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

International Settlements Policy Reform	)	IB Docket No. 11-80
	)	
Joint Petition for Rulemaking of AT&T Inc., Sprint Nextel Corporation and Verizon	))	RM-11322
	)	
Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct	)))	IB Docket No. 05-254
	)	
Petition of AT&T for Settlements Stop Payment Order on the U.S.-Tonga Route	))	IB Docket No. 09-10

COMMENTS OF AT&T INC.

James J. R. Talbot
Gary L. Phillips
Paul K. Mancini

Attorneys for
AT&T Inc.
1120 20th Street, NW
Washington, D.C. 20036
(202) 457-3048 (phone)
(202) 457-3073 (fax)

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AT&T Inc., on behalf of its affiliates, ("AT&T") submits the following comments in response to the Notice of Proposed Rulemaking in the above-referenced proceeding.[1]

SUMMARY

In response to the continued growth of competition in the international market and the success of its prior deregulation of international traffic termination arrangements with foreign carriers, the Commission proposes to extend the benefits of commercial market-based arrangements, while strengthening its competitive safeguards procedures. AT&T strongly supports these proposals.

Removing the International Settlements Policy (ISP) from most routes where it still applies will foster the negotiation of lower rates that will benefit U.S. consumers and stimulate the further growth of U.S. international calling volumes. As the Commission proposes, there is a reasonable rationale to retain the ISP on the U.S.-Cuba route, although AT&T believes it should be applied there in a modified form to avoid potential obstacles to the resumption of direct service with this country. AT&T also supports proposed improvements to the Commission's competitive safeguards to ensure that U.S. carriers are properly protected against all foreign carrier conduct that may obstruct efforts to ensure continued reductions in termination rates.

AT&T believes, however, that well-intentioned new regulations requiring the filing of all above-benchmark agreements in fact would constitute burdensome and unnecessary re-regulation. At a time when U.S. carriers' commercially negotiated arrangements have driven U.S. international termination rates to historically low levels, the Commission should continue to use the least burdensome tools for achieving its long-standing goal of cost-based termination rates by continuing to rely on U.S. carriers to identify specific instances of high rates that may require Commission intervention. Such new regulation would not be consistent with President Obama's January 2011 direction – endorsed by Chairman Genachowski – to "use the least burdensome tools for achieving regulatory ends," and to pursue the "simplification of reporting and compliance requirements." The proposed new filing burden would advance neither enforcement nor commercial negotiations, and thus, would not advance U.S. consumer interests.

Lastly, the facts clearly demonstrate that U.S. carriers' retail rate reductions have exceeded their reductions in termination costs by almost 80 percent since 1996. These lower prices have almost *quadrupled* U.S. outbound calling volumes in this period, benefitting not only

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[1] Notice of Proposed Rulemaking, FCC-11-75 (rel. May 13, 2011) ("Notice").

U.S. customers but called parties throughout the world.[2]

I. THE ISP SHOULD BE REMOVED ON ALL INTERNATIONAL ROUTES OTHER THAN CUBA

AT&T supports the proposal set forth in the Notice (¶ 13) to remove the ISP from all remaining U.S.-international routes other than the U.S.-Cuba route. Under the Commission's international deregulatory policies, 165 U.S. international routes, accounting for more than 98 percent of U.S.-outbound traffic, are now ISP-exempt.[3] U.S. carriers have negotiated market-based commercial traffic termination arrangements on these routes that have reduced U.S. termination rates far below the Commission's settlement rate benchmarks. Indeed, U.S. carriers' average world-wide termination rates have been less than 6 cents since 2006.[4] As AT&T, Sprint and Verizon first proposed in the Joint Petition[5] – without opposition by any party – this highly successful deregulatory approach should now be extended worldwide.[6]

As the result of increased global competition, the continued application of the ISP to the

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[2] *See* FCC 1996 & 2009 Section 43.61 reports, Table A1 (showing 19,268,958, 821 total U.S. outbound minutes for 1996 & 72,937,281,238 total U.S. outbound minutes for 2009).

[3] *See International Settlements Policy Reform*, First Report and Order, 19 FCC Rcd. 5709, ¶ 31 (2004) ("*ISP Reform Order*") (eliminating the ISR policy). *See also*, *1998 Biennial Regulatory Review, Reform of the International Settlements Policy and Associated Filing Requirements*, Report and Order and Order on Reconsideration, 14 FCC Rcd. 7963, ¶ 24 (1999) ("*1999 Settlements Reform Order*").

[4] *See* FCC 2006-2009 Section 43.61 Reports, Table A1.

