

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

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In the Matter of	)	
	)	
1998 Biennial Regulatory Review	)	IB Docket No. 98-148
Reform of the International Settlements	)	
Policy and Associated Filing Requirements	)	
	)	
Regulation of International	)	CC Docket No. 90-337
Accounting Rates	)	(Phase II)
	)	
Market Entry and Regulation of	)	IB Docket No. 95-22
Foreign-affiliated Entities	)	

**REPORT AND ORDER AND ORDER ON RECONSIDERATION**

**Adopted:** April 15, 1999

**Released:** May 6, 1999

By the Commission:

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## I. Introduction

1. The Commission has sought to foster an increasingly competitive international telecommunications market by adopting policies that promote the shift away from regulated monopolies and toward private sector competition.<sup>1</sup> This *Order* is a further step in the Commission's policy of removing cumbersome regulations and encouraging competition in the international telecommunications marketplace. In this *Order*, we remove outdated rules that govern the manner in which U.S. international telecommunications carriers relate to foreign carriers that provide service in competitive markets. We find that it is no longer necessary to apply our existing international settlements policy (ISP) to U.S. carrier arrangements with nondominant foreign carriers and with arrangements with all foreign carriers in competitive foreign markets. Indeed, we find that applying our international settlements policy where unnecessary actually inhibits competition in the U.S. market and may be depriving U.S. consumers of benefits of greater competition. The *Order* therefore removes rules that limit the extent to which U.S. carriers compete among themselves in the provision of international telecommunications services. As a result, this action is expected to create greater incentives for U.S. carriers to adopt business strategies that will enable them to obtain low rates to terminate U.S. traffic in foreign markets.

2. The Telecommunications Act of 1996 directs the Commission to undertake, in every even-numbered year beginning in 1998, a review of all regulations issued under the Communications Act that apply to operations or activities of any provider of telecommunications service and to repeal or modify any regulation it determines to be "no longer necessary in the public interest."<sup>2</sup> In particular, the Act directs the Commission to determine whether any such regulation is no longer necessary "as the result of meaningful economic competition between providers of such service."<sup>3</sup> Accordingly, the Commission initiated a comprehensive 1998 biennial review to identify regulations that are overly burdensome or no longer serve the public interest.<sup>4</sup> We find, pursuant to Section 11(a)(2) of the Communications Act (Act), that in the specific instances described below, the ISP is no longer necessary in the public interest as a result of meaningful economic competition. As required under Section 11(b), we therefore repeal the ISP, as it is no longer in the public interest.<sup>5</sup>

3. In August 1998, the Commission issued a *Notice of Proposed Rulemaking*, in which it proposed substantial changes in the way it regulates international telecommunications carriers' relations with their foreign counterparts.<sup>6</sup> We proposed in the *Notice* to reform our application of the ISP, which governs the settlement payment for the exchange of telecommunications traffic between U.S. and foreign

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<sup>1</sup> See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23,891 (1997) (*Foreign Participation Order*), petition for recon. pending.

<sup>2</sup> 47 U.S.C. § 161 (1998).

<sup>3</sup> 47 U.S.C. § 161(a)(2).

<sup>4</sup> See FCC Staff Proposes 31 Proceedings as Part of 1998 Biennial Regulatory Review, News Release (Feb. 5, 1998).

<sup>5</sup> 47 U.S.C. § 11(a)-(b).

<sup>6</sup> *1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements*, IB Docket No. 98-148 and CC Docket No. 90-337, Notice of Proposed Rulemaking, 13 FCC Rcd 15,320 (1998) (*Notice*).

telecommunications carriers. This *Order* adopts most of those proposed changes.

4. The steps we take in this *Order* remove regulatory impediments to increased competition in the international telecommunications marketplace. These steps are a response to the dramatic changes in international telecommunications markets that have occurred in recent years. We expect these changes to promote lower prices and greater innovation in international telecommunications services for U.S. consumers.

5. In the *Notice*, the Commission sought comment on the application of the ISP generally and proposed to make several significant changes. First, we proposed no longer to require U.S. carriers to comply with the ISP in certain circumstances. Specifically, we proposed not to apply the ISP to arrangements: (1) between U.S. carriers and foreign carriers that lack market power in World Trade Organization (WTO) Member countries; and (2) with foreign carriers in WTO Member countries to which U.S. carriers are authorized by the Commission to provide international simple resale (ISR). We also sought comment, in those circumstances where we decline to apply the ISP, whether to require U.S. carriers to file contracts or settlement rate information. Second, we proposed to modify our existing flexibility policy. Third, we sought comment on whether to modify our rules governing ISR as a mechanism for putting increased pressure on international settlement rates. Finally, we sought comment on the application of our existing competitive safeguards and whether, if we do make changes in our ISP, we should modify those safeguards.

6. We conclude, as discussed below, that we should remove the ISP: (1) for settlement arrangements between U.S. carriers and foreign telecommunications carriers that lack market power; and (2) for all settlement arrangements on routes where U.S. carriers are able to terminate at least 50 percent of their U.S. billed traffic in the foreign market at rates that are at least 25 percent below the applicable benchmark settlement rate. We also find, as discussed below, that in light of these changes, our flexibility policy is superfluous and therefore remove it. We also clarify our No Special Concessions rule and make minor changes to our filing requirements. We take these steps based on the Commission's objectives of maintaining a regulatory regime that takes into account the current state of telecommunications markets, consistent with the requirements of Section 11 of the Act that we remove rules that are no longer necessary in the public interest as a result of meaningful economic competition.<sup>7</sup> The steps we take in this *Order* also reflect our desire to ensure that our rules are narrowly tailored to apply only in circumstances where their benefits clearly outweigh any harmful effects.

