arrangements with foreign carriers and on the current competitive status of the market.[37] The Commission also sought comment on whether the ISP is precluding further gains to U.S. consumers, and to what extent, if any, the ISP is needed.[38] Further, the Commission asked for information on whether its policies and rules support or discourage competition or hinder U.S. carriers' ability to achieve more cost-based rates. The Commission also sought comment in the *NPRM* on whether the ISP remains important for particular routes, countries, or types of countries in light of outstanding competitive concerns regarding "whipsawing" and anticompetitive practices generally.[39]

17. In particular, the Commission sought comment on three specific proposals to reform the application of the ISP to U.S.-international routes: (1) removing the ISP from routes approved for the provision of ISR;[40] (2) removing the ISP from benchmark-compliant routes;[41] and (3) removing the ISP from all U.S.-international routes.[42] Although the Commission had previously considered and rejected similar proposals in its 1999 *ISP Reform Order*,[43] in this proceeding, the Commission sought comment as to whether it should revisit its conclusions with respect to these proposals in light of recent experience with current regulatory structure and changes in the global telecommunications market and other factors.

18. *Current Regulatory Structure*. In reviewing the experience the Commission has gained in implementing the benchmarks policy and the current ISP and ISR policies, a number of relevant facts come to light. As an initial matter, the Commission's experience with alternate accounting rate structures is considerably greater now than at the time of the 1999 *ISP Reform Order*. At that time, the Commission had only modest experience with the exchange of

35 *ISP Reform Order*, 14 FCC Rcd at 7988, ¶ 65, 47 C F.R § 43.51(e)(3) and referenced Note.

36 AT&T Comments at 14; CompTel Reply at 3

37 *See NPRM*, 17 FCC Rcd at 19971, ¶ 27

38 *See NPRM*, 17 FCC Rcd at 19970-71, ¶ 25.

39 *See NPRM*, 17 FCC Rcd at 19971, ¶ 27.

40 *See NPRM*, 17 FCC Rcd at 19973-74, ¶¶ 34-35

41 *See NPRM*, 17 FCC Rcd at 19973, ¶¶ 32-33

42 *See NPRM*, 17 FCC Rcd at 19972-73,¶¶ 30-31.

43 *See ISP Reform Order*, 14 FCC Rcd at 7981-88, ¶¶ 50-65.

international traffic outside the ISP. Prior to the adoption of the *ISP Reform Order*, the Commission permitted ISR and accounting rate flexibility in limited circumstances. Only approximately twenty routes were ISR-approved[44] and, although permitted under certain circumstances, few if any other types of flexible accounting rate arrangements were established on any other route.[45] Subsequent to the *ISP Reform Order*, however, the Commission substantially approved more routes for ISR or flexible accounting rate arrangements. The number of ISR routes expanded to 33 by the end of 2000; to 64 routes by the end of 2001; and to 81 routes by the end of 2002. Currently, 91 routes (out of approximately 203 routes world-wide) are ISR-approved, and these routes represent approximately 65 percent of U.S-outbound traffic.[46] Moreover, during the last few years, the countries approved for ISR have expanded from a small set of highly developed, mostly European, economies to include many developing economies throughout Asia, South America, and Africa. For reasons described elsewhere in this Order, the number of routes exempt from the ISP has grown more modestly, and currently includes 16 routes (11 of which are ISR-approved), representing approximately 31 percent of U.S.-outbound traffic. As a result of these developments, the Commission has gained experience with alternate accounting rate structures over the last several years and has expanded its knowledge from that gleaned from a few routes with only a small share of international traffic to that derived from many routes comprising the majority share of U.S. outbound traffic.

19. Under our existing structure, we have retained the ISP as an option on ISR-approved routes. On ISR-approved routes, it is our experience that the ISP has effectively been superceded by the more flexible ISR structure. We are aware of no instances where carriers that were allowed to negotiate ISR arrangements opted to file settlement agreements as ISP agreements. Nor are we aware of any circumstance in which carriers on a route approved for ISR opted to pursue an agreement under the ISP. Thus, for all intents and purposes, U.S. carriers on ISR-approved routes no longer negotiate the terms and conditions for the exchange of international traffic under the restrictions of the ISP.

20. The Commission's experience with ISR-approved routes provides insight into the effect that removing the ISP likely would have on settlement rates, because ISR-approved routes are effectively operating outside the ISP. The key fact is that settlement rates have continued to decrease substantially once a route has become ISR-approved. As shown in Appendix C, we divided the 91 routes that are currently ISR-approved into six cohorts[47] based on the year in which they were approved for ISR. The first cohort comprises routes approved in 1998 or earlier; the second cohort comprises routes approved in 1999; the third cohort comprises routes approved in 2000; and so forth, until 2003. Using historical data from the Commission's annual

[44] *See* "International Simple Resale" listing ISR-Approved Countries and the year in which they were approved, at the International Bureau's website at www.fcc.gov/ib/pd/pf/isr.html. (*ISR -Approved List*)

[45] For instance, the Commission adopted rules permitting flexibility in our accounting rate policies in the 1996 *Accounting Rate Flexibility Order* and allowed U.S. carriers to negotiate alternative international settlement payment arrangements that deviated from the ISP with any foreign correspondent in a country meeting the effective competitive opportunities (ECO) test. *See Regulation of International Accounting Rates*, Docket No CC 90-337 Phase II, Fourth Report and Order, FCC 96-459, 11 FCC Rcd 20063 (1996) (*Accounting Rate Flexibility Order*).

[46] *See* ISR-Approved List, Section 43.61 annual report.

[47] For the purposes of this Order the term "cohort" refers to a group of individual routes having been approved for ISR during a particular timeframe.

International Telecommunications Data report, we computed the change in the settlement rate[48] for each route over the relevant time period and the average annual change for each cohort.[49] For routes approved for ISR during or prior to 1998, the average annual decrease in rates from 1998 to 2002 was 12 percent. For routes approved for ISR during 1999, the average annual decrease in rates from 1999 to 2002 was 13 percent. For routes approved in 2000, the average annual decrease in rates from 2000 to 2002 was 19 percent. Finally, for routes approved in 2001, the average annual decrease in rates from 2001 to 2002 was 25 percent. It is not possible to determine the change in rates for the 2002 or 2003 cohorts because the latest year for which data is available is 2002. Thus, for all categories for which we have data, settlement rates decreased robustly after approval for ISR. Moreover, for the 91 ISR-approved routes, there were only seven routes where settlement rates did not decrease.

21. *Liberalization of Foreign Markets.* We believe that increasing liberalization in many foreign markets has been a factor in the lower settlement rates we have seen in the past few years. Recent reports on the state of competition in foreign telecommunications markets show decreasing costs for termination of international traffic and increased carrier participation in many markets.[50] According to *Telegeography*, the market share of non-incumbent international carriers worldwide has grown from approximately 9.5 percent in 1997, when we adopted our benchmark policies, to 31.8 percent in 2002, the latest year for which data are available.[51] Additionally, *Telegeography* surveyed the market shares of international carriers operating in 38 countries (including the United States) from 1989 to 2002. As of 2002, there was at least some competition in the international telecommunications services market in each of the 38 countries, *i.e.*, in no case did any international carrier have 100 percent of the traffic. In 19 of the 38 countries, however, competition began only in 1997 or later (the first year the WTO Basic Telecommunications Agreement took effect).[52] According to the Organisation for Economic Co-Operation and Development (OECD), this transition to competitive markets has led to lower prices for many telecommunications services in OECD countries, which has brought increased benefits to users and spurred increased economic development in many countries through lower

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[48] The computed statistic includes any surcharges, including mobile termination surcharges and operator handling surcharges, and is most accurately characterized as "the payout to foreign carriers per U.S. outbound minute."

[49] In order to prevent large-volume routes from skewing the data in each category, we calculated simple averages for each category, effectively giving each route in a given category equal weight.

[50] Commission of the European Communities, Eighth Report From the Commission on the Implementation of the Telecommunications Regulatory Package, European Telecoms Regulation and Markets 2002 (rel. Feb. 12, 2002) (*EC Eighth Report*); Organisation for Economic Co-Operation and Development, OECD Communications Outlook 2003 (rel. June 2003) (*OECD 2003 Communications Outlook*); Organisation for Economic Co-Operation and Development, Working Party on Telecommunication and Information Services Policies, Trends in International Calling Prices in OECD Countries (rel. Dec. 2003) (*OECD Trends Report*).