[5] *See Joint Petition for Rulemaking to Further Reform the International Settlements Policy*, RM-11322 (filed by AT&T Inc., Sprint Nextel Corporation and Verizon on March 13, 2006) ("Joint Petition"). *See also*, Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemakings filed, Public Notice, Report No. 2764 (rel. Mar. 20, 2006).

[6] As described below, AT&T agrees with the retention of this policy in limited form on the U.S.-Cuba route.

small number of routes still subject to this policy – accounting for less than 2 percent of U.S.-outbound international traffic – is no longer necessary to protect the U.S. market against competitive harm. Since the adoption of the 2004 *ISP Reform Order*, as stated in the Notice (¶ 14), there has been "significant competitive growth." The Commission deregulated benchmark compliant routes in 2004 in light of data showing, among other things, thirty-eight countries had some competition in their international telecommunications services markets in 2002.[7] In today's global market, according to *TeleGeography*, "competition has spread to all but a handful of countries, and the vast majority of the world's international traffic originates and terminates in countries with competitive telecom markets."[8] These pro-competitive pressures are now being felt at least to some extent on virtually all U.S. international routes. Additionally, as described below, the retention of the ISP on a small number of routes now imposes significant difficulties on the negotiation of lower rates on those routes in compliance with the requirements of this regulation. For these reasons, as stated by the Joint Petition, the burdens resulting from the continuation of the ISP now greatly outweigh any remaining benefits of this policy.[9]

1. **The ISP Now Imposes Greater Burdens on U.S. Carriers Seeking to Negotiate Lower Rates**

Although it has long been recognized that the ISP frequently impedes the negotiation of lower rates,[10] this regulation obstructs U.S. carrier rate negotiations to an even greater extent,

[7] *ISP Reform Order*, ¶ 21 (citing data from *TeleGeography 2004*).

[8] *TeleGeography Report, Carriers* (2010), at 1.

[9] Joint Petition at 6-8.

[10] The requirements of the ISP that U.S. carriers must be offered the same accounting rate, receive a proportionate share of return (*i.e.*, U.S.-inbound) traffic, and maintain symmetrical rates for outbound and inbound traffic on each route often impede the negotiation of lower termination rates. The Commission noted in 2004 that the ISP "is not structured to provide an

(Footnote continued on next page)

now that most U.S. international routes are ISP-exempt. In the largely deregulated world in which U.S. carriers compete today, rate reductions are now much more likely to result from the removal of the ISP on a route than from its continued application on a handful of routes. As described by the Joint Petition, foreign carriers on ISP routes have little or no incentive to agree to pay symmetrical rates to U.S. carriers for their U.S.-bound traffic in compliance with the ISP, since they readily may send that traffic to the U.S. at much lower market rates through traffic re-origination arrangements offered by third country foreign carriers on ISP-exempt routes between the U.S. and those third countries.[11]

Although the Commission retained the ISP on non-benchmark compliant routes in 2004 because of the higher rates and more limited development of market forces on these routes, this regulation has now become a major hindrance to the negotiation of lower rates on the routes where it still applies. To overcome this obstacle, the Commission should now remove the ISP and its associated filing requirements from all international routes other than the U.S.-Cuba route, as proposed by the Notice.

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incentive to foreign carriers to lower rates to cost-based levels," and "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." *ISP Reform Order*, ¶¶ 13, 34. Similarly, the Commission has explained that, under the ISP requirement that negotiated rates must be available to all other U.S. carriers, "the negotiating carrier has a reduced incentive to negotiate aggressively," because "[n]o matter how aggressively a carrier negotiates, it will be unable to achieve a cost advantage vis-à-vis its competitors under the ISP." *1999 Settlements Reform Order*, ¶ 24.

[11] Joint Petition at 7.

2. Competitive Concerns Are Fully Addressed By the Commission's Safeguards

The protection of the U.S. market against competitive harm – the original purpose of the ISP – does not require the continuation of this policy. The prevention of anticompetitive conduct by foreign carriers is addressed in a more targeted manner on ISP-exempt routes by the Commission's competitive safeguards procedures that were established specifically to protect the U.S. market after the removal of the ISP. These safeguards would become even more effective under the proposals for their improvement in the Notice. As the Commission has found, the safeguard procedures "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."[12] Further protection is provided by the Commission's longstanding prohibition on anticompetitive conduct by foreign carriers[13] and the "No Special Concessions" rule, which continues to apply to U.S. carrier arrangements with foreign dominant carriers. These rules and policies would continue to prevent the abuse of foreign market power following the further exemption of international routes from the ISP proposed by the Notice.

The U.S. industry's additional experience since 2004, when the Commission greatly expanded the number of international routes exempted from the ISP, confirms the benefits of commercially negotiated arrangements in securing agreement to lower rates and more efficient arrangements on both liberalized and non-liberalized routes. U.S. carriers' average world-wide termination rates fell by more than 20 percent from 7.3 cents in 2004 to less than 6 cents in 2006,

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[12] *ISP Reform Order*, ¶ 36.