## II. Background

7. The Commission has had a long-standing policy of protecting U.S. carriers from the monopoly power wielded by foreign carriers in the international telecommunications market. The international telecommunications market in the United States has had multiple, competing carriers almost since its inception. There has been significant competition in U.S. provision of telex and telegraph service since the 1930s and competition for basic voice service, or International Message Telephone Service (IMTS) since the mid-1980s. On the other hand, until very recently, international telecommunications markets in foreign countries have been dominated by single monopoly operators, usually government owned.

8. The Commission's policies recognize that this competitive differential could have a significant impact on the prices U.S. consumers pay for international service. A significant component of

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<sup>7</sup> 47 U.S.C. § 11(a)-(b).

U.S. carriers' costs of providing international service is the settlement payments they make to foreign carriers to terminate international calls in other countries.<sup>8</sup> In negotiating settlement rates, foreign monopoly carriers could pit competing U.S. carriers against one another, exploiting the fact that U.S. carriers unwilling to pay settlement rates demanded by foreign carriers would lose business on those routes to higher-bidding U.S. competitors, as there are no alternative means of terminating international traffic. This practice, known as "whipsawing," can drive up the cost to U.S. carriers of terminating international traffic in foreign markets, and hence, the prices paid by U.S. consumers.

9. In a series of decisions starting in 1936, the Commission developed its International Settlements Policy (ISP), a policy that, among other things, requires U.S. telecommunications carriers to pay nondiscriminatory rates for the termination of international traffic in foreign countries.<sup>9</sup> Although the ISP initially applied only to international telegraph and telex service, the Commission extended it to voice traffic in 1986 in the *ISP Order*.<sup>10</sup> This policy was developed to prevent foreign monopoly carriers from engaging in "whipsawing," or playing U.S. carriers against each other to the disadvantage of U.S. carriers and U.S. ratepayers.<sup>11</sup> The ISP requires: (1) the equal division of the accounting rate between the U.S. and foreign carrier; (2) nondiscriminatory treatment of U.S. carriers (all U.S. carriers must receive the same accounting rate, with the same effective date); and (3) proportionate return of inbound traffic. As stated in the *ISP Order*, "[t]he policy of uniform settlement rates arose in response to the unique situation in the international telecommunications arena which places single governmental or quasi-governmental entities from other nations in direct negotiation with multiple private U.S. entities for the formation of operating agreements to arrange international services."<sup>12</sup> To ensure compliance with the ISP and other relevant rules, the Commission requires that all accounting rate agreements be filed with the Commission and made public.<sup>13</sup> The International Bureau, on delegated authority, may reject a particular agreement if it finds that

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<sup>8</sup> The current international accounting rate system was developed as part of a regulatory tradition in which international telecommunications services were supplied through a bilateral correspondent relationship between national monopoly carriers. An accounting rate is the price a U.S. facilities-based carrier negotiates with a foreign carrier for handling one minute of international telephone service. Each carrier's portion of the accounting rate is referred to as the settlement rate. In almost all cases, the settlement rate is equal to one-half the negotiated accounting rate.

<sup>9</sup> See *Mackay Radio and Telegraph Company, Inc.*, 2 FCC 592 (1936), *aff'd Mackay Radio and Telegraph Co. v. FCC*, 97 F.2d 641 (D.C. Cir. 1938); *Modifications of Licenses in the Fixed Public and Fixed Public Press Services*, 11 FCC 1445 (1946); *Mackay Radio and Telegraph Company*, 25 FCC 690, 733-34 (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 Communications Corp.*, 46 FCC 2d 1042 (1974); *Uniform Settlement Rates on Parallel International Communications Routes*, Docket No. 21265, Memorandum Opinion and Order, 84 FCC 2d 121 (1980) (*USP Order*).

<sup>10</sup> *Implementation and Scope of the Uniform Settlements Policy for Parallel Routes*, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (Feb. 7, 1986) (*ISP Order*), *modified in part on recon.*, 2 FCC Rcd 1118 (1987) (*ISP Reconsideration*), *further recon.*, 3 FCC Rcd 1614 (1988). See also *Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), *on recon.*, 7 FCC Rcd 8049 (1992); 47 C.F.R. § 43.51(e)(4); 47 C.F.R. § 64.1001 (1998).

<sup>11</sup> For a discussion of whipsawing and its harmful effects, see *USP Order*, 84 FCC 2d 121,122, ¶ 4-5.

<sup>12</sup> *ISP Order*, 51 Fed. Reg. at 4736, ¶ 3.

<sup>13</sup> See 47 C.F.R. 64.1001(1)(2) (1998).

its terms and conditions do not comply with the ISP and serve the public interest in achieving cost-based accounting rates.<sup>14</sup>

10. Since the Commission first implemented the ISP for voice traffic, the market for international telecommunications services has changed radically. Today, over 30 countries are committed to open and competitive telecommunications markets, and 22 other countries have committed to open their markets in the future as a part of the WTO Agreement on Basic Telecommunications.<sup>15</sup> New entrants are being established in regions throughout the world and are rapidly gaining substantial market share in many markets. For example, in Europe, over 50 new facilities-based carriers have entered the market and are providing service in competition with incumbent operators in nearly all countries of the European Union. In the past year, companies have committed to investing over \$3 billion to build independent intra-European fiber-optic networks.<sup>16</sup> In Japan, Hong Kong, Australia, and many other countries, similar developments are occurring as U.S. and other domestic carriers are entering the market to compete with incumbent carriers.

11. The development of competition in the international market has led the Commission to reexamine its ISP in recent decisions to ensure that it does not have the unintended effect of stifling competition in the U.S. market for international services.<sup>17</sup> The Commission has recognized in several orders in the past three years that the ISP is not necessary on routes where there is competition in the foreign market and may, in fact, impede the further development of competition on such routes.<sup>18</sup> In the 1996 *Policy Statement on International Accounting Rate Reform (Policy Statement)*, the Commission stated that: "(1) the ISP was designed for a world characterized by bilateral negotiations between carriers with market power; (2) as competitive markets emerge, the ISP could impede competitive behavior and the development of effectively competitive markets; and (3) competitive market forces, where they exist, should determine the supply and pricing of international service."<sup>19</sup>

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<sup>14</sup> The Commission approves accounting rate changes except where such changes violate the ISP or would result in increased settlement payments for U.S. carriers. *See, e.g., AT&T Corp., Petition for Waiver of the International Settlements Policy*, File No. ISP-97-M-731, Memorandum Opinion and Order, DA 99-1925 (Tel. Div., Int. Bur., rel. Sept. 23, 1998) (rejecting AT&T's proposed accounting rate change for service to Haiti because newly imposed surcharges would result in overall increased settlement rates for U.S. carriers).