[51] *TeleGeography 2004. Global Traffic Statistics and Commentary*, TeleGeography, Inc. (November 2003) (*Telegeography*) at 64

[52] *Telegeography* at 66-72. The countries include Austria, Belgium, Brazil, Colombia, France, Germany, Greece, Hong Kong, Ireland, Israel, Italy, Mexico, Netherlands, Nigeria, Norway, Singapore, Spain, Switzerland, and Taiwan.

costs of telecommunications services and improved levels of service.[53]

22. Many U.S. carriers conclude in this proceeding that the U.S.-international market is sufficiently competitive that we should modify the ISP.[54] In addition, foreign carriers that filed comments in this proceeding note the effects increased competition has had on their domestic and regional telecommunications markets.[55] Telecom Italia argues that the liberalization process in Europe "has been completed and is producing significant choice between operators and reduction of tariffs" and notes that there are more than 900 licensed operators in Europe and that prices for international calls have decreased over 40 percent since 1998, while in some European countries prices have decreased by 65 percent.[56] Other commenters also note that the liberalization policies of foreign governments have complemented our policies to accelerate competitive entry in many countries.[57]

23. *"Least-Cost" Routing and Technological Advances*. Technological developments since the mid-1990s, along with the Commission's 1997 *Benchmarks Order* and liberalization in foreign markets, appear to have placed pressures on bilateral settlement rates on many routes to move toward cost.[58] Commenters note that where carriers are unable to reach agreements to

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[53] *OECD 2003 Communications Outlook* at 17. In fact, at this time only one Organisation for Economic Co-operation and Development (OECD) country still has a monopoly telecommunications market structure. *OECD 2003 Communications Outlook* at 28 (noting Turkey as the sole country, as of the report's publication date, to have such a market structure); *OECD Trends Report* at 4 (noting that "[i]nternational telecommunications carriers now offer many types of discount options for users as a consequence of market liberalization and [the] development of competition. ...The OECD average one minute rate with discount options in 2003 is 74% lower than the OECD average standard rate in 1993.") In the European Community (EC) markets, the number of local operators providing residential services doubled between 2001 and 2002, with 50 new carriers providing infrastructure-based fixed access operations. *EC Eighth Report* at 4. This level of competition has resulted in consumers in each of the EU member states having a choice of providers for long-distance and international calls. *EC Eighth Report* at 10. Furthermore, consumers in the EC have benefited from a 4 percent drop in international call prices during the same period *EC Eighth Report* at 4. According to these reports, it appears that, while the telecommunications market in certain foreign countries is becoming increasingly competitive, outstanding competition issues remain, including market access concerns and the regulatory implementation of "cost-orientation" and non-discrimination principles. *EC Eighth Report* at 6; *OECD 2003 Communications Outlook at* 29-30.

[54] *See, e g* , AT&T Comments at 11-12; Verizon Comments at 1; MCI Comments at 1; CompTel Reply at 1-2; Verizon Reply at 1; MCI Reply at 1; AT&T Reply at 1; Letter from Nancy J. Victory, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Michael K. Powell, Chairman, Federal Communications Commission, Docket Nos. 02-234 and 96-261 at 1 (dated Aug. 5, 2003) (NTIA Aug. 5, 2003 *Ex Parte* Letter)

[55] Telecom Italia Comments at 4; Telefonica Comments at 4; Telecom Colombia Comments at 1; C&W Comments at 8-9.

[56] Telecom Italia Comments at 4 (citing the European Commission 8th Implementation Report of the Telecommunications Regulatory Package, *available at* http://europa.eu.int/information_society/topics/telecoms/implementation/annual_report/8threport/index_en.htm).

[57] C&W Comments at 7-8. *See also* Sprint Comments at 3 (noting that its "current experience is that there are now more ways to terminate international voice telephone calls to a particular destination.") C&W argues that innovative services and wireless substitution will likely continue to erode the dominant position of some foreign carriers C&W Comments at 8

[58] The arbitrage practices known as re-file or re-origination route bilateral traffic through a third country to take advantage of a lower termination rate between the third country and the ultimate destination country. As the Commission has previously noted, these least-cost routing practices have eroded the stability of the bilateral

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achieve acceptable rates, it is often possible to find alternative means to deliver traffic via re-file or re-origination practices that are pervasive in the industry.[59] In the *Benchmarks Order*, the Commission noted that "[l]east-cost traffic routing is an economically rational response to inflated settlement rates and will continue as long as carriers maintain excessive settlements."[60] The use of re-file and re-origination practices by U.S. carriers offers them least-cost routing options that can result in cost benefits to U.S. carriers and customers. Since the adoption of the *Benchmarks Order*, the resale "spot market" for the termination of U.S.-international traffic has grown and appears to be a factor placing downward pressure on termination rates.[61] Moreover, non-traditionally settled U.S.-international traffic such as Voice over Internet Protocol (VoIP) may have a role in foreign carriers lowering their settlement rates.[62] Alternative termination arrangements, however, are not available to all countries and these services are receiving increasing scrutiny from foreign governments. AT&T also argues that VoIP over international routes cannot handle large traffic volumes and these technological advances may have limitations in terms of availability and service quality.[63] The OECD, however, points out that VoIP is providing a lower cost competitive alternative.[64] At this time, although we have no comprehensive data on the extent of development of non-traditional termination arrangements on a global basis, we believe that the use of non-traditional arrangements increasingly will become a factor in a rapidly changing global telecommunications market.

24. *Potential Harms to Competition.* Although lower rates generally exist where U.S. carriers have the flexibility to negotiate arrangements in a competitive market, our experience and the record in this proceeding also show that the potential for anticompetitive practices still exists. These practices can take various forms, even in markets where competition is developing.[65] Several commenters contend that anticompetitive concerns and harms will continue to exist and that the Commission should maintain certain policies to mitigate their effect

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accounting rate system and are economically rational responses to inflated settlement rates. *Benchmarks Order*, 12 FCC Rcd at 19811-12, ¶ 11.

59 MCI Comments at 3; Sprint Comments at 1, 3. *But see* AT&T Comments at 2 (noting that such arrangements do not always provide sufficiently low rates and should not be viewed as a substitute for competition).

60 *Benchmarks Order*, 12 FCC Rcd at 19811-12, ¶ 11.

61 For the purposes of this Order, we consider a "spot market" to be a market in which a commodity, in this case termination services to various foreign countries, or currency is traded for immediate delivery. These services may be provided through auction, or other market mechanisms, organized by a third party to the transaction and delivered at the third party's point of presence through interconnection of buyers and sellers at the third party's switch. Alternatively, suppliers of international termination services may offer such services directly to prospective buyers through commonly agreed interconnection arrangements, without the intervention of a third party.

62 Verizon notes that these alternative arrangements often involve lower costs to terminate traffic. Verizon Comments at 3-4 Verizon characterizes the growth in the non-traditional telecommunications services as "explosive." *Id.*

63 AT&T Comments at 10.

64 *OECD Trends Report* at 29-31

65 We also note that certain arrangements within foreign markets can produce anticompetitive harms against U.S. carriers and customers, such as where there is collusion between a dominant foreign carrier and a group of foreign carriers acting together to set above-cost termination rates.

on U.S. carriers and customers.[66] They cite recent examples of demands by foreign carriers and some governments for rate increases, "whipsaw-type" behavior, or "rate floors" on a number of U.S.-international routes where there is little or no competition on the foreign end.[67] In such markets, the introduction of new technologies and alternative methods of terminating traffic that would otherwise reduce the ability of foreign carriers to engage in anticompetitive behavior are either not available or may be insufficient. Thus, on some routes, including benchmark-compliant U.S.-international routes where settlement rates often indicate responsiveness to global market forces, foreign carriers are able to leverage their market power and require U.S. carriers to pay above-cost settlement rates while paying rates that are closer to cost for termination in the U.S. market.[68]

25. Even in some markets where competition exists, U.S. carriers have confronted unilateral demands for rate increases from incumbent foreign carriers, either acting in concert or pursuant to their government's mandates to raise rates. In some cases, U.S. carriers have been threatened with network disruption or other anticompetitive harm if they do not agree to demands for increases. The Commission has been presented with evidence that actions by foreign carriers in certain markets have affected negatively the competitive status of some U.S.-international routes. In 2003, the International Bureau found several Philippine carriers "whipsawed" U.S. carriers by disrupting circuits on the U.S.-Philippine route of those carriers that did not agree to the settlement rate increase demanded by the Philippine carriers. The Bureau issued an order in response to petitions filed by U.S. carriers, requiring all U.S. carriers providing facilities based services to suspend payments to the Philippine carriers for terminating services until those carriers restored U.S. carriers' circuits, and also removing the Philippines from the Commission's list of ISR routes.[69] Cases such as this demonstrate how foreign carriers

[66] AT&T Comments at 17-22, MCI Comments at 1-2; MCI Reply at 4-10; CompTel Reply at 2; Sprint Comments at 3-6; City of Laredo Reply at 4-5. AT&T argues that most foreign countries still have not opened their international telecommunications markets and only 50 of the 203 U.S.-international routes have international telephone service competition. Thus, AT&T states that more than three out of four U.S.-international routes are still under monopoly control at the foreign end. AT&T Comments at 7.

[67] AT&T Comments at 2-3; MCI Comments at 4; Sprint Comments at 5. AT&T notes "that in recent months a growing number of dominant foreign carriers and foreign governments have sought to recapture lost U.S. subsidies by increasing rates on ISR routes." AT&T Comments at 19. AT&T argues that U.S. carriers cannot avoid rate increases in monopoly markets because they cannot send their traffic to other carriers. Furthermore, AT&T argues that "U.S. carriers also cannot avoid rate increases in supposedly competitive markets where a government-mandated rate floor is applied to all inbound international calls, where foreign carriers engage in concerted action to charge higher rates, or where there are other restrictions on competition." AT&T Reply at 11-12. By way of example, MCI notes that, on some ISR-approved routes, 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." MCI Comments at 4. Sprint further argues that, to date, the rate floors have, in fact, exceeded the prevailing commercially established rate. Sprint Comments at 5-6, MCI Comments at 4, 9-11; CompTel Reply at 4; AT&T Reply at 4, 9.

[68] Regarding the market power of foreign carriers, the Commission determined that, if a foreign carrier possesses less than 50 percent market share in each of the three relevant input markets, it presumptively lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market. *See* 47 C.F.R. § 43.51, Note 3; *ISP Reform Order*, 14 FCC Rcd at 7978-79, ¶ 43 The three relevant markets are (1) international transport facilities or services, including cable landing station access and backhaul facilities; (2) inter-city facilities or services; and (3) local access facilities or services on the foreign end of a particular route.

[69] The International Bureau lifted the suspension of payments on the Philippine carriers that ceased blocking traffic to U.S. carriers. *See AT&T Circuits to the Philippines Reactivated by Digital Telecommunications Philippines, Inc and Bayan Telecommunications Company: Suspension Lifted on U S Carrier Payments to These*

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on routes where we have allowed greater flexibility can continue to exercise market power for the purpose of raising settlement rates above competitive levels.