[13] *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief*, 19 FCC Rcd. 9993, ¶ 18, n.64 (2004) ("*Philippines Order On Review*") ("The Commission's policy of protecting the public interest from anticompetitive behavior goes back over sixty years."). *See also, id.*, ¶¶ 22, 31; *ISP Reform Order*, ¶ 45.

and have since remained at or below that level, which is more than 60 per cent below the lowest benchmark rate of 15 cents.[14] Continued pro-competitive developments in the global telecommunications market, as described above, also support this further deregulatory step. This continued growth of global competition helps to address concerns that the further removal of the ISP would lead to the abuse of foreign market power and further demonstrates that the benefits of more flexible traffic termination arrangements should now be extended globally.

3. There is a Reasonable Rationale to Retain the ISP in Limited Form on the U.S.-Cuba Route

The Notice proposes (¶ 13) to retain the ISP on the U.S.-Cuba route, the only international route currently listed in the Commission's "Exclusion List."[15] Additionally, current State Department policy guidelines provide for the continuation of the ISP with respect to Cuba. AT&T agrees that, given the unique policy and administrative considerations that apply to the U.S.-Cuba route, a narrowly tailored treatment is appropriate at present. By continuing to apply the non-discrimination requirement of the ISP to this route, on which presently there is no direct service, the Commission will ensure that when direct services resume, U.S. carriers have competitive access to the same termination rate arrangements.

AT&T is concerned, however, that beyond the non-discrimination requirement of the ISP, the application of the remaining requirements of the ISP to this route would serve no purpose and would not promote the resumption of direct services with Cuba in accordance with

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[14] *See* FCC 2004 & 2006 43.61 Reports, Table A1.

[15] The Exclusion List identifies countries for which U.S. carriers require separate Section 214 authority, or that are subject to other restrictions. *See Streamlining the International Section 214 Authorization Process and Tariff Requirements,* 11 FCC Rcd. 12884, ¶¶ 17-118 (1996). *See also,* Public Notice, DA 10-112, rel. Jan. 21, 2010 (retaining Cuba on the Exclusion List).

the policies announced by President Obama in 2009.[16] Specifically, the requirements of the ISP for the proportionate return of traffic and symmetrical rates for U.S.-inbound and U.S.-outbound traffic could create significant practical obstacles to the resumption of direct services on this route. As described above, foreign carriers have little or no incentive to agree to symmetrical rates when they can send their U.S.-bound traffic at much lower market-based rates through refile arrangements with third-country carriers.

To avoid this potential impediment to the ability of U.S. carriers to enter into new direct bilateral arrangements on the U.S.-Cuba route, the Commission should remove the proportionate return and symmetrical rate requirements of the ISP.[17] Additionally, the Commission should plan to extend the full benefits of its deregulatory policies to the U.S.-Cuba route by removing the ISP completely when multiple U.S. carriers have termination rate arrangements and it is clear that the non-discrimination safeguard is no longer necessary.

II. PROPOSED NEW REQUIREMENTS TO FILE ABOVE-BENCHMARK AGREEMENTS WOULD IMPOSE UNNECESSARY AND BURDENSOME RE-REGULATION

The Notice proposes (¶ 17) that U.S. carriers should be required to file all agreements with dominant or non-dominant foreign correspondents where agreed-upon rates are above benchmark, or where any contractual provision would have the effect or raising the settlement rate above benchmark. Alternatively (¶ 17), U.S. carriers would file notice of such rates.

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[16] *See* The White House, Office of the Press Secretary, *Fact Sheet: Reaching Out to the Cuban People*, April 13, 2009.

[17] Similarly, the terms and conditions for U.S.-inbound traffic arrangements included in U.S. carrier agreements on this route should not be made routinely available for public inspection. *See* Notice, ¶ 18.

Adoption of this proposal would impose significant and unnecessary re-regulation on commercially-negotiated arrangements that have successfully driven U.S. termination rates to historically low levels. U.S. carrier arrangements with all foreign non-dominant carriers were exempted from the ISP and associated filing requirements in 1999, regardless of the level of the settlement rates negotiated under those arrangements. Subsequently in 2004, the ISP and its associated contract-filing requirements were lifted from U.S. carrier arrangements with dominant carriers on all but 38 international routes. Based on the current average U.S. termination rate of 5.4 cents, the large majority of U.S. carrier arrangements today are likely to involve below-benchmark rates. But where it would apply, this proposed requirement would necessitate burdensome new filings regarding U.S. carrier termination arrangements with both dominant and non-dominant foreign carriers that have been exempt from filing requirements for many years. Rather than impose new filing requirements that may be difficult to apply to these long-deregulated arrangements, the Commission should continue its longstanding and successful policy of relying on U.S. carriers to identify specific concerns regarding high termination rates on routes not subject to the ISP, that may require Commission intervention.