<sup>15</sup> The results of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS, April 30, 1996, 36 I.L.M. 366 (1997). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Basic Telecom Agreement." *See Foreign Participation Order*, 12 FCC Rcd 23,891.

<sup>16</sup> *See FCC International Bureau, Report on International Telecommunications Markets 1997-1998* (Dec. 7, 1998) (available at <http://www.fcc.gov/Bureaus/International/Reports/ritm9798.pdf>).

<sup>17</sup> *See Policy Statement on International Accounting Rate Reform*, 11 FCC Rcd 3146 (1996) (*Policy Statement*); *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20,063 (1996) (*Flexibility Order*); *Foreign Participation Order*, 12 FCC Rcd 23,891; *Notice*, 13 FCC Rcd 15320.

<sup>18</sup> *See Policy Statement*, 11 FCC Rcd 3146.

<sup>19</sup> *Policy Statement*, 11 FCC Rcd at 3155-56, ¶ 33.

12. In support of the *Policy Statement*, the Commission adopted policies that allow U.S. carriers, under certain conditions, to enter into arrangements with foreign carriers to route international traffic without adhering to the requirements of the ISP. The Commission's rules currently include two options for U.S. carriers to route traffic outside the requirements of the ISP. The first is international simple resale, or ISR, and the second is the Commission's policy, adopted in the *Flexibility Order*, allowing so-called "alternative settlement arrangements."

13. Under the Commission's ISR rules, authorized carriers may route switched traffic over international private lines interconnected to the public switched network. Such traffic is not subject to the ISP's requirements of nondiscriminatory accounting rates, equal division of accounting rates, or proportionate return of inbound traffic.<sup>20</sup> The Commission reasoned that allowing ISR would promote the public interest in increased competition and reduced prices for international telecommunications services, and that it would also put pressure on above-cost accounting rates.<sup>21</sup> The Commission's ISR rules were originally intended to apply to resellers that leased matching international private line circuits in the U.S. and foreign country, interconnected them to the public switched network on both ends, and offered international voice service to the public.<sup>22</sup> The policy also applies, however, to facilities-based carriers that agree with their foreign correspondents to designate certain circuits as "private lines." Thus, on routes where the Commission allows ISR, facilities-based carriers have a choice of carrying traffic via an ISR arrangement, where they negotiate a rate for the termination of traffic in the foreign market, or of carrying traffic pursuant to a traditional settlement arrangement that is subject to the ISP.

14. The Commission's policy is to encourage the development of ISR as an alternative to the accounting rate system. At the same time, however, the Commission has recognized that ISR poses potential concerns for the U.S. market. Specifically, the Commission is concerned with the potential for "one-way bypass," which could occur if foreign carriers are able to send traffic into the United States at low rates via ISR, but U.S. carriers are not able to send traffic out of the United States over ISR and must instead send traffic over the traditional accounting rate system. We also use this term more broadly to refer to any practice by which a foreign carrier terminates U.S.-inbound traffic at low rates and exercises its market power to require that U.S. carriers pay much higher rates to terminate traffic in the foreign market. One-way bypass could raise U.S. carriers' settlement costs, and, ultimately consumer prices substantially, if U.S. carriers are forced to pay high settlement rates for outbound traffic but receive little offsetting revenues from inbound traffic routed under an ISR arrangement.

15. To address this potential for one-way bypass, the Commission limits the routes on which U.S. carriers may provide ISR. Under the Commission's current rules, carriers may engage in ISR on routes to WTO Member countries only where settlement rates for at least 50 percent of the settled, U.S. billed traffic on the route are at or below the appropriate benchmark *or* where the foreign market offers equivalent resale opportunities.<sup>23</sup> For service to non-WTO Member countries, ISR is authorized only

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<sup>20</sup> See *Regulation of International Accounting Rates*, Phase II, CC Docket No. 90-337, First Report and Order, 7 FCC Rcd 559, 561-562 ¶¶ 17-24 (1991) (*International Resale Order*); Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992); Third Report and Order and Order on Reconsideration, 11 FCC Rcd 12,498 (1996).

<sup>21</sup> *International Resale Order*, 7 FCC Rcd at 560, ¶ 8.

<sup>22</sup> See generally *International Resale Order*, 7 FCC Rcd 559.

<sup>23</sup> Originally adopted in 1991, the "equivalency" test was developed to prevent one-way inbound bypass of the settlements system, a practice that would exacerbate the settlements deficit and increase costs to U.S.

where 50 percent of the traffic is settled at benchmark rates *and* where the foreign market offers equivalent resale opportunities. Where equivalent opportunities for ISR exist on the foreign end of a route, there is no concern about one-way bypass because U.S. carriers possess the ability to terminate traffic in the foreign market at non-discriminatory termination rates. In addition, the Commission has reasoned that where settlement rates are relatively low, *e.g.*, at or below the benchmark level, the financial incentive for foreign carriers to engage in one-way bypass is significantly reduced.<sup>24</sup>

16. The second mechanism that allows departure from the ISP is the Commission's flexibility policy. In response to developing competition in foreign markets and the need to increase market pressure to bring international settlement rates closer to cost, in 1996 the Commission adopted a policy to permit alternative settlement arrangements that do not comply with the ISP. The Commission found in the *Flexibility Order* that where there is competition on the foreign end of the international route, the parallel accounting rate and proportionate return requirements of the ISP could limit innovative commercial arrangements and discourage competition.<sup>25</sup> It therefore adopted a procedure to allow settlement arrangements that deviate from the ISP where the foreign market is open to competition.<sup>26</sup> The