B. Discussion

26. Many commenters believe that the Commission's current application of the ISP is overly broad for most U.S.-international routes, and support lifting the ISP on benchmark-compliant routes.[70] Some also argue that, where liberalization processes are incomplete or alternative means of terminating traffic are limited,[71] there is a continuing need for the ISP because U.S. carriers continue to confront the public interest harms the ISP was originally designed to address.[72] These commenters argue that the ISP remains necessary to prevent anticompetitive harm from foreign carriers with market power.[73] In addition, representatives of other governments sharing a common interest in promoting lower calling rates for telecommunications customers in their country, likewise, believe that relaxation of the current criteria for applying the ISP will bring further benefits globally.[74]

27. After considering the record and the alternatives proposed in the *NPRM*, we conclude that it would be in the public interest to modify our ISP policy by removing the ISP requirements from all U.S.-international routes on which U.S. carriers have negotiated benchmark-compliant rates. We agree with commenters supporting this approach that removing the ISP requirements from benchmark-compliant routes would simplify the Commission's current regulatory regime and would serve the purpose of expanding the opportunity for flexible, commercial arrangements on more routes to the benefit of U.S. competition and U.S. customers.[75] This modification will eliminate the need for carriers to seek ISR approval and will maximize the number of routes on which carriers will be free to negotiate market-based settlement agreements by eliminating the distinction between WTO and non-WTO routes for purposes of the ISP.

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Carriers, DA 03-1030 (rel. March 31, 2003) (Int'l Bur. 2003), *AT&T and MCI Circuits to the Philippines Reactivated by Smart. Suspension lifted on U S Carrier Payments to Smart*, DA 03-3664 (rel. November 17, 2003) (Int'l Bur 2003); *AT&T and MCI Circuits to the Philippines Reactivated by PLDT: Suspension lifted on U.S. Carrier Payments to PLDT*, DA 04-63 (rel. January 15, 2004) (Int'l Bur. 2004); *AT&T and MCI Circuits to the Philippines Reactivated by Globe Suspension Lifted on U.S Carrier Payments to Globe*, DA 04-162 (rel. January 26, 2004) (Int'l Bur 2004); *Suspension Lifted on U S Carrier Payments to Subic*, DA 03-38 (rel. February 12, 2004) (Int'l Bur. 2004).

70 AT&T Comments at i, 11-17; MCI Comments at 5, C&W Comments at 10-11, CompTel Reply at 2; AT&T Reply at 1-2; MCI Reply at 2-4.

71 *See, e g.*, AT&T Comments at 2-3; Sprint Comments at 4-6; C&W Comments at 10-12; CompTel Reply at 2, AT&T Reply at 1-2

72 *See* AT&T Comments at 21-23; NTIA Aug 5, 2003 *Ex Parte* Letter at 2; MCI Comments at 2, 4. As we discuss below in our consideration of the specific proposals for reform of the ISP, some commenters believe no application of the ISP is warranted.

73 *See, e g.*, CompTel Comments at 2; MCI Comments at 4.

74 *See* EC Reply at 1.

75 Commenters generally support this approach so long as adequate safeguards are in place to address potential "backsliding" and anticompetitive harms *See, e g*, AT&T Comments at i, 12; AT&T Reply at ii, 2-4; CompTel Reply at 1-2, 5, C&W Comments at 2-3, 11, 15

28. Lifting the ISP and related filing requirements on benchmark–compliant routes will remove regulatory requirements that we believe are no longer necessary and result in a simplified standard that should expedite the process by which carriers can respond to market conditions and negotiate more commercial arrangements.[76] The standard will eliminate many of the inefficiencies in the existing process that thwart our ultimate goal of promoting competition through market-based solutions and unnecessarily delay the benefits to U.S. customers of market-based arrangements. Specifically, lifting the ISP on these routes will provide incentive to U.S. carriers to negotiate aggressively with foreign incumbents because U.S. competitors will no longer be required to share the gains of such negotiation with competitors in the form of identical contracts. Also, lifting the ISP will eliminate the proportionate return and symmetric rate requirements that serve to preserve the market positions of carriers to the detriment of new entrants.[77] Finally, lifting the ISP may promote greater retail price competition among U.S. carriers by introducing uncertainty about rivals' international termination costs, a significant component of retail costs.[78] Moreover, unlike other alternatives set forth in the *NPRM*,[79] this approach will remove the problems associated with carriers having to rely on other U.S. carrier demonstrations. Removing the ISP on benchmark-compliant routes will provide U.S. carriers with the ability to respond rapidly to fluctuations in a competitive market through commercial agreements, which, based on the experience of recent years, should place additional downward pressures on termination rates.[80]

29. By this Report and Order, we expand our list (attached as Appendix D) of routes that have been exempted from the ISP to include those routes that have been approved for ISR.[81] We also attach, as Appendix E, a list of routes that we believe, based on filings at the Commission, to be benchmark-compliant. All interested parties will have 30 days from the effective date of this Order to file comments or petitions on those routes, and 15 days to file responses. At the end of that period, we will remove the ISP for all routes for which no reasonable concerns have been raised. We will address those routes on which concerns have been raised after full review of the issues raised.

30. Those routes that have not yet met the benchmarks standard will be added to the list once a showing is made that they have become benchmark-compliant. In order to make a showing that a route is benchmark-compliant, a U.S. carrier would need to show that it had

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[76] *See* MCI Reply at 3. *See also* AT&T Reply at 4; Letter from Douglas Schoenberger, Counsel, AT&T to Marlene Dortch, Secretary, FCC, IB Docket No. 02-234, 96-261, at 2-3 (dated Oct. 22, 2003)(AT&T Oct. 22, 2003 *Ex Parte* Letter).

[77] *See* Verizon Comments at 4; *NPRM*, 17 FCC Rcd at 19968, ¶ 21; *ISP Reform Order*, 14 FCC Rcd 7972-73, ¶¶ 25-26.

[78] *See ISP Reform Order*, 14 FCC Rcd 7973, ¶¶ 27-28.

[79] *See NPRM*, 17 FCC Rcd at 19972-74, ¶¶ 30-35.

[80] *See* AT&T Comments at 13; *see also* C&W Comments at 11 (stating that the retention of the ISP for benchmark-compliant routes risks undermining the competitive opportunities for U.S. carriers and, in its experience, once a U.S.-international route is approved for ISR arrangements, termination rates often drop ten percent, and in some cases as much as fifty percent).

[81] We will revise our list of routes exempted from the ISP on the effective date of this rule change. The revised list will be posted, as is the current list, at www.fcc.gov/ib. Should we make changes to the list of routes approved for ISR after the release of this Order, any such revision will be reflected in the list we post on the effective date of this Order.

entered into a benchmark-compliant agreement with the carrier with market power on a route.[82] This would be demonstrated through an effective accounting rate modification filed pursuant to Section 64.1001 of the Commission's rules. As the ISP provides that foreign carriers offer the same rates to all U.S. carriers, a showing that one U.S. carrier has negotiated a benchmark-compliant rate with the foreign carrier with market power triggers the ability for all other U.S. carriers to take the same rate. Once the foreign carrier with market power is under an obligation to provide services at benchmark rates to all U.S. carriers, we find it reasonable to conclude that the concerns underlying our use of the ISP on that route have been sufficiently alleviated to lift the ISP.[83] Upon receipt of an accounting rate modification, pursuant to Section 64.1001, that the Commission deems to be benchmark-compliant, the Commission will issue a public notice announcing its intention to remove the ISP from the route in question and provide a thirty day public comment period.

31. Under this new standard, our existing ISR policy and filing requirements associated with it become unnecessary. Consistent with our determinations in this Report and Order, we revise Section 43.51 of the Commission's rules and eliminate the Commission's ISR policy as contained in Section 63.16 of the Commission's rules, as well as other rule references to the Commission's ISR policies.[84]

32. We find that the concerns expressed by the Commission in the 1999 *ISP Reform Order,* when it rejected a proposal to remove the ISP from benchmark-compliant U.S.-international routes, are no longer as compelling as they were at the time.[85] At that time, the Commission had just adopted its new benchmark policy. The transition periods incorporated

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82 We decline to adopt AT&T's proposed standard to accept benchmark-compliance solely on the submission of a letter or affidavit by a U.S carrier that it has reached a benchmark-compliant rate. Such a demonstration would not ensure that the Commission or objecting parties will have the opportunity to comment or object to proposed rates for a route in the event of anticompetitive harm against other U.S. carriers, as Section 64.1001 of the Commission's rules, 47 C.F.R. § 64.1001, currently provides.

83 In our 1999 *ISP Reform Order*, we limited application of the ISP to foreign carriers with market power on the principle that those carriers that do not have market power have minimal opportunity to engage in the types of anticompetitive behavior from which the ISP is intended to protect. *See ISP Reform Order*, 14 FCC Rcd at 7971-73, ¶¶ 21-30. Consequently, a determination that the foreign carrier with market power has agreed to rates that are benchmark-compliant is sufficient to determine that the route is benchmark-compliant. *See* 47 U.S.C. § 214; 47 C.F R. § 63.18.

84 *See* Appendix B. We note that our actions in removing the ISP from certain routes and elimination of the ISR policy does not disturb the requirement on U.S. carriers, contained in Section 214 of the Communications Act and its implementing rules to obtain appropriate authorization prior to providing U.S.-international services.