1. The Proposed Requirement Would be Difficult to Apply to Agreements with Multiple Rates

An additional objection to the proposed requirement is that it will be difficult to apply in practice. The more complex nature of many of today's correspondent arrangements will make it difficult in a number of instances to determine whether "U.S. outbound rates are above-benchmark" (Notice, ¶ 17), so as to mandate filing or notification of the agreement to the Commission. Many correspondent agreements now include different rates for traffic terminated in different geographical areas, on fixed and mobile networks, and with different carriers in the foreign country. For example, an agreement with a foreign correspondent may include different rates for traffic to be handed off by the foreign correspondent to as many as four or five different mobile carriers. Additionally, rates may be structured to be reduced substantially, back to the first minute, once particular volumes are reached within the contract period. As a further complicating factor, agreements are now frequently of short duration (*e.g.*, quarterly or monthly).

In such circumstances, the most appropriate method to determine benchmark compliance is to apply a weighted average to take account of the number of minutes terminated under each different rate set forth in the agreement. However, these weighted average rates can only be determined retrospectively, once it is known how many minutes are terminated under each different rate set forth in the agreement. Before that point, a U.S. carrier must estimate an average weighted rate for the expected traffic with its foreign correspondent, which may be proved incorrect if expected volumes are not achieved.

The further proposal in the Notice (¶ 17) "that the filing requirement also apply when any provision in the contract has the effect of bringing the settlement rate above benchmark even though the stated contract rate is at or below benchmark" may indicate that U.S. carriers should file every multi-rate agreement that includes an above-benchmark rate. However, the filing of an above-benchmark agreement would lead to the issuance of a public notice by the Bureau and potential enforcement action by the Commission.[18] A U.S. carrier may therefore need to demonstrate the overall benchmark-compliant nature of the agreement to prevent such action. To avoid the potential burdens for both U.S. carriers and the Commission staff entailed by any need to undertake such review of every agreement that contains an above-benchmark rate

[18] Notice, ¶ 17.

element, any contract filing or notification requirement should apply as narrowly as possible, and preferably should be avoided altogether.

2. Commission Should Continue its Successful Approach of Relying on Specific Carrier-Initiated Complaints

It is also unclear why such extensive re-regulation is necessary *seven years* (*twelve years* in the case of non-dominant carrier arrangements) after all contract filing requirements were removed by the Commission, especially as those deregulatory actions were taken when termination rates were at higher levels than today.[19] The re-imposition of onerous filing requirements now that U.S. average settlement rates have fallen to historically low levels is unnecessary, and fails to follow President Obama's January 2011 direction – endorsed by Chairman Genachowski – to "use the *least* burdensome tools for achieving regulatory ends" and to pursue the "*simplification* of reporting and compliance requirements." (Emphasis added.)[20]

The proposals set forth in the Notice would also depart from the Commission's even longer-standing policy, adopted in the 1997 *Benchmarks Order*, of relying upon U.S. carriers to request enforcement measures when they are unable to negotiate benchmark-compliant rates.[21] In support of that decision, the Commission noted that "[a]s it is clearly within the interest of a

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[19] *See ISP Reform Order*, ¶¶ 28-29 (removing the ISP and related filing requirements from dominant carrier arrangements on all benchmark compliant routes); *1999 Settlements Reform Order*, ¶ 29 (removing the ISP and the contract filing requirement from arrangements with non-dominant foreign carriers). Average settlement rates were 7 cents in 2004 and 23 cents in 1999. *See* FCC 2004 & 1999 Section 43.61 reports, Table A1.

[20] *Improving Regulation and Regulatory Review*, Executive Order 13563, Sect. 1 (Jan. 18, 2011), 76 Fed. Reg. 3821 (2011); *Presidential Memorandum – Regulatory Flexibility, Small Business, and Job Creation*, Jan.18, 2011. *See also*, *Genachowski Endorses Obama Stance on Regulation*, Communications Daily (Feb. 7, 2011) (quoting email from Chairman Genachowski to Commission staff).

[21] *See International Settlement Rates*, 12 FCC Rcd. 19806, ¶ 186 (1997) ("Benchmarks Order").

U.S. international carrier to negotiate rates at or below the relevant benchmark, we believe that we can rely primarily on such a carrier-initiated enforcement process."[22] As shown by their continuing success in maintaining low termination rates – with the average U.S. termination rate now approximately one third of the level of the lowest benchmark rate established in 1997 – U.S. carriers' interests have not changed since then.