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carriers by reducing the number of U.S.-inbound minutes which are netted from U.S.-outbound minutes for purposes of calculating net settlement payments. *See International Resale Order*, 7 FCC Rcd at 559, 561-562, ¶¶ 17-24. The equivalency test requires applicants to demonstrate that the destination market provides U.S.-based carriers: (1) the legal right to resell international private lines interconnected at both ends for the provision of switched services; (2) nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carrier facilities for termination and origination of international services, with adequate means of enforcement; (3) competitive safeguards to protect against anticompetitive and discriminatory practices affecting private line resale; and (4) fair and transparent regulatory procedures, including separation between the regulator and operator of international facilities-based services. *Market Entry and Regulation of Foreign Affiliated Entities*, IB Docket 95-22, Report and Order, 11 FCC Rcd 3873, 3924-26, ¶¶ 133-138 (*Foreign Carrier Entry Order*). In 1997, the Commission adopted a benchmark settlement rate condition that prohibits U.S. carriers from engaging in ISR unless at least 50 percent of the settled, U.S.-billed traffic on a particular route is settled at or below benchmark settlement rates established by the Commission. *See International Settlement Rates*, IB Docket 96-261, Report and Order, 12 FCC Rcd 19,806, 19,916-21, ¶¶ 242-259 (1997) (*Benchmarks Order*), *Reconsideration pending, aff'd sub. nom., Cable & Wireless et al. v. FCC*, No. 97-1612 slip op. (D.C. Cir. Jan. 12, 1999), 1999 WL 7824. In the *Foreign Participation Order*, the Commission removed the equivalency test as a requirement for authorizing ISR for service to WTO Member states, but retained it for authorization of ISR to non-WTO Member countries and countries that do not satisfy the benchmarks condition. *Foreign Participation Order*, 12 FCC Rcd at 23,930-31, ¶ 85.

<sup>24</sup> *Foreign Participation Order*, 12 FCC Rcd at 23,928, ¶ 80.

<sup>25</sup> *See Flexibility Order*, 11 FCC Rcd at 20,070 ¶¶ 18, 19.

<sup>26</sup> Under the standard adopted in the *Flexibility Order* in 1996, parties seeking approval of a flexible settlement arrangement were required to show that the destination market satisfied the effective competitive opportunities (ECO) test, adopted in the *Foreign Carrier Entry Order*. *Flexibility Order*, 11 FCC Rcd at 20,078-84 ¶¶ 36-51. In 1997, the Commission modified this standard for parties seeking approval of flexible settlement arrangements for service to WTO Member countries. The *Foreign Participation Order* adopted a presumption in favor of flexible settlement arrangements for service to WTO Member countries. The presumption can only be rebutted by a showing that the foreign carrier that is a party to the alternative settlement arrangement is not subject to competition from multiple (more than one) facilities-based competitors providing service in the foreign market that possess the ability to terminate international traffic. *Foreign Participation Order*, 12 FCC Rcd at 24,026-30 ¶¶ 302-313.



Commission also stated that it would allow settlement arrangements that deviate from the ISP on routes that do not meet the threshold standard for permitting flexibility if the U.S. carrier seeking to enter the arrangement can demonstrate that the arrangement would promote market-oriented pricing and competition while precluding the abuse of market power on the route.<sup>27</sup>

17. We believe the ISR and flexibility policies have been positive initial steps in encouraging increased competition among U.S. carriers and lowering settlement rates on many international routes. These policies allow for deviation from the Commission's restrictive ISP only under certain conditions, however, and their positive impact on the U.S. market for international message telephone service (IMTS) has been limited by these conditions.

18. As the international market for telecommunications services has undergone substantial change in recent years, our policies must change as well. In many cases, application of the ISP is no longer necessary to prevent harm to consumers due to whipsawing by a foreign carrier. Moreover, we find below that where the ISP is unnecessary, its application will actually inhibit competition in the U.S. international services market. We thus adopt below several modifications to our ISP so that it applies only where necessary. We further find in this *Order* that although the flexibility policy has been a useful interim step in the transition from traditional accounting rates to a competitive market, the steps we take in this *Order* largely supersede the flexibility policies. We therefore remove our flexibility policy.

### III. Reforming the International Settlements Policy

#### A. Application of the ISP and related filing requirements to arrangements with foreign carriers that lack market power

19. The Commission proposed in the *Notice* to remove the ISP for all arrangements between U.S. carriers and foreign carriers that lack market power in WTO Member markets. We stated our belief that we should review our international settlements policies to lift unnecessary regulatory burdens in light of significant changes in international telecommunications markets.<sup>28</sup> We sought comment on whether we should continue to maintain the requirement that carriers file contracts and settlement rate information for arrangements with foreign carriers that lack foreign market power.<sup>29</sup> The Commission maintains these filing requirements to ensure that carriers comply with the ISP. Finally, we sought comment on how the Commission and interested parties could confirm that a foreign carrier lacks market power in the foreign market and thus verify that an arrangement with that foreign carrier qualifies for exemption from the ISP.<sup>30</sup>

20. In this *Order*, we remove the ISP for U.S. carriers' settlement agreements with foreign telecommunications carriers that lack market power in WTO Member, as well as non-WTO Member,

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<sup>27</sup> The *Flexibility Order* maintains two safeguards for flexible arrangements: (i) alternative arrangements between affiliated carriers and those involved in non-equity joint ventures must be publicly filed with the Commission regardless of the amount of traffic affected; and, (ii) alternative arrangements affecting more than 25 percent of the inbound or outbound traffic on a particular route must also be publicly filed and may not contain unreasonably discriminatory terms and conditions. See *Flexibility Order*, 11 FCC Rcd at 20,078-84 ¶¶ 36-51; see also *Foreign Participation Order*, 12 FCC Rcd at 24,026-30 ¶¶ 302-313.