85 *See ISP Reform Order*, 14 FCC Rcd at 7981, ¶ 50. We note that the Commission also previously considered and rejected the removal of the ISP from ISR-approved routes in its 1999 *ISP Reform Order*. At the time, while finding significant merit in the proposal to remove the ISP from routes already approved for ISR, the Commission expressed continuing concern about the harmful effects of "one-way bypass" or other market power abuses. The Commission determined that a standard that requires the showing of a settlement rate at least 25 percent below the relevant benchmark for at least 50 percent of the U.S.-billed traffic on a route would more effectively protect U S. customers as the benchmark rates are still above-cost and such a standard would provide incentives to foreign carriers to agree to more cost-based rates. Moreover, the Commission rejected adopting a standard that restricts the routes eligible for non-ISP agreements to routes to and from WTO members, as the ISR policy makes such a distinction in its criteria for approval. The Commission determined such a distinction would not likely be useful as an incentive to encourage foreign countries to join the WTO or otherwise address anticompetitive concerns if competitive market forces are demonstrated through lower settlement rates. *See ISP Reform Order*, 14 FCC Rcd at 7982-85, ¶¶ 53-58.

into the benchmarks process had not yet been completed. In adopting the benchmarks policy, the Commission was concerned that because benchmark rates were set at levels that were considerably above-cost, foreign carriers would be able to take advantage of the differential to thwart competition among U.S. carriers, ultimately preventing the benefit of competitive rates from reaching U.S. customers. The Commission also was concerned that lifting the ISP on benchmark-compliant routes could enable a foreign carrier with market power to exercise its market power to evade the Commission's benchmark settlement rates or to engage in one-way bypass that would raise the effective rate paid by U.S. carriers to terminate traffic in the foreign market.[86] At that time, there was not a compelling case that the benefits of lifting the ISP outweighed the risks and, as a result, the Commission was obligated to exercise necessary caution in modifying its ISP policy.

33. Now, having completed all the transition periods in the benchmark process, we have the opportunity to reassess our views in light of our experience since the Commission's 1999 *ISP Reform Order*. As discussed above, increased liberalization of foreign markets,[87] the emergence of resale "spot" markets, least-cost routing mechanisms, and new technologies appear to be placing competitive pressures on many foreign carriers to agree to rates that are closer to cost.[88] Indeed, the increasing availability of new ways to terminate traffic reduces our concern about the exercise of foreign market power and one-way bypass. To the extent, however, that that U.S. carriers confront specific instances of anticompetitive conduct or other structural impediments that distort or harm competition, we find that more targeted safeguards may effectively achieve the same purposes of the ISP to prevent anticompetitive harm without also broadly prohibiting the benefits of more flexible agreements to U.S. competition and U.S. customers.

34. Sprint points out that the benchmark rates currently in effect are still significantly above-cost, and raise the concern that removing the ISP from benchmark-compliant routes would provide a disincentive for foreign carriers to agree to rates below the current benchmark levels.[89] While we believe that benchmarks can be a useful threshold for estimating when it is appropriate to remove the ISP policy from a route, the two policies are, nevertheless, separate. The ISP is not intended as a tool to use to promote cost-based rates. The Commission created the ISP policies to protect U.S. carriers from discriminatory behavior such as whipsawing. The ISP policy is not structured to provide an incentive to foreign carriers to lower rates to cost-based levels. Although the ISP has been in place for decades, rates on ISP routes remained at or near historically high levels until the mid-1990's when the WTO and benchmarks policies (which were geared more directly at lowering rates) were instituted. While we are aware that some foreign carriers and foreign governments have used benchmarks as a justification to raise rates, we do not believe that leaving the ISP in place on benchmark-compliant routes would have any

86 *ISP Reform Order*, 14 FCC Rcd at 7982, ¶ 53

87 *See* Telecom Italia Comments at 4 (noting the increased liberalization in Europe and South American countries).

88 The Commission's international regulatory policies, the increased level of liberalization of foreign markets, average lower international termination rates, the emergence of resale "spot" markets for wholesale capacity that may complement or substitute for bilateral carrier arrangements, and the development of new technologies have benefited U.S. customers and have reduced or removed incentives for foreign carriers to engage in anticompetitive behavior. *See, e.g.,* AT&T Comments at i, 1-2, C&W Comments at 7-8; Sprint Comments at 3.

89 *See* Sprint Comments at 10-11

realistic effect on preventing foreign carriers or governments from setting or raising rate floors. Consequently we are not persuaded by Sprint's arguments against lifting the ISP from benchmark-compliant routes.

35. Because we find that lifting the ISP from routes on which carriers have negotiated benchmark-compliant agreements will maximize the number of routes on which carriers will be permitted to negotiate commercial arrangements, we decline to adopt the alternative that would lift the ISP only for routes approved for ISR.[90] In addition to retaining the inefficient ISR-approval process described above, that alternative would maintain the distinction between WTO and non-WTO routes, limiting the number of routes on which the ISP would be lifted.[91] A more restrictive approach that limits the opportunity for more flexible commercial arrangements would not serve the Commission's larger policy goal of achieving greater competition and more cost-based rates for U.S. customers.[92]

36. We also decline to adopt an approach that would remove the ISP from all U.S.-international routes, including non-benchmark-compliant routes. We find that the market is not developed sufficiently to render regulation completely unnecessary on all U.S.-international routes.[93] The record indicates that a significant risk to competition exists on routes where rates are above benchmarks, where liberalization processes are incomplete, or where rates are otherwise not subject to regulatory restraint or market forces.[94] Alternative methods of terminating traffic and technological substitution are not always adequate substitutes or sufficiently ubiquitous to address anticompetitive harm from foreign carriers with market power on all U.S.-international routes.[95] Given that the market works imperfectly and there are many routes that have not been liberalized, regulation on some routes is still necessary.[96] Above-benchmark rates are a reasonable threshold by which we can determine that a route evidences a

90 We note that, in support of its proposal to remove the ISP only from ISR-approved routes, Verizon argues that competitive services should place sufficient downward pressure on U.S.-settlement rates so as to alleviate concerns about the "one-way bypass" and "whipsawing" on ISR-approved routes. Verizon Comments at 4. We agree with MCI that Verizon's assertion "that whipsawing is unlikely on ISR-approved routes" is inaccurate citing circumstances where carriers created a unified bargaining position on an ISR-approved route in order to increase termination rates. MCI Reply at 5. *See also* note 69 and accompanying text.

91 *See infra* note 86 and accompanying text.

92 We affirm the current ISP exemption for U.S. carrier arrangements with foreign carriers that lack market power, as foreign carriers without market power generally cannot engage in anticompetitive behavior. *See NPRM*, 17 FCC Rcd at 19959, ¶ 6. We note, however, that the risk of anticompetitive behavior can still exist. Upon demonstration of such circumstances, including where multiple carriers in a foreign market are under common control or act pursuant to anticompetitive government mandates, the Commission has made clear that its policies regarding foreign market power abuses apply. *See ISP Reform Order*, 14 FCC Rcd at 7973, ¶¶ 31-32. *See also AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of WorldCom, Inc. For Prevention of "Whipsawing" On the U.S.-Philippines Route*, IB Docket No. 03-38, Order, 18 FCC Rcd 3519 (Int'l Bur. 2003) (*Philippines Order*).

93 *See* Sprint Comments at 5; AT&T Reply at 7-8. *But see* ASETA Comments at 1; AHCIET Comments at 4

94 *See* MCI Comments at 6; MCI Reply at 2, AT&T Comments at 25-26.

95 *See* Sprint Comments at 14, AT&T Comments at iv, 2, 9-11(noting that, in several foreign markets, alternative methods of terminating traffic such as VoIP are considered unlawful by foreign governments).

96 Some foreign carriers and organizations argue that the Commission's regulations are ineffective and obsolete considering the current state of competition and liberalization in the global marketplace *See* AHCIET Comments at 4; ASETA Comments at 1, Telefonica Comments at 4.

lack of, or resistance to, market pressures. Neither the Commission's experience nor the record in this proceeding provides sufficient support to conclude that the potential benefits of more flexible, commercial arrangements outweigh the risk to the public interest of removing the ISP from all U.S.-international routes. Instead, the effects of market forces on these routes still appear to be insufficient to prevent potential anticompetitive behavior.

37. We also decline to adopt Sprint's proposal that the Commission establish a standard for removal of the ISP based on wholesale prices available in U.S. spot markets to determine whether the available rates for "commercially meaningful" volumes of services on a U.S.-international route are sufficiently "low."[97] Sprint suggests that the Commission rely on rate information from sources such as resale spot markets and carriers providing wholesale capacity for international services in lieu of the Commission's less timely traffic and revenue data collected pursuant to Section 43.61 of the Commission's rules.[98] Sprint asserts that the Commission could obtain data from the various websites of resale spot markets and confidentially from wholesale carriers and that this approach would conserve both carrier and Commission resources.[99] As for a determination as to what is "low," Sprint argues that low could be defined in several ways, including in terms of existing benchmark rates or a weighted average of rates on routes where the Commission has lifted the ISP.

38. We agree with AT&T that such an approach would place undue reliance upon the existence of wholesale market arrangements that are not well documented and that typically cannot handle a large percentage of U.S. calling to any country and are not available to all U.S.-international routes.[100] Additionally, as MCI points out, Sprint's proposal would be burdensome and difficult to implement, requiring constant monitoring of U.S. carrier websites and trade resources to gather reliable data.[101] We agree that Sprint's proposal, while intended to achieve the benefits of lower rates for U.S. customers, would add unnecessary complexity and uncertainty to our rules and would be administratively cumbersome and problematic in its reliance on limited, proprietary, commercial sources of information for the broad application of our regulatory policies. Instead, we find that the standard that we adopt today for removal of the ISP encourages a more rapid transition to commercial arrangements on benchmark-compliant routes while maintaining targeted safeguards, and better addresses Sprint's, and our, goal of achieving lower, more cost-based termination rates.

IV. COMPETITIVE SAFEGUARDS

A. Background

39. In the *NPRM,* the Commission sought comment on what safeguards, if any, should be continued or implemented if the Commission were to adopt further reforms to the ISP.[102] In particular, the Commission asked for comment on the extent of potential

97 *See* Sprint Comments at 2, 12, n.25.