Rather than impose this new regulation, the Commission should continue to rely on U.S. carriers to raise specific concerns regarding rate increases and unreasonably high rates on routes where the ISP is removed.[23] At the most, the Commission should limit any new filing obligation to arrangements with dominant foreign carriers on the 38 routes currently subject to the ISP, and should require only the filing of notice of above-benchmark rates, rather than the filing of agreements (which, as stated before, often last only for brief durations now).[24] The Commission also should provide that any new notification requirement it imposes shall expire after a maximum of three years (and preferably sooner), if the Commission has not used the information provided by these filings to take action against any foreign carrier.

Similarly, the Commission should not adopt the further suggested requirement (Notice, ¶ 36) for U.S. carriers to report to the Commission within a certain timeframe if they are unable to reach agreement on a settlement rate at or below the benchmark rate. No such requirement has

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22 *Id*.

23 *See Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S. Tonga Route*, IB Docket No. 09-10, filed Dec. 3, 2008; *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief*, IB Docket No. 03-38, filed Feb. 7, 2003; *Petition of WorldCom, Inc. for Prevention of 'Whipsawing' on the U.S.-Philippines Route*, IB Docket No. 03-38, filed Feb. 7, 2003.

24 As the Notice proposes, (¶ 18), any agreements required to be filed should not be made publicly available.

been applied, or proposed, in the fourteen years since benchmark rates were first adopted and none is necessary today, since the Commission may continue to rely on U.S. carriers to identify high termination rates that may require intervention.

III. THE COMMISSION SHOULD ADOPT ENHANCED COMPETITIVE SAFEGUARDS

As foreign carrier whipsaw conduct may still threaten competitive harm to the U.S. market, the Commission should improve its competitive safeguards to support U.S. carriers in negotiating international termination arrangements. The Commission's safeguards should address all potential anti-competitive conduct, including disrupting individual services, degradations in service quality, terminations of operating agreements, and any other conduct that may disadvantage a U.S. carrier during settlement rate negotiations. Threats by foreign carriers of service-affecting conduct may also require intervention. These safeguards should continue to apply to dominant foreign carriers as well as to non-dominant foreign carriers that act collusively or in accordance with anticompetitive government mandates.[25] More expedited procedures are also necessary to allow more timely relief against anticompetitive behavior.

[25] *See ISP Reform Order*, ¶ 35, n.92 (FCC anti-whipsaw policies apply "where multiple carriers in a foreign market are under common control or act pursuant to anticompetitive government mandates"); *1999 Settlements Reform Order*, ¶ 29 ("a foreign carrier that otherwise might lack market power might possess some ability unilaterally to set rates for terminating U.S. traffic due to government policies or collusive behavior in the foreign market").

1. Foreign Carrier Anticompetitive Conduct That May Require Intervention Should be Broadly Defined

Dominant foreign carriers may whipsaw U.S. carriers and harm the U.S. market by blocking all calling, as occurred most recently on the U.S.-Tonga route,[26] by blocking one type of traffic on a route,[27] or by engaging in discriminatory behavior affecting a particular service.[28] The Commission also has found that "threatening or carrying out circuit disruptions in order to achieve rate increases" may require intervention.[29] The Commission's competitive safeguards therefore should continue to protect U.S. consumers against both actual and threatened disruption of any service in support of foreign carrier efforts to increase rates.

In response to the questions raised by the Notice on this subject (¶¶ 27-28), AT&T supports the use of a rebuttable presumption that all types of partial circuit blockages, or threats to undertake such action, harm the public interest where they are threatened, or undertaken, in connection with rate negotiations. As the Commission has previously found, engaging in retaliatory action "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

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[26] *See Petition of AT&T for Settlements Stop Payment Order on the U.S.-Tonga Route,* 24 FCC Rcd. 8006 (2009) ("Tonga Order").

[27] *See AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief*, 18 FCC Rcd. 3519, ¶ 12 (2003) ("Philippines Order") (dismissing claims that blocking limited to "offnet" traffic destined for other carriers did not constitute whipsaw activity). *See also, Philippines Order On Review*, ¶¶ 12, 17.

[28] *AT&T Corp., MCI International, Inc*., 12 FCC Rcd. 13,378 (1997) (foreign carrier attempted to whipsaw U.S. carriers by engaging in discriminatory behavior in negotiations for Home Country Direct services).