<sup>28</sup> *Notice*, 13 FCC Rcd at 15,327-30, ¶¶ 18-24.

<sup>29</sup> *Notice*, 13 FCC Rcd at 15,328, ¶ 21.

<sup>30</sup> *Notice*, 13 FCC Rcd at 15,329-30, ¶ 23.

markets. We also remove the requirement that copies of such agreements and settlement rate information be filed with the Commission.<sup>31</sup> We will publish a list of foreign carriers we believe continue to possess market power and, unless otherwise determined by the Commission, with which U.S. carriers may not enter into arrangements that deviate from the ISP.<sup>32</sup>

### 1. Removal of the ISP and filing requirements

21. We find that removing the ISP and related filing requirements for arrangements between U.S. carriers and foreign carriers that lack market power in foreign markets would remove unnecessary regulatory burdens on U.S. carriers and at the same time further competition in the U.S. international services market. The vast majority of commenting parties support this change in Commission policy.<sup>33</sup>

22. As we stated in the *Notice*, the Commission adopted the ISP and related filing requirements to prevent whipsawing by a foreign monopoly carrier.<sup>34</sup> Where the carrier in the foreign market lacks market power, however, its ability to whipsaw U.S. carriers is substantially diminished, if not eliminated. Except in unusual circumstances, a U.S. carrier that is faced with an attempt at whipsawing by a foreign carrier that lacks market power on the foreign end of a particular route may respond by entering an agreement with a different foreign carrier on the route. We thus conclude that the ISP is not necessary to prevent whipsawing for settlement arrangements with foreign carriers that lack market power.

23. We further find that removal of the ISP and related filing requirements for settlement arrangements between U.S. carriers and foreign carriers that lack market power will promote competition in the U.S. market. The ISP essentially ensures that U.S. carriers have a unified bargaining position in dealing with a foreign carrier, while our filing requirements ensure transparency. This unified bargaining position and transparency are important where the foreign carrier has the ability unilaterally to set the terms and conditions for terminating traffic in the foreign market. In contrast, where the foreign carrier lacks this ability unilaterally to set the terms and conditions for the termination of international traffic, such a unified bargaining position and transparency on the part of U.S. carriers is not only unnecessary, but could impede competition among U.S. carriers.<sup>35</sup> We therefore find, pursuant to Section 11 of the Act, that the ISP is no longer necessary in the public interest as a result of meaningful economic competition, when it is applied to arrangements between U.S. carriers and foreign carriers that lack market power. As required under Section

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<sup>31</sup> See 47 C.F.R. §§ 43.51, 64.1001.

<sup>32</sup> See *infra*, Section III.B (removing the ISP for arrangements with all foreign carriers on routes where U.S. carriers are able to terminate at least 50 percent of their U.S. billed traffic in the foreign market at rates that are 25 percent below the applicable benchmark settlement rate or less). The Commission is releasing a Public Notice, concurrent with the release of this *Order*, containing a list of foreign carriers that do not qualify for a presumption that they lack market power in the foreign telecommunications market. Public Notice, DA 99-809 (rel. May 6, 1999); see also *infra* ¶ 43.

<sup>33</sup> See, e.g., AT&T comments at 4-5; BellSouth comments at 2-3; Qwest comments at 2-3; RSL com comments at 3; but see Ameritech comments at 3-4 (arguing that the Commission's proposals go too far because they could allow foreign carriers to gain an unfair advantage over other U.S. carriers).

<sup>34</sup> See *Notice*, 13 FCC Rcd at 15,321-22 ¶¶ 3-4; see also 47 C.F.R. § 43.51; *id.* § 64.1001; see also *ISP Order*, 51 Fed. Reg. at 4740, ¶ 3.

<sup>35</sup> See *ISP Reconsideration Order*, 2 FCC Rcd at 1118, ¶ 2 (describing the purposes of the ISP to respond to competitive threats posed by foreign monopoly carriers).

11(b), we therefore repeal this rule, as applied in such cases, as it is no longer in the public interest.<sup>36</sup>

24. In the *Notice*, we outlined three ways the ISP may act to inhibit competition among U.S. international carriers.<sup>37</sup> First, the ISP could potentially reduce incentives for U.S. carriers to negotiate low settlement rates by removing any possible differential in rates competing carriers pay for the termination of foreign traffic. Where the rate negotiated by one carrier is available to all other carriers, whether they negotiate or not, the negotiating carrier has a reduced incentive to negotiate aggressively. No matter how aggressively a carrier negotiates, it will be unable to achieve a cost advantage vis-a-vis its competitors under the ISP.

25. Second, the proportionate return requirement of the ISP can distort competition in the U.S. market.<sup>38</sup> Under the proportionate return regime, the volume of outbound and inbound traffic are tied together, with carriers receiving a settlement credit for each additional minute of inbound traffic. This bundling of traffic flows can distort competition. The Commission has found that "the markets for inbound and outbound traffic have different attributes, and a potentially effective entrant in one might be less effective in another."<sup>39</sup> Removing the regulatory link between inbound and outbound traffic markets, thus "should have the ultimate result of producing decentralized, more competitive market structures that improve economic performance and ultimately redound to the benefit of consumers."<sup>40</sup>

26. The proportionate return requirement also is an impediment to new entrants on both ends of the international route where it applies. New entrants in the United States that have little or no U.S. outbound traffic automatically face a higher cost structure than established carriers that have a substantial amount of outbound traffic. That is because, under the proportionate return requirement, U.S. carriers receive return traffic in proportion to the amount of traffic they send outbound. The credits each U.S. carrier receives for return traffic offset the payments it must make for outbound traffic. In most cases, foreign carriers will not start sending a U.S. carrier return traffic until the U.S. carrier's outbound traffic volume reaches a certain threshold. Thus, a new entrant with little outbound traffic would not receive any return traffic to offset the payments it makes for outbound traffic. In addition, U.S. carriers have little incentive to enter into arrangements with foreign new entrants that have little U.S. inbound traffic to offer. If the U.S. carrier terminates traffic with the foreign new entrant, rather than the incumbent (which carries large volumes of U.S. inbound traffic) the U.S. carrier would forgo return traffic it would otherwise receive that would offset the cost of terminating the U.S. outbound traffic.