98 *See* 47 C F.R § 43.61.

99 *See* Sprint Comments at 13.

100 *See* AT&T Reply at 6.

101 *See* MCI Reply at 3.

102 *See NPRM,* 17 FCC Rcd at 19974-77, ¶¶ 36-41

anticompetitive harm to U.S. carriers and consumers that may be associated with the specific alternative proposals to reform the ISP and what safeguards, if any, would be necessary to prevent such harm and protect consumers.[103]

B. Discussion

40. Notwithstanding our decision to expand the opportunity for U.S. carrier negotiations of flexible, market-based arrangements on U.S.-international routes, we conclude that certain safeguards are necessary as a precautionary matter to allow us to address anticompetitive conduct as it arises. While we believe that competitive markets can generally constrain harmful behavior better than regulation, global markets are not fully competitive and the independence and effectiveness of foreign regulators varies. In the absence of full liberalization, an independent regulator, and fully competitive markets, carriers with market power might be free to act anticompetitively, ultimately harming U.S. customers through artificially inflated costs for call termination. In order to fulfill our mandate to protect the public interest, we set forth standards and procedures that will support the ability of parties to initiate complaints of anticompetitive harms as they arise. We also maintain certain safeguards that continue to be necessary to ensure that U.S. customers are protected as we adopt a less regulatory approach with respect to U.S.-international traffic.

1. Basis for Commission Intervention

41. The Commission has broad authority to protect U.S. customers from harms resulting from anticompetitive behavior.[104] The D.C. Circuit recognized in *Cable & Wireless P.L.C. v. FCC*[105] that the Communications Act of 1934 (the Act) gives the Commission jurisdiction over "all interstate and foreign communication by wire or radio ... which originates and/or is received within the United States ...."[106] The Act defines "foreign communication" as "communication from or to any place in the United States to or from a foreign country."[107] In addition to the general regulatory oversight of international communications set forth in Section 2(a), Section 201 of the Communications Act gives the Commission authority to ensure that "all charges, practices, classifications, and regulations for and in connection with" the provision of "interstate or foreign communications by wire or radio" be "just and reasonable."[108] As a result, the Commission has authority to enact and enforce regulations, including the ISP and its related safeguards, to ensure that the accounting rates paid by U.S. carriers are just and reasonable.[109] As its approach to exercising this authority has evolved since the adoption of the ISP, the

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103 *See NPRM*, 17 FCC Rcd at 19974, ¶ 36.

104 *See Benchmarks Order*, 12 FCC Rcd at 19817, ¶ 24.

105 *Cable & Wireless v. FCC*, 166 F.3d 1244 (D.C. Cir. 1999).

106 47 U.S C. § 152(a).

107 47 U.S C. § 153(17)

108 47 U.S.C. § 201(a) & (b) The D.C. Circuit, in *Cable & Wireless. v FCC*, found that accounting rates constitute a "practice" or a "charge" that is "in connection with" the provision of international communications within the meaning of Section 201 *See Cable and Wireless v. FCC*, 166 F.3d at 1231

109 *See id., see also Regulation of International Accounting Rates*, Order on Reconsideration, 7 FCC Rcd 8049, 8052 n.18 (1992)(stating that the Commission may enforce the ISP requirements using whatever mechanisms that are within the Commission's authority to ensure nondiscriminatory accounting rate arrangements).

Commission has sought to ensure that its rules permit U.S. carriers the ability to take advantage of lower termination rates, where available, for the benefit of U.S. customers. Even though we remove the requirements of the ISP on routes that are benchmark-compliant, the safeguards we clarify and adopt in this Order seek to remain consistent with this approach.

42. The Commission's broad authority to act in the public interest includes the ability to respond to carrier-initiated petitions and notifications when addressing anticompetitive harms on individual routes. For example, the Commission has acted on several petitions for waiver of the ISP in cases where U.S. carriers requested to be relieved from its requirements to adopt more flexible settlement arrangements with foreign carriers.[110] In other instances, the Commission has granted carrier-initiated petitions in order to protect U.S. carriers and customers from anticompetitive harm.[111]

43. In order to protect U.S. customers, we adopt certain procedural elements to clarify the process by which parties can request Commission intervention to address specific allegations of anticompetitive conduct. Several commenters to the proceeding support this approach.[112] As MCI notes, anticompetitive behavior may take many forms in which U.S. carriers may interact with foreign carriers abusing market power or a foreign administration compels foreign carriers to act in an anticompetitive manner.[113] Relying primarily on a case-by-case analysis and procedure by which U.S. carriers and other parties may seek relief from anticompetitive conduct on a U.S.-international route, permits us to take into consideration the differences in the state of competition and particular facts on each route.[114]

44. We expect that U.S. carriers whose interests are potentially harmed will have sufficient incentive to file a complaint alleging anti-competitive behavior on a route that will result in harm to U.S. customers. We also will respond to petitions from non-carriers that believe that anticompetitive conduct may be taking place that harm U.S. customers, and we will act on our own motion if we find evidence of market failure. In this respect, we would regard certain actions as indicia of potential anticompetitive conduct by foreign carriers, including, but not limited to: (1) increasing settlement rates above benchmarks; (2) establishing rate floors, even if below benchmarks, that are above previously negotiated rates; or (3) threatening or carrying out circuit disruptions in order to achieve rate increases or changes to the terms and

110 *See, e.g., AT&T Corp., MCI Telecommunications Corp., Sprint, LDDS, WorldCom, Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Peru Re-Applications on Review*, Order on Review, FCC 99-89, 14 FCC Rcd 8318 (1999), *Petition of AT&T Corp for Approval of a Waiver of the International Settlements Policy Regarding Arrangements for Service between the United States and Venezuela*, Report and Order, DA 00-1255, 15 FCC Rcd 9684 (Int'l Bur. 2000); *Sprint Communications Company L.P., Petition for Waiver of the International Settlements Policy to change the Accounting Rate for Switched Voice Service with Chile (Bell South)*, Order, DA 01-2120, 16 FCC Rcd 16387 (Int'l Bur 2001); *GTE Hawaiian Tel International Inc., Petition for Waiver of the International Settlements Policy to change the Accounting Rate for Switched Voice Service with Vietnam*, Order, DA 01-713, 15 FCC Rcd 6838 (Int'l Bur 2001).

111 *See Philippines Order*, 18 FCC Rcd 3536-57, ¶¶ 20-21.

112 *See, e.g.*, C&W Comments at 3, 17; Verizon Reply at 2-3; MCI Comments at iii, 4, 7; MCI Reply at 7.

113 *See* MCI Comments at 7.

114 To the extent anticompetitive behavior occurs on a route where the ISP continues to apply, U.S. carriers may, as has been the case, continue to demonstrate alleged violations of the ISP and seek enforcement remedies

conditions of termination agreements. Each of these types of actions has been demonstrated as a means to disrupt normal commercial negotiations in order to force U.S. carriers to accept above-cost settlement rate increases that would be passed on to U.S. customers, and may require Commission action to protect U.S. customers.

45. We find, in particular, that blockage or disruption of U.S. carrier networks by foreign carriers directly harms the public interest, leads to decreases in call quality or completion and to potential increases in calling prices. Resorting to such retaliatory abuse of market power against U.S. carriers, as opposed to resolving disagreements through commercial negotiations, is unlikely ever appropriate or justified in the public interest and does not benefit the provision of international services to customers in the United States or abroad. As a result, we find that there is a rebuttable presumption of harm to the public interest if U.S. carriers demonstrate in their petitions that they have suffered network disruptions by foreign carriers with market power in conjunction with their allegations of anticompetitive behavior, or "whipsawing."[115]

46. We note Verizon's assertion that, in circumstances where a foreign government has enacted a rate increase, we should focus our regulatory actions on the procedures used by the foreign regulator.[116] It asserts that neither Commission policy nor the International Telecommunications Union (ITU), Institute for Telecommunications Research (ITR), nor WTO agreements preclude national regulatory authorities from raising termination rates so long as those actions are "cost-oriented," do not discriminate against carriers, and are enacted after public notice and consultation.[117] Verizon argues that if rate floors are "justified" in this manner they "should not be viewed as an automatic cause for the Commission's concern" and that it is "misleading" to lump the recent actions of various national regulatory authorities together.[118] We agree that the Commission must assess the basis for foreign regulatory action in order to determine whether and to what extent regulatory intervention is required. Because each controversy presents somewhat different circumstances, our first response to allegations of anticompetitive conduct in commercial disputes will be to consult with foreign regulators in coordination with appropriate Executive Branch agencies. However, we also agree with several commenters in this proceeding that we should establish or maintain competitive safeguards as a precautionary measure to address the exercise of foreign market power that may erode the benefits of greater flexibility we are now permitting in this Order.[119]

47. In the event a party is able to demonstrate that there is a real or potential harm to the U.S. public interest through U.S. carrier interaction with foreign carriers on non-ISP routes,

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[115] We note that NTIA argues that automatic examination of a route has merit when a foreign government mandates a price floor that increases rates above competitively negotiated levels, regardless of whether the increase is below current benchmarks *See* NTIA Aug. 5, 2003 *Ex Parte* Letter at 2. Consistent with NTIA's concerns, the U.S.-carrier initiated process we note in this Order, will address anticompetitive harm against U.S. competition and U.S. customers, and the rebuttable presumption of harm in the event of retaliation against U.S. carriers will expedite such findings.

[116] Verizon Comments at 7 (stating that any response by the Commission should consider other factors such as transparency and procedural fairness).

[117] Verizon Reply at 3; *see also* Verizon Comments at 7.