[29] *ISP Reform Order,* ¶ 44.

international services to customers in the U.S. or abroad."[30]

A U.S. carrier that is requesting Commission intervention should be required to demonstrate, through affidavit or other evidence, the existence of an action or threat that is likely to harm U.S. carriers and customers. With this information, the Commission should "evaluate the allegations and facts presented on a case-by-case basis."[31] Foreign carriers or governments should continue to have an opportunity to comment and to provide cost data in support of requested rate increases.[32]

The Commission's safeguards should treat unreasonable contract terminations as having a similar adverse potential impact on U.S. competition as the blockage of traffic. When U.S. carriers resist rate increases or attempt to negotiate more cost-based rates, they should not be denied the ability to terminate traffic with a dominant foreign carrier, regardless of whether the foreign carrier acts by blocking circuits or by terminating U.S. carriers' operating agreements.

Foreign carriers also engage in market power abuse when they seek to require U.S. carriers to accept unreasonable conditions in operating agreements, such as conditions allowing termination of those agreements on very short notice, or prohibiting the use of third country routing arrangements to avoid an unreasonably high inbound rate. The Commission, therefore, should also take action when a U.S. carrier demonstrates that unreasonable conduct of this type is likely to cause harm to U.S. carriers and consumers.

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[30] *Id.*, ¶ 45.

[31] *Id.*, ¶ 50.

[32] *Id.*

2. More Expedited Relief is Required to Address Actual and Threatened Circuit Disruption

The Notice (¶¶ 30-34) asks for comment on the effectiveness of the existing complaint process, including the present pleading cycle, and the circumstances under which the Commission should grant relief on an immediate basis under Rule 63.1002(d). The Commission has previously noted that the existing process may not allow sufficiently timely relief against circuit disruption, and AT&T agrees with this concern.[33] The availability of expedited relief is particularly necessary to address threats of circuit or service disruption. In order to allow more rapid action on all complaints, AT&T supports a shorter pleading cycle of five days for comments and two days for replies. Additionally, the Commission also should be ready to impose immediate relief on an *ex parte* basis under Rule 63.1002(d) where a U.S. carrier demonstrates there is a credible threat of imminent circuit disruption or other circumstances that require immediate action.

AT&T supports the proposed requirement (Notice, ¶ 35) that a U.S. carrier should make a reasonable attempt to serve the subject foreign carrier at the time of filing a request for relief under section 64.1002(d), in order to make every effort to ensure notification to, and the active participation of, the subject foreign carrier. But where expedited relief is required, the Commission may take any necessary action immediately on receipt of the U.S. carrier request. The Commission has found that where it takes action in response to foreign carrier whipsaw action, there is "no obligation to serve [the relevant notification] on any foreign carrier or to seek

[33] *Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct*, 20 FCC Rcd. 14096, ¶ 5 (2005) (Notice of Inquiry).

comment from them."[34] This is because the proceeding establishing the relevant enforcement policy more than satisfies any notice requirements in these circumstances.[35]

3. The Commission Should Continue to Place Primary Reliance on Market Mechanisms to Resolve Disputes

The Notice proposes (¶ 31) that the Commission should maintain the ability to act on its own motion in response to anticompetitive conduct by foreign carriers, and AT&T supports this proposal. The Commission, however, should allow disputes to be resolved commercially wherever possible. As noted above, U.S. carriers have significant incentives to press for the lowest possible termination rates in foreign markets and have used deregulated, market-based negotiations to drive U.S. termination rates to historically low levels in the years since the removal of the ISP on most routes. The Commission, therefore, should be hesitant to intervene in the negotiation process where a U.S. carrier does not request such action and should do so only under compelling circumstances.

The Commission properly proposes (Notice, ¶ 43) to continue its existing practice of directly contacting the foreign regulator as early as possible after being notified of a dispute involving anticompetitive conduct by a foreign carrier.[36] The Commission stated in the *ISP Reform Order* that its "first response to allegations of anticompetitive conduct in commercial disputes will be to consult with foreign regulators in coordination with appropriate Executive

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[34] *Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Peru*, 14 FCC Rcd. 8318, ¶ 25 (1999).

[35] *AT&T Corp., Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina*, 11 FCC Rcd. 18,014, ¶ 23 (1996) (" Argentina Order") (foreign carrier "had notice of the rulemaking underlying our ISP, and was therefore on notice that the discriminatory practices contravening the ISP would be subject to enforcement action").

[36] *See* Comments of AT&T Corp., IB Docket No. 05-254, filed Oct. 7, 2005, at 13-14.

Branch agencies."[37] This practice of intervening directly with foreign regulators has had successful results in the past and continues to offer a way to resolve disputes expeditiously without the use of enforcement measures. As the Notice further states, such government-to-government contacts should not preclude the use of other remedies.