27. Third, the ISP may inhibit competition at the retail level. Settlement rates are a significant component of the costs of providing international switched services. These rates are made public, and all U.S. carriers pay the same settlement rates to terminate traffic to a specific country. Thus, all carriers have a clear knowledge of a significant component of their competitors' costs. To the extent carriers are aware of their competitors' costs, they are less likely to compete aggressively on price. If the ISP did not exist, and U.S. carriers were each able to enter into independent negotiations for the termination of international traffic without a significant danger of whipsawing by foreign carriers, U.S. carriers' costs would differ,

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<sup>36</sup> 47 U.S.C. § 11(a)-(b).

<sup>37</sup> *Notice*, 13 FCC Rcd at 15,324, ¶¶ 9-11.

<sup>38</sup> The proportionate return requirement of the ISP is codified at 47 C.F.R. § 43.51(e).

<sup>39</sup> *See Flexibility Order*, 11 FCC Rcd at 20,070, ¶ 19.

<sup>40</sup> *See Flexibility Order*, 11 FCC Rcd at 20,070, ¶ 19.

there would be greater uncertainty, and thus greater pressure on U.S. carriers to compete on price, all to the benefit of U.S. consumers.

28. In addition, requiring public availability of the terms and conditions of arrangements between U.S. and foreign carriers may exert a chilling effect on arrangements that might ultimately result in lower costs for particular U.S. carriers. Foreign carriers may be reluctant to enter into arrangements with U.S. carriers to terminate traffic at reduced rates if the U.S. carrier is required to file such arrangements publicly. Indeed, anecdotal information indicates that some carriers are faced with the choice of concluding an arrangement with a foreign carrier at lower rates or complying with the Commission's public filing requirements.

29. For these reasons, we will no longer require U.S. carriers that conclude arrangements with foreign carriers that lack market power in the foreign market to comply with the terms of the ISP or our contract filing requirements. Instead, we find that a policy that promotes the conclusion of unrestricted commercial arrangements between U.S. carriers and foreign carriers that lack market power in the foreign market will best further our goal of promoting competition in the international services market. We find that our Section 43.51 contract filing requirement should no longer apply to any U.S. carrier arrangement with a foreign carrier that lacks market power.<sup>41</sup>

30. We recognize that in certain unusual circumstances a foreign carrier that otherwise would appear to 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. In such cases, the Commission may be required to take appropriate remedial action. Nevertheless, on balance, we find that the procompetitive benefits of removing the ISP for arrangements with foreign carriers that lack market power far outweigh the potential harm from such arrangements.

31. We believe there still may be a danger that a foreign carrier that possesses market power would have the ability to whipsaw U.S. carriers because such a foreign carrier may unilaterally set the prices, terms and conditions under which U.S. carriers are able to exchange traffic. Where settlement rates are high, U.S. consumers can be injured as a result of increased settlement payments that may result from whipsawing behavior. We thus conclude that application of the ISP to arrangements with foreign carriers with market power is necessary unless the potential harm from the exercise of foreign market power is otherwise limited.<sup>42</sup> We therefore will continue to apply the ISP to all arrangements with foreign carriers that possess market power, except as provided below.<sup>43</sup> All carriers entering into arrangements with foreign carriers that possess market power are also required to file copies of contracts with the Commission.<sup>44</sup> Carriers deviating from the ISP for arrangements with dominant carriers that remain subject to the ISP or failing to file with the Commission arrangements with foreign carriers that possess market power are subject to Commission enforcement action.<sup>45</sup>

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<sup>41</sup> See *Notice*, 12 FCC Rcd 15,328-29, ¶ 21 (questioning whether there is a strong rationale for maintaining the Commission's filing requirements for arrangements with foreign carriers that lack market power).

<sup>42</sup> See *infra*, Section III.B.1.

<sup>43</sup> See *infra* ¶¶ 50-70.

<sup>44</sup> See 47 C.F.R. § 43.51.

<sup>45</sup> See, e.g., 47 C.F.R. § 503 (providing for fines up to \$100,000 for each day of a continuing violation, not to exceed \$1,000,000 for any single act or failure to act in the case of any willful or repeated failure to

32. We note that our decision to remove the ISP and our contract filing requirement for arrangements between U.S. carriers and foreign carriers that lack market power is consistent with the application of the Commission's "No Special Concessions" rule. The rule only applies to agreements with foreign carriers that possess market power in the foreign market. Our No Special Concessions rule prohibits U.S. international carriers from "agreeing to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier *possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market* . . . ." <sup>46</sup> As the Commission stated in the *Foreign Participation Order*, the No Special Concessions rule is intended to address the concern that an exclusive vertical arrangement between a U.S. carrier and a foreign carrier with market power on the foreign end could result in harm to competition and consumers in the U.S. market. <sup>47</sup> By contrast, the Commission has found it unlikely that an exclusive arrangement between a U.S. carrier and a foreign carrier that lacks market power would result in such harm. <sup>48</sup>

33. The vast majority of commenting parties support our proposal no longer to apply the ISP to arrangements with foreign carriers that lack market power. Ameritech argues, however, that we should maintain the ISP for some arrangements, regardless of whether the foreign carrier possesses market power. <sup>49</sup> Ameritech would eliminate the ISP only: "(1) for settlement agreements that affect less than 25 percent of the traffic on a particular route and which are between U.S. carriers and foreign carriers from WTO member countries that permit multiple operator entry to the relevant foreign telecommunications markets; or (2) for routes where transparent, nondiscriminatory, cost-based international termination charges are available on both ends of the route, regardless of whether carriers at either end possess market power." <sup>50</sup>

34. Ameritech would lift the ISP only in cases where there is competition and/or cost-based rates on the foreign end of the international route, regardless of whether the carrier on the foreign end of the international route possesses market power. We agree with Ameritech that cost-based termination rates in foreign markets are a desirable goal. Ameritech's limited proposal to relax the ISP, however, is unlikely to achieve its goal of lowering settlement rates to cost. Ameritech would preclude U.S. carriers from entering

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comply with any rule, regulation, or order issued by the Commission under the Communications Act).