[118] Verizon Reply at 3; *see also* Verizon Comments at 7

[119] AT&T Comments at 13; AT&T Reply at 1, 2,10; MCI Comments at 11-14; C&W Comments at 17; AT&T Oct 22, 2003 *Ex Parte* Letter at 3

the Commission may pursue a variety of remedies. For example, the Commission may re-impose the strict requirements of the ISP if necessary to prevent anticompetitive behavior and discrimination among U.S. carriers.[120] However, the re-imposition of the ISP's requirements may not effectively address the nature of the anticompetitive harm and may cause further detriment to U.S. competition and U.S. customers on a route. In such circumstances, the Commission may pursue other remedies, including, but not limited to, issuing stop-payment orders on U.S. carrier payments to particular foreign carriers or imposing a "best practice" rate.[121]

48. Additionally, we note that MCI requests that the Commission adopt a rule prohibiting U.S. carriers from agreeing to demands for rate increases over previously commercially negotiated levels.[122] MCI argues that there are rarely circumstances under which a U.S. carrier would voluntarily agree to an increase in rates and that such instances are usually a result of abuse of market power or unilateral action, rather than a consequence of commercial negotiations. We agree that because competitive market forces should result in rates that are increasingly cost-based, upward movement in rates that are not cost-based is not consistent with the development of competition in the U.S.-international market. Indeed, because there is no reason to believe that the underlying incremental costs are rising, increases in rates likely indicate either the absence or thwarting of effective market forces, or abuse of market power.

49. We do not rule out, however, the possibility that, at some future date, U.S.-international termination rates may be substantially cost-based and subject to fluctuation, including increases that are based on increases in cost. Therefore, we decline to adopt a bright-line standard that would consider *any* increase in U.S.-international termination rates an indication of anticompetitive behavior that would be detrimental to the public interest. Nevertheless, if U.S. carriers or other parties can demonstrate harms to U.S. competition or U.S. customers, including non-cost based increases in rates, pursuant to the process we adopt in this Order, we will consider action to the extent necessary to prevent anticompetitive harm to U.S. customers, and the imposition of appropriate remedies against U.S. carriers, as discussed further below.[123]

50. A U.S. carrier or other party seeking to demonstrate anticompetitive conduct that

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120 *See* C&W Comments at 3, 17, MCI Comments at 7.

121 *See ISP Reform Order*, 14 FCC Rcd at 7973, ¶ 30; *Benchmark Report and Order,* 12 FCC Rcd at 19869-71, ¶¶ 132-135.

122 *See* MCI Comments at 11; MCI Reply at 7 Similarly, Sprint argues that the Commission should automatically scrutinize the elimination of low prices on routes where they previously existed or circumstances where foreign government action is involved. *See* Sprint Comments at 12. We note that, although the Commission may always act upon its own motion, we modify our rules to enhance the efficiency of U.S. carrier-initiated petitions in this Order. As a result, we clarify that the standard U.S carriers should use to request Commission action is a demonstration of harm to U.S. competition and U S. customers. Moreover, as we discuss below, if U.S. carriers encounter retaliation, we find there is a rebuttable presumption that such harm to the public interest has occurred

123 *See* AT&T Comments at ii, 19; AT&T Oct. 22, 2003 *Ex Parte* Letter at 5. AT&T also argues that any U.S. carrier should be permitted to ask the Commission to prohibit payment to a foreign carrier with market power for an increased foreign termination rate for a U.S.-outbound service including country-direct and 800 service. *See* AT&T Comments at 22-23 As we conclude in this Report and Order, U.S. carriers may ask for Commission action on a case-by-case basis with the appropriate demonstration that there is harm to the U.S. public interest

warrants Commission intervention must show that the anticompetitive action or foreign regulation will harm U.S. carriers and customers. As we discussed above, we will evaluate the allegations and facts presented on a case-by-case basis. In order to evaluate properly a carrier's petition, we agree with commenters that assert that a petitioning carrier be required to file its commercial agreement, giving all interested parties, including foreign carriers or governments, an opportunity to comment.[124] This approach would provide opposing parties, including foreign carriers or governments, an opportunity to respond with cost data demonstrating that any demanded rate increases are justified to ensure recovery of long-run incremental costs.[125]

51. Several commenters also request that the Commission consider expedited notice and comment procedures, particularly when U.S. networks and services are affected, so that this safeguard process may be available to U.S. carriers on a timely basis.[126] While providing all potentially interested parties the opportunity to comment on such requests, we agree that action on U.S. carrier petitions for Commission intervention should be swift in order to address or avert potential harm to U.S. competition and U.S. customers. As a result, we will adopt an expedited comment cycle for such petitions from the date of public notice of ten days for comments or oppositions and seven days for replies.[127]

52. To ensure expeditious action, the International Bureau shall consider petitions

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124 *See* AT&T Reply at 13; MCI Comments at 12.

125 *See* AT&T Reply at 13, MCI Comments at 12. We also agree with MCI and AT&T that petitioning carriers should be permitted to file the relevant commercial agreements on a confidential basis. Accordingly, petitioners seeking redress under this rule may file their agreements accompanied with a request for confidential treatment. Petitioners must also file a redacted version for the public record in order to give parties notice and an opportunity to comment. To the extent the Commission needs to rely upon information submitted for purposes of making its decision, however, the information must be placed in the public record. To the extent the Commission relies upon confidential information in its decision-making, the Commission will make such documents available pursuant to a protective order. *See* 47 C.F.R. § 0 459; *see also Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission,* GC Docket No. 96-55, Report and Order, FCC 98-184, 13 FCC Rcd 24816 (1998); *Accounting Safeguards Under the Telecommunications Act of 1996· Section 272(d) Audit Procedures*, CC Docket No 96-150, Memorandum Opinion and Order, FCC 02-239, 17 FCC Rcd 17012 (2002). Parties may also pursue access to the underlying commercial agreement under the Freedom of Information Act. *See* 47 C.F.R. § 0.461. As rulings on requests for Commission intervention may have broad policy implications, we will consider such proceedings "permit-but-disclose" under the Commission's *ex parte* rules. *See* 47 C.F.R. § 1.1206.

126 *See* AT&T Reply at 1; MCI Reply at 8; Letter from Scott Shefferman, Counsel, MCI to Marlene Dortch, Secretary, FCC, IB Docket No. 02-234, 96-261, at 1 (dated Aug. 12, 2003)(MCI Aug. 12, 2003 *Ex Parte* Letter). AT&T contends that comment periods should be no longer than five days and replies no longer than two days and that the Commission should provide interim relief if necessary. *See* AT&T Reply at 14. While we find merit in an expedited comment cycle, we decline to adopt AT&T's proposal. We find that a seven-day comment cycle would not give commenters a fair opportunity to gather and prepare the information needed to respond to allegations. The ten-day and seven-day cycle we adopt above should permit all interested parties, including foreign parties, a fair opportunity to comment in such proceedings and will allow necessary time for the Commission's internal review and evaluation of the complaint. In addition, the proposed comment cycle will provide an opportunity for the Commission and/or other agencies of the U S. government to contact the relevant foreign administrations for information and assistance. We note that the Commission and U.S. government generally attempt to contact foreign administrations for information and assistance in matters involving foreign carriers and U.S. carriers in order to avert potential harm to competition and customers in the United States and the relevant foreign country.

127 In order to ensure foreign parties will have an opportunity to review and file in the record of these proceedings, we will provide all record information electronically on the Commission's website at www.fcc.gov.

initiated under this process pursuant to its delegated authority. Accordingly, we modify Part 64 of our rules to incorporate the standard for U.S. carriers and other parties to request Commission intervention on U.S.-international routes no longer governed by the ISP.[128] We note that by making our party-initiated process more efficient, this action would not prevent the Commission from acting on its own motion as necessary to protect the public interest.

2. The "No Special Concessions" Rule

53. We agree with commenters that we should preserve the current "No Special Concessions" rule prohibiting U.S. carriers from agreeing to accept special concessions, as defined in that rule, from foreign carriers with market power.[129] Based on the record and the policy goals we seek to achieve in the proceeding, we find no basis for eliminating or further narrowing the "No Special Concessions" rule at this time.[130] The "No Special Concessions" rule prohibits exclusive arrangements between a U.S. carrier and a foreign carrier with market power that involve services, facilities, or functions on the foreign end of a U.S.-international route that are necessary for the provision of basic telecommunications services where the arrangement is not offered to similarly situated U.S. carriers.[131] The Commission narrowed the application of the "No Special Concessions" rule in the *ISP Reform Order* by removing from the matters covered by the rule the terms and conditions under which traffic is settled, including the allocation of return traffic or "grooming" arrangements, on a route where the Commission removes the ISP.[132] Thus, under the existing rule, when the Commission lifts the ISP from a route, the "No Special Concessions" rule continues to apply to matters other than the terms and conditions relating to the settlement of traffic with foreign carriers possessing market power on that route. For example, the "No Special Concessions" rule continues to prohibit exclusive arrangements relating provisioning and maintenance of international facilities even on routes where the ISP is lifted.[133]

54. Special concessions between U.S. and foreign carriers with market power are prohibited because such concessions pose an unacceptable risk of anticompetitive harm against U.S. carriers by foreign carriers with market power[134] Even on routes where the Commission has lifted the ISP, the danger of discriminatory behavior, including whipsawing, by foreign

[128] *See* Appendix B, § 64.1002(d).

[129] *See* AT&T Comments at ii, 19, 22-23; C&W Comments at 3, 18; CompTel Reply at 4. PanAmSat took no position as to whether the "No Special Concessions" rule should be narrow or eliminated but argues that the Commission should ensure that any revision to the rule is consistent with the prohibition against exclusive satellite services arrangements set forth in the ORBIT Act. *See* PanAmSat Comments at 2 (citing 47 U.S.C. § 765(g)).

[130] *See* MCI Comments at iii, 14; MCI Reply at 10.