The Notice also asks for comment (¶ 36) on how quickly U.S. carriers should report circuit blockages to the Commission. No such requirement exists today, or has existed in the past, and there appear to be no new circumstances in today's deregulated marketplace requiring new regulation of this type. As U.S. international facilities-based carriers remain dependent on maintaining connectivity with foreign correspondents in order to serve customers, they continue to have ample incentives to inform the Commission in a timely manner of circuit disruptions by foreign carriers.[38]

IV. THE COMMISSION SHOULD USE ADDITIONAL REMEDIES TO ADDRESS ANTICOMPETITIVE CONDUCT BY FOREIGN CARRIERS

AT&T considers that the Commission should determine the remedies to be used to address anticompetitive foreign carrier conduct based on the relevant facts and in consultation with the affected U.S. carriers. The Notice proposes (¶ 40) to make prohibitions on increased payments its "remedy of choice" where there is anticompetitive behavior, because the parties may be more likely to keep circuits open in those circumstances while negotiations continue. AT&T supports this approach as potentially helpful where circuits are not disrupted but the foreign carrier threatens to take such action if a demanded rate increase is not agreed to. Alternative remedies that would reduce existing payments may be counterproductive where the

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[37] *ISP Reform Order*, ¶ 46. *See also*, Notice, ¶ 10, n.24.

[38] *See, e.g.*, *Argentina Order*, *Philippines Order* & *Tonga Order*.

foreign carrier has not yet taken any action to affect existing services.[39]

A prohibition on the payment of any increased rate would ensure that the foreign carrier would not profit from its coercive conduct, since any U.S. carriers billed for an increase following the issuance of such an order would simply deduct the increase from their settlement statements. At the same time, by allowing the continued payment of rates at the levels agreed to prior to the commencement of this conduct, this remedy would encourage the foreign carrier to maintain circuits and services with U.S. carriers. Allowing these continued payments should also facilitate the restoration of normal commercial negotiations once U.S. carriers are no longer subject to the threat of circuit disruption. But in the event that the foreign carrier proceeds to disrupt circuits notwithstanding the prohibition on increased payments, the Commission would likely need to impose a full stop payment order to exert greater pressure on the foreign carrier to resume service. Indeed, AT&T believes that full stop payment orders are generally the most appropriate remedy where the Commission is responding to actual, rather than threatened, circuit disruption.

The Commission also has authority to condition or revoke Section 214 authorizations to address anticompetitive conduct,[40] as proposed by the Notice (¶ 44), and such action may be appropriate in some circumstances where the sanctioned conduct involves the Section 214 licensee and such a remedy is necessary to protect the interests of U.S. consumers. However, AT&T does not support the use of this remedy in other contexts.

The Notice properly observes (¶ 42) that the re-imposition of the ISP would not be

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[39] *See* AT&T Reply Comments, IB Docket No. 05-254, filed Oct. 27, 2005, at 10.

[40] *See Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1389 (D.C. Cir. 1995)

appropriate to address anticompetitive conduct. The Commission has previously noted that this remedy "may not effectively address the nature of the anticompetitive harm and may cause further detriment to U.S. competition and consumers on a route."[41] AT&T agrees that this remedy would likely be burdensome for U.S. carriers and obstruct the resumption of normal commercial relations.

The Notice proposes (¶ 42) an additional remedy of prohibiting U.S. carriers from carrying or terminating inbound traffic from a foreign carrier that disrupts service. While this remedy is potentially helpful, it is unclear whether it could be fully enforced in today's international market in view of the widely available least cost routing opportunities allowing a foreign carrier to send U.S. traffic via third countries and thus making identification of such traffic more difficult.[42]

AT&T also supports the proposal to apply benchmarks to indirect routing arrangements, after prior notice and opportunity for comment, for enforcement in those specific situations where full stop payment orders are imposed to address anticompetitive conduct. Notice, ¶¶ 49-58. Such targeted action is well within Commission authority, and would prevent the effectiveness of a stop payment order from being undermined by U.S. carriers paying above-benchmark rates for traffic sent by indirect routes to the destination carrier subject to the stop payment order. As the Notice explains (¶¶ 53, 57), Commission authority applies to all "foreign communication" sent by direct or indirect routing arrangements, and the exercise of such

[41] ISP Reform Order, ¶ 47.