<sup>46</sup> 47 C.F.R. § 63.14(a) (1998) (*emphasis added*). A "special concession" is defined as "an exclusive arrangement involving 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.-licensed carriers and involves:

"(1) operating agreements for the provision of basic services;

"(2) distribution arrangements or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times; or

"(3) any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers." 47 C.F.R. § 63.14(b).

<sup>47</sup> *Foreign Participation Order*, 12 FCC Rcd at 23,955-65, ¶¶ 150-170; see 47 C.F.R. 63.14 (1998).

<sup>48</sup> *Foreign Participation Order*, 12 FCC Rcd at 23,955-65, ¶¶ 150-170.

<sup>49</sup> Ameritech comments at 4.

<sup>50</sup> Ameritech comments at 5.

into arrangements with foreign carriers that lack market power that deviate from the ISP except under the conditions it outlines above. Precluding such arrangements, or limiting the amount of traffic such arrangements may cover, could require U.S. carriers to pay higher termination rates than might otherwise be the case. Moreover, where the foreign carrier lacks market power, there is no need for such restrictions. Furthermore, Ameritech's proposal would do less to bring about cost-based rates than the policy adopted by the Commission. In addition, Ameritech's proposal would create a cumbersome regulatory framework. Determining whether there are "transparent, nondiscriminatory, cost-based interconnection charges" in the foreign market is likely to require a detailed review of the foreign regulatory regime. Such a review would have similar negative aspects to the effective competitive opportunities analysis we largely abolished in the *Foreign Participation Order*.<sup>51</sup> For these reasons, we decline to adopt Ameritech's proposed standard.

35. In the *Notice*, we proposed to apply our proposal to lift the ISP for arrangements with carriers that lack market power in the foreign market only to arrangements with carriers in WTO Member countries.<sup>52</sup> We received comment from several parties urging us to allow U.S. carriers to exchange traffic outside of the ISP with carriers that lack market power in all foreign markets and not to restrict our relaxation of the ISP only to arrangements with foreign carriers that lack market power in WTO Member countries.<sup>53</sup> AT&T, however, opposes extending any exemption from the ISP to non-WTO markets. AT&T argues that non-WTO markets present greater competitive concerns than WTO markets and that "provision of additional benefits to countries with membership of the WTO" serves the public interest in opening foreign markets. AT&T cites the Commission's decision in the *Foreign Participation Order* to adopt a different standard for entry into the U.S. market by carriers from WTO Members than for carriers from non-WTO Members as support for its position.<sup>54</sup>

36. Although we proposed in the *Notice* to restrict the policies adopted here to WTO Member country routes only, we find that such a restriction would not serve the public interest. We find, after considering the comments filed, that there are significant potential benefits to lifting the ISP for arrangements with carriers that lack market power in non-WTO Member countries. Where new entrants exist in non-WTO Member countries, the ISP may be a significant impediment to their ability to enter into arrangements with U.S. carriers to terminate U.S. traffic.<sup>55</sup> Commission policy should encourage U.S. carriers to enter into arrangements with such carriers. At the same time, we find that there are few risks associated with allowing U.S. carriers to enter into such arrangements with foreign carriers that lack market power in non-WTO Member markets. As discussed above, the risks of anticompetitive effects from arrangements between U.S. carriers and foreign carriers that lack market power are slight.<sup>56</sup> We therefore will remove the ISP for arrangements with foreign carriers that lack market power in all foreign markets.

37. AT&T advocates distinguishing between WTO Member and non-WTO Member countries

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<sup>51</sup> *Foreign Participation Order*, 12 FCC Rcd at 23,904-17, ¶¶ 30-58.

<sup>52</sup> *Notice*, 13 FCC Rcd at 15,327, ¶ 17.

<sup>53</sup> See, e.g., Teleglobe comments at 2-5; MCI WorldCom comments at 3; Cable & Wireless reply at 3; Star Telecom reply at 2.

<sup>54</sup> AT&T reply at 27 (citing *Foreign Participation Order*, 12 FCC Rcd at 23,944-45, ¶¶ 125-27).

<sup>55</sup> See *supra* ¶ 26.

<sup>56</sup> See *supra* section III.A.1.

for the purpose of applying the ISP to encourage more countries to seek membership in the WTO.<sup>57</sup> We find it unlikely that the opportunity for non-dominant carriers to enter into arrangements with U.S. carriers that need not comply with the ISP would encourage more countries to seek membership in the WTO. The incentive created by such a policy is unlikely to be a strong one because countries introducing competitive telecommunications regimes already have a strong incentive to join the WTO. A policy of requiring all arrangements with carriers from non-WTO Member countries to comply with the ISP may, however, stifle pro-competitive arrangements with new entrants from such countries. We find that the costs of such a policy are not justified by any benefit that may arise due to incentives that might be created for a country to join the WTO. We decline, therefore, to adopt the proposal in the *Notice* to continue to apply the ISP to settlement arrangements with carriers that lack market power from non-WTO Member countries.