[131] 47 C.F.R. § 63.14 Originally, the "No Special Concessions" rule applied to arrangements with all foreign carriers. *Foreign Carrier Entry Order*, 11 FCC Rcd at 3971-72, ¶¶ 257-258. In the *Foreign Participation Order*, the Commission narrowed the rule to apply to agreements with foreign carriers that possess market power because special concessions between U.S. carriers and foreign carriers that lack market power may permit carriers to offer innovative services that result in lower rates to U.S. customers. *Foreign Participation Order*, 12 FCC Rcd at 23957-65, ¶¶ 156-170

[132] *See ISP Reform Order*, 14 FCC Rcd at 7994-98, ¶¶ 82-94. *See also supra* note 27.

[133] *ISP Reform Order*, 14 FCC Rcd at 7995, ¶ 86 *See also Foreign Participation Recon Order*, 15 FCC Rcd at 18177, ¶¶ 40-42.

[134] *See* MCI Reply at 10.

carriers with market power still exists. The "No Special Concessions" rule helps to prevent certain anticompetitive strategies that foreign carriers can use to discriminate among their U.S. carrier correspondents, such as refusal to interconnect and circuit blocking, which in our experience have proven the most injurious to U.S. carriers. Absent such a safeguard, foreign carriers with market power could use their market power to whipsaw or otherwise discriminate in favor of certain U.S. carriers, including their own affiliates.[135]

3. Modification of Commission Accounting Rate, Contract, and Data Filing Requirements for Non-ISP Routes

55. The Commission inquired in the *NPRM* whether revisions to the Commission's accounting rate, contract, and data filing requirements are necessary in light of potential reform of our application of the ISP.[136] Commenters generally support removing filing requirements on routes where the ISP no longer applies. These parties argue that contract and accounting rate filings are burdensome,[137] and that public disclosure of the contracts may have a "chilling" effect on negotiations.[138] Verizon argues that public disclosure of settlement rate contracts may actually facilitate collusion.[139] We agree and revise our reporting requirements accordingly, in light of the modifications to the ISP we adopt in this Order.

56. Currently, to safeguard against anticompetitive harm, the Commission requires U.S. carriers with a correspondent relationship with foreign carriers possessing market power to file with the Commission, pursuant to Section 43.51 of the rules, a copy of each operating agreement.[140] In addition, pursuant to Section 64.1001 of the rules, carriers are required to file with the Commission, and obtain prior approval for, modifications to their international settlement arrangements with foreign carriers possessing market power.[141] While the requirement to file accounting rate modifications applies only to U.S.-international routes governed by the strict requirements of the ISP,[142] the contract filing requirement in Section 43.51 of the Commission's rules applies to all U.S. carrier arrangements with foreign carriers that possess market power.

57. First, we clarify and confirm that the requirements of Section 64.1001 apply only to accounting rate modifications on routes that are subject to the ISP. Thus, under our revised international settlements policy, once a route is benchmark-compliant and is no longer subject to the ISP, U.S. carriers are not required to file accounting rate modifications pursuant to Section

135 MCI Comments at 14.

136 *See NPRM,* 17 FCC Rcd at 19976, ¶ 40.

137 *See* AT&T Reply at 5; CompTel Reply at 3; Verizon Comments at 6; MCI Comments at 13.

138 *See* AT&T Reply at 5; CompTel Reply at 3; MCI Comments at 13

139 *See* Verizon Comments at 6.

140 47 C.F R. §§ 43.51, 64.1001(b). The Commission has noted that "whipsawing" tends to exist in the negotiation stage prior to the filing of service agreements or rate modifications by U S. carriers with the Commission. Therefore, the ISP is focused on ensuring that U.S carriers' negotiating leverage is not affected by anticompetitive practices However, the Commission has used the oversight of filed agreements to monitor compliance with the ISP's requirements. *See ISP Order,* 51 Fed. Reg 4736 at ¶ 2.

141 *See* 47 C F R §§ 43.51(e), 64.1001(b)-(g)

142 *See* 47 C F R §§ 43.51(e)(3), 64 1001(b)

64.1001. We also amend Sections 43.51 and 64.1001 to make explicit the requirement that carriers proposing to initiate service in correspondence with a foreign carrier possessing market power on a route that is subject to the ISP must file with the Commission, and obtain prior approval for, their initial settlement arrangements, in addition to changes in those arrangements.

58. With respect to filings of carrier agreements, we find that the current contract filing requirement in Section 43.51, which requires that U.S. carriers file contracts regarding the provision of U.S.-international services involving foreign carriers with market power, is overly broad in light of our further reform of the ISP. Although commenters disagree as to the extent to which these filings are necessary,[143] we find that the filing and maintenance of current contracts at the Commission for routes where the ISP no longer applies unnecessarily restricts the flexibility of U.S. carriers in their negotiations and may provide disincentives for U.S. carriers to negotiate aggressively toward more cost-based rates to the benefit of U.S. customers.[144] Such filings are impractical in a dynamic marketplace. In addition, they place an unnecessary administrative burden on U.S. carriers and on the Commission. We therefore eliminate the contract filing requirements in section 43.51 for U.S. carrier agreements with foreign carriers that possess market power on the foreign end of routes that are exempt from the ISP.[145] In adopting this rule change, we recognize that U.S. carrier contracts with foreign carriers that possess market power also govern matters unrelated to the settlement of traffic, such as interconnection of international facilities, private line provisioning and maintenance, and quality of service, which are matters that will continue to be covered by our "No Special Concessions" rule.[146] For this reason, we reserve the right to require the filing of particular contracts when presented with evidence of a violation of the "No Special Concessions" rule or of other anticompetitive behavior related to these matters on a particular route.

59. In contrast to benchmark-compliant routes, we find that a significant risk of anticompetitive harm continues to exist on routes where carriers are unable to reach benchmark-compliant rates.[147] In addition to retaining the ISP, we will therefore retain the reporting requirements for these routes, because the risk of anticompetitive harm to U.S. competition and U.S. customers outweighs the benefit of greater flexibility and a more deregulatory approach. Accordingly, we narrow the applicability of the Section 43.51 contract filing requirement on U.S. carriers entering agreements with foreign carriers with market power to apply only to only

[143] *See* C&W Comments at 3, 18 (arguing that the Commission should continue to require confidential filings of agreements for foreign carriers with market power in order to address potential anticompetitive harm). *But see* MCI Comments at 13 (arguing that the Commission can always request specific rate agreements pursuant to its authority in Section 211 of the Act, and U.S. carriers will have incentives to file necessary information in the event of anticompetitive behavior)

[144] The Commission noted ongoing concerns that public filing may create "free rider" or "chilling" effects in negotiations and on the ability to enter agreements. *NPRM*, 17 FCC Rcd at 19976, ¶ 40.

[145] In the event that there is anticompetitive behavior on particular U.S.-international routes that are exempt from the ISP, U.S. carriers filing a complaint through the carrier-initiated process described above may provide necessary contract information confidentially. *See also* AT&T Reply at 5

[146] *See supra* ¶¶ 50-51.

[147] *See supra* § III B. *See also Benchmarks Order*, 12 FCC Rcd at 19809-18, ¶ 5-27.

those U.S.-international routes still governed by the ISP.[148]

60. We also agree with several commenters that our Section 43.61 reporting requirements provide both the Commission and the industry the means by which to detect anticompetitive conduct on particular routes.[149] We note, however, that the International Bureau has recommended that the Commission initiate a proceeding to re-examine several of its data collection requirements, including Section 43.61 of the Commission's rules, and the need for quarterly reporting and its effectiveness.[150] Our decisions in this Report and Order do not prejudge the outcome of that pending proceeding.

61. We decline to adopt AT&T's proposal to make public each quarter, in order to assist U.S. carriers in their negotiations, a list of the routes with the lowest overall U.S.-outbound rates indicated by the quarterly reports.[151] We agree with commenters that assert that this type of publication could disclose information from which competitors may be able to deduce another carrier's commercially-negotiated rates based upon historical percentages and filings, thereby gaining competitive advantages.[152] Public disclosure of rate information on routes from which we remove the ISP actually may harm the public interest through the "chilling" effect on U.S. carriers' ability to enter into agreements with foreign carriers and may provide a disincentive to negotiate aggressively towards more cost-based rates. For these reasons, we choose not to adopt AT&T's proposal and, instead, maintain our current quarterly reporting requirements.[153]

62. Consistent with these findings, we modify Section 43.51 of the Commission's rules and clarify that accounting rate modifications required pursuant to Section 64.1001 only apply to proposed rates on U.S.-international routes that continue to be subject to the ISP. We revise Part 43 of the Commission's rules accordingly.[154]

4. Adding Foreign Mobile Carriers to the "Market Power" List

63. AT&T proposes that we add foreign mobile carriers to the Commission's *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*.[155] AT&T asserts that all foreign mobile carriers should be deemed to possess market power as these carriers have an effective monopoly over their subscribers for termination services and thus have market power in the market for call

148 We do not disturb the Commission's dominant carrier safeguards contained in Section 63.10 of the Commission's rules and referenced in Section 43.51(b)(3). *See* 47 C.F.R. §§ 63.10, 43.51(b)(3).

149 *See* AT&T Comments at 16; MCI Comments at 7, 24, AT&T Reply at 5; CompTel Reply at 4-5.

150 *See International Bureau, Federal Communications Commission, Biennial Regulatory Review 2002*, IB Docket No. 03-309, GC Docket 02-390, 18 FCC Rcd 4196, 4201 at ¶ 13 (2003) (*2002 IB Biennial Review Staff Report*)

151 *See* AT&T Comments at 24, AT&T Reply at 15.

152 *See* MCI Reply at 11-12.