[42] The Notice does not propose increasing rates on inbound calls as a potential remedy. *See id*., ¶ 41. AT&T concurs with this approach in view of the likely difficulty in preventing the foreign carrier from using third country routing arrangements to avoid increases in inbound rates.

authority does not exert jurisdiction over any foreign carrier. These conclusions apply no matter how many intermediate countries through which a U.S. international call may be routed before it reaches the destination country.[43] AT&T supports the use of this remedy to increase the effectiveness of the Commission's stop payment orders imposed in 2010 to address the disruption of U.S. carrier circuits on the U.S.-Tonga route and also supports the use of this remedy in other similar circumstances, as proposed here.[44]

The Notice also asks (¶ 58) whether benchmarks should be imposed on alternative routing arrangements to address instances of high rates substantially above benchmarks for a prolonged period with no foreseeable progress in lowering rates. AT&T believes that the application of this remedy should be limited to the circumstances described above involving full stop payment orders against carriers engaging in circuit disruptions and other service-affecting conduct.[45]

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[43] 47 U.S.C. Sect. 153 (17). *See also*, Comments of AT&T Inc., IB Docket No. 09-10, filed Jan. 6, 2010, at 6; Reply Comments of AT&T Inc., IB Docket No. 09-10, filed Jan. 20, 2010, at 3-4.

[44] *Id*. Compared with the "no payment" approach on which the Notice also requests comment (¶ 47), the application of benchmarks to indirect routing arrangements would be more likely to allow continued call termination with the destination carrier.

[45] AT&T also agrees that U.S. carriers should not be required to negotiate benchmark compliant rates for all indirectly routed traffic. *See* Notice, ¶ 56, n.121.

V. THE FACTS DEMONSTRATE THAT U.S. CARRIERS PASS THROUGH REDUCTIONS IN TERMINATION RATES

There is no basis to foreign carrier claims that U.S. carriers have failed to reflect reductions in termination costs in their retail rates. As stated by the Notice (¶ 60), from 1996 to 2009, "the average IMTS settlement rate paid by U.S. carriers decreased by $0.37 per minute, while the average IMTS revenue per minute (an estimate of the average U.S. international calling rate) decreased by $0.66 per minute, more than flowing through settlement rate reductions." Indeed, this data demonstrates that U.S. carriers' reductions in retail rates exceeded their reductions in termination costs in this period by *almost 80 percent*.

Foreign carriers claiming that even greater reductions in retail rates are required on the grounds that reductions should be "*in proportion* to any settlement rate reduction" (Notice, ¶ 59 (emphasis added)) fail to recognize that foreign termination costs are not the only cost component of international calls, which also require use of the U.S. network, as well as marketing, billing, and other costs. Therefore, just as a ten percent reduction in the price of steel does not result in a ten percent reduction in the price of an automobile, reductions in settlement costs do not allow the same percentage reductions in international calling prices. With U.S. carriers' average per minute IMTS revenues exceeding their average per minute termination costs by only $0.026 in 2009, these tired foreign carrier claims that U.S. carriers are using termination cost reductions to earn excessive profits from these services should now be laid to rest.[46]

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[46] *See Notice*, ¶ 60, n.131 (citing FCC 2009 Section 43.61 data showing average IMTS revenue per minute of $0.08 and average settlement payout per minute of $0.054).

As the Commission has repeatedly found, competitive market pressures ensure that U.S. international carriers' prices closely follow costs.[47] The U.S. market has "approximately 40 facilities-based carriers and approximately 770 resellers providing IMTS service,"[48] and "many consumers approach IMTS as an 'a la carte' service often purchased from providers other than their presubscribed carrier, including independent resellers."[49] Accordingly, "various structural characteristics of the IMTS mass market will ensure that the market remains competitive."[50] And "[b]asic economic theory teaches that, in a competitive market, changes in the marginal cost of a

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[47] *See ISP Reform Order*, ¶ 72; *Benchmarks Order*, ¶ 270.

[48] *SBC Communications, Inc. & AT&T Corp*., 20 FCC Rcd. 18290, ¶162 (2005).

[49] *Id*., ¶ 161.

[50] *Id*., ¶ 163 (emphasizing that "mass market IMTS customers have multiple access channels through which to obtain international service, including calling plans offered by their presubscribed long distance carrier, 'dial-around' services, prepaid calling cards, as well as important emerging access channels such as discounted international calling plans offered by wireless carriers and VoIP providers," as well as the existence of "no significant barriers to entry in the provision of mass market IMTS"). As a result, there would be no adverse impact on competition even if settlements cost reductions were not "flowed through uniformly to all segments of the retail market." Notice, ¶ 60.

product are reflected fully in its price, and are therefore 'passed on' to customers."[51] Thus, "[b]oth statistical data collected by the Commission and economic theory indicate that reductions in settlement rates are being passed on to U.S. customers."[52] The recent data summarized in the Notice reaffirm the validity of these Commission findings.

Respectfully submitted,

By: /s/ James J. R. Talbot

James J. R. Talbot
Gary L. Phillips
Paul K. Mancini

Attorneys for
AT&T Inc.
1120 20th Street, NW
Washington, D.C. 20036
(202) 457-3048 (phone)
(202) 457-3073 (fax)

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[51] *ISP Reform Order*, ¶ 73

[52] *Id.*, ¶ 72.