## 2. Market power determination

38. In the *Notice*, we proposed to adopt a presumption that a foreign carrier lacks market power when it possesses less than a 50 percent market share in each of the relevant foreign markets.<sup>58</sup> The Commission adopted this same presumption in the *Foreign Participation Order* for the purpose of determining when to apply competitive safeguards.<sup>59</sup> The Commission found in the *Foreign Participation Order* that the relevant input markets for the purpose of applying our competitive safeguards are the facilities and services markets necessary for provision of U.S. international services. They generally include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end.<sup>60</sup> We find here that the same markets are relevant for determining whether we should continue to apply the ISP, because market power in any of these markets can give a foreign carrier the power to set unilaterally the rates, terms, and conditions of an arrangement to exchange traffic with a U.S. carrier.<sup>61</sup>

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<sup>57</sup> AT&T reply at 27.

<sup>58</sup> *Notice*, 13 FCC Rcd at 15,327-28, ¶¶ 18-20.

<sup>59</sup> The Commission does not apply its No Special Concessions rule to arrangements with foreign carriers that lack market power in the relevant foreign markets. The Commission presumes that a carrier lacks market power if it possess less than 50 percent market share in the relevant foreign markets. *See Foreign Participation Order*, 12 FCC Rcd at 23,955-65, ¶¶ 150-70. Likewise, the Commission will regulate U.S. carriers that are affiliated with foreign carriers as dominant unless the foreign carrier possesses less than 50 percent market share in the relevant foreign markets. *See Foreign Participation Order*, 12 FCC Rcd at 23,869-99, ¶¶ 177-239.

<sup>60</sup> *See Foreign Participation Order*, 12 FCC Rcd at 23,952-3, ¶ 145; *see also Foreign Carrier Entry Order*, 11 FCC Rcd at 3917, ¶ 116 ("Bottleneck services or facilities' are those that are necessary for the provision of international services, including inter-city or local access facilities on the foreign end"); *see also, The Merger of MCI Communications Corporation and British Telecommunications plc*, GN Docket No. 96-245, Memorandum Opinion and Order, 12 FCC Rcd 15,351, ¶ 43 (rel. Sept. 24, 1997) (*BT/MCI Merger Order*) (identifying six input markets in its merger review: (1) international transport between the United States and United Kingdom; (2) U.K. cable landing station access; (3) U.K. backhaul; (4) U.K. inter-city transport; (5) U.K. terminating access services; and (6) U.K. originating access services).

<sup>61</sup> We find below, however, that where there are viable alternatives to terminate U.S. traffic in the foreign market and/or the settlement rates available for service to such a market are low, the benefit of removing the ISP for all arrangements, including those with foreign carriers that have market power, outweighs any risk of harm involved. *See infra* ¶¶ 50-65.

39. We find no basis to modify the presumption the Commission adopted in the *Foreign Participation Order* that a carrier that possesses less than 50 percent market share in a foreign market lacks the ability to exercise market power in that market, as some commenting parties request.<sup>62</sup> The Telecommunications Resellers Association (TRA) urges us to presume that foreign carriers that possess less than 25 percent market share in the foreign market lack market power.<sup>63</sup> KDD urges the Commission to allow deviation from the ISP for arrangements with foreign carriers that: i) lack market power in the local exchange market; ii) face competition from multiple facilities-based operators in the foreign market; and iii) are from WTO Member markets.<sup>64</sup>

40. The Commission recognized the importance, in the *Foreign Participation Order*, of adopting a standard that enables carriers "to establish quickly and accurately what international transactions, services, and practices are permissible."<sup>65</sup> The Commission also found, in that *Order*, that a presumption that a carrier with less than 50 percent market share in each of the relevant foreign markets lacks market power is consistent with antitrust legal precedent.<sup>66</sup> Adopting TRA's proposed 25 percent market share threshold is inconsistent with the relevant case law and would require that we impose restrictions on some arrangements that pose little or no risk of competitive harm. As discussed above, we find that applying the ISP in circumstances where it is unnecessary can deter competition.<sup>67</sup> We also note that the 50 percent market share screen is merely a presumption that may be rebutted by an interested party.<sup>68</sup>

41. We also decline to adopt the proposal of KDD to find that a carrier lacks market power, for purposes of applying the ISP, where it lacks market power in the local exchange market and faces competition in a WTO Member country. We find that such a standard would be more cumbersome to apply than the one we adopt and would provide less certainty for carriers seeking to determine whether the ISP applies in a given case. Moreover, a presumption by the Commission that a carrier possesses market power in the foreign market based on its market share may be rebutted by an appropriate showing that the carrier nevertheless lacks market power. We thus find that there would be little, if any benefit of substituting KDD's proposed standard for the Commission's existing standard.

### 3. Procedures to determine whether a carrier qualifies for exemption from the ISP

42. We recognized in the *Notice*, in light of our proposals to remove the requirement that carriers file contracts with the Commission, that it is necessary to adopt a mechanism to ensure that carriers enter into arrangements that deviate from the ISP only with carriers that lack market power in the foreign market, and that our relaxation of the ISP does not enable U.S. carriers to enter into arrangements

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<sup>62</sup> TRA comments at 4; KDD reply at 4-7.

<sup>63</sup> TRA comments at 4.

<sup>64</sup> KDD comments at 5-6.

<sup>65</sup> *Foreign Participation Order*, 12 FCC Rcd at 23,959, ¶ 160 (quoting comments of U S West).

<sup>66</sup> *See Foreign Participation Order*, 12 FCC Rcd 23,959-60 and n. 314, ¶¶ 160-61 (*citing* A.B.A. Section of Antitrust Law, *Antitrust Law Developments* at 235-236 (4th ed.) (1997)).

<sup>67</sup> *See supra* ¶¶ 24-27.

<sup>68</sup> *Foreign Participation Order*, 12 FCC Rcd 23,959-60 and n. 314, ¶¶ 160-61.



that deviate from the ISP with foreign carriers that could exercise their market power to the detriment of U.S. consumers.<sup>69</sup> We thus proposed three alternatives to enable the Commission and interested parties to determine whether a particular settlement arrangement must comply with the ISP: (1) require no filing to substantiate the claim that a particular foreign carrier with which a U.S. carrier corresponds lacks market power; (2) require that a carrier identify the route on which it plans to provide service and file a certification that the carrier on the foreign