153 We note our intention to address the International Bureau's recommendation that a proceeding be initiated reviewing the Commission's data collection requirements including those required under Section 43.61 of our rules. *See IB Biennial Review Staff Report*, 18 FCC Rcd 4201 at ¶ 13.

154 *See* Appendix B.

155 AT&T Comments at 33-35, AT&T Reply at 22.

termination on their networks.[156] AT&T further argues that, in countries adopting a Calling Party Pays (CPP) regulatory regime, market forces cannot adequately discipline foreign mobile operators that abuse this power.[157] Several commenters oppose AT&T's proposal, arguing that it would impose burdensome regulations on these carriers and stifle investment.[158] Other commenters disagree based on grounds of international comity and regulatory sovereignty.[159]

64. We decline to adopt AT&T's proposal because there is no compelling justification for adding all foreign mobile carriers to the Commission's market power list at this time. The Commission's *Foreign Carriers List* identifies those foreign carries with which the exchange of traffic is subject to, *inter alia,* the "No Special Concessions" prohibition in Section 63.14, the contract filing requirements in Section 43.51, and the ISP on non-exempt routes.[160] Under Section 43.51 of the Commission's rules, a party seeking to add a carrier to the Commission's list bears the burden of submitting information to the Commission sufficient to demonstrate that the foreign carrier either (1) has 50 percent market share in the international transport or local acc markets on the foreign end of the route served by the foreign carrier; or that (2) the foreign carrier nevertheless has sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market.[161] AT&T has not provided any information to meet the burden of proof required under Section 43.51. Nor is there any other evidence in the record to support such a finding. We note that every carrier, whether fixed or mobile, h omplete control over termination to its subscriber base. We do not have record evidence a. .nis time, however, that this level of control over termination, by itself, establishes that a foreign carrier has sufficient market power on the foreign end of a route to affect competition adversely in the U.S. market.

65. Although we acknowledge that there are concerns that mobile termination rates are often set at rates that significantly exceed costs, particularly under a CPP regime such as those that exist in most European markets, we find no evidence in the record of this proceeding that would warrant a blanket finding that foreign mobile carriers as a class possess sufficient market power to affect competition adversely in the U.S. market.

5. Transition Period

66. In the *NPRM,* we sought comment on whether any of our proposals to remove the ISP may affect existing commercial agreements and whether a transition period therefore would be necessary to phase-out agreements negotiated under the current ISP.[162] No commenter addressed this issue. In raising this concern, the Commission sought to ensure that any revision

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156 AT&T Comments at 33-35; AT&T Reply at 22. *See also* MCI Comments at 17-25, Sprint Comments at 17-18

157 AT&T Comments at 33; AT&T Reply at 24

158 *See* AT&T Wireless Reply at 11-13, Verizon Reply at 5-7, Vodafone Reply at 5-6; BellSouth Reply at 2-5.

159 *See* C&W Comments at 20-23; GSM Europe Comments at 3; T-Mobile Reply at 2; Government of Japan Reply at 2; NTT DoCoMo Reply at 8-10; KDDI Reply at 2-3; KPN Reply at 3.

160 The list also governs the applicability of certain safeguards relating to the landing and operations of U.S.-licensed submarine cables in foreign markets. *See* 47 C.F.R § 1.767(g)(5).

161 47 C F.R § 43.51(e)(3).

162 *NPRM*, 17 FCC Rcd at 19997, ¶ 42

to the ISP, including the revision we adopt in this Order, would not disrupt services to U.S. customers or payment flows to U.S. carriers. Based on our review of bilateral contractual arrangements between U.S. and foreign carriers, we note that most arrangements involve a separate, severable rate agreement that can be easily modified without disrupting service on a route. Furthermore, it is our understanding that, in practice, carriers traditionally "true up" or credit each other when they adopt retroactive agreements and thus would not require a regulatory time frame instituted by the Commission to implement successfully our reform of the ISP. As such, we decline to adopt a transition period for the removal of the ISP on benchmark-compliant routes as no existing contracts are likely to be abrogated and parties will have sufficient notice and incentive to negotiate new rate agreements once the removal of the ISP becomes effective on a route that is benchmark-compliant.

V. ACCOUNTING RATE REFORM

A. Background

67. In developing its 1997 benchmarks policy, the Commission established benchmark rates and a transition schedule for achieving rates at or below the benchmarks. The Commission calculated the benchmark rates using foreign carriers' publicly available tariff rates and information published by the ITU. The Commission categorized countries by their level of economic development using a World Bank and ITU classification scheme, and calculated the benchmark for each category using the "tarriffed component price" (TCP) methodology[163] applied to sample countries in each category. The benchmarks are: 15 cents for upper income countries; 19 cents for upper-middle and lower-middle income countries; and 23 cents for lower income countries. These rates serve as a cap upon the settlement rates that U.S. carriers may negotiate with their foreign correspondents. The Commission established transition dates to take into account the time and difficulty some countries would have in rebalancing their rates.[164] Also, it established a procedural mechanism by which U.S. carriers could petition the Commission to enforce the benchmarks policy on a given route.[165]

68. In the *NPRM*, the Commission requested comment on the future of the current benchmarks policy. The Commission asked for comment on a number of issues related to potential revision of the policy, including elimination of the policy if permitted by market trends

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163 *Benchmarks Order*, 12 FCC Rcd at 19828-65, ¶¶ 45-120.

164 The Commission established the following transition schedule: U.S.-international routes to countries in the Upper Income category (with a Gross National Product (GNP) per capita greater than $8,995) were to achieve a settlement rate at or below $0.15 by January 1, 1999; routes to Upper Middle category countries ($2,896 < GNP per capita < $8,955) were to achieve a settlement rate at or below $0.19 by January 1, 2000; routes to Lower Middle Income category countries ($726 < GNP per capita < $2,895) were to achieve a settlement rate at or below $0.19 by January 1, 2001; routes to Low Income countries (GNP per capita < $726) were to achieve a settlement rate at or below $0 23 by January 1, 2002, and U.S -international routes to countries with a teledensity of less than 1.00 were to achieve a settlement rate at or below $0.23 by January 1, 2003. *See Benchmarks Order*, 12 FCC Rcd at 19885, ¶ 165

165 U.S carriers may seek Commission enforcement of the benchmark rate by submitting a petition that: (1) demonstrates that the U.S. carrier has been unable to negotiate a settlement rate that complies with the benchmark rate; and (2) requests that the Commission take enforcement measures to ensure that no U S. carrier pays more that the benchmark rate The Commission will also take into consideration the individual circumstances surrounding each petition in determining the appropriate enforcement action. *Benchmarks Order*, 12 FCC Rcd at 19893-96, ¶¶ 185-90.

(involving establishment of sunset date), downward revision of benchmark rates to reflect lower costs, greater carrier operational efficiencies, a more selective application of the policy through classification of certain U.S.-international routes as *de minimis*, and which application of the policy may be counterproductive to achieving the Commission's goals.[166] The Commission did not, however, offer a specific proposal for comment as to what future benchmark calculation methodologies, rates, classification criteria, or revised compliance deadlines the Commission might develop and implement.

69. A total of 14 parties filed comments, replies or submitted *ex parte* submissions addressing the issues regarding the benchmarks policy. Seven parties contend that we should eliminate our current benchmarks policy.[167] Seven commenters state that we should maintain the policy,[168] of which four maintain that we should revise the benchmark rates to reflect recent developments since the Commission's adoption of the benchmarks policy in 1997.[169] AT&T proposes that if we modify the policy we should do so in a separate proceeding and not delay implementation of ISP reform.[170]

B. Discussion

1. Effect of the Benchmarks Policy

70. In the *Benchmarks Order,* the Commission acknowledged that the benchmark rates established were above-cost, but noted that application of benchmarks would result in significant reductions in settlement rates, bringing them closer to cost and placing some discipline on a "system of inflated settlement rates."[171] The Commission stated in the *Benchmarks Order* that periodic revisions would be necessary to avoid the problem of the benchmarks not keeping pace with cost reductions and to encourage further movement toward cost-based rates.[172] It also stated, however, that the best way to achieve cost-based settlement rates is through effective competition.[173] Where there is fully developed competition, efficient pricing by competitors likely will drive settlement rates toward cost. The Commission recognized that development of vigorous competition in many markets will take time and that it could not rely upon such development to reduce settlement rates to more cost-based levels in a

166 *NPRM*, 17 FCC Rcd at 19977-78, ¶ 44

167 AHCIET Comments at 4-5; ASETA Comments at 2; EU comments at 2; Government of Japan Comments at 1-2; KDDI Comments at 2-3; Telefonica Comments at 5-6; Letter from Selby Wilson, Secretary General, Caribbean Association of National Telecommunications Organizations, to Marlene Dortch, Secretary, FCC, IB Docket 02-324, 96-261 at 2-3(dated Jan. 16, 2004) (CANTO Jan. 16, 2004 *Ex Parte* Letter).

168 AT&T Comments at 26-29; AT&T Reply at 15-16; C&W Comments at 17; CompTel Reply at 5-6; Telecom Italia Comments at 5; Sprint Comments at 7-11; Verizon Comments at 6-7; Verizon Reply at 4; MCI Comments at 15; MCI Reply at 10.

169 AT&T Comments at 26-29; Telecom Italia Comments at 5; Sprint Comments at 7-11; MCI Reply at 10.

170 AT&T Comment at 27; AT&T Reply at 16.

171 *Benchmarks Order*, 12 FCC Rcd at 19828, 19855 & 19861, ¶¶ 47, 102 & 112. *See also NPRM,* 17 FCC Rcd at 19977-78, ¶ 44.

172 *Benchmarks Order*, 12 FCC Rcd at 19840 & 19855, ¶¶ 69 & 102

173 *Benchmarks Order*, 12 FCC Rcd at 19862, ¶ 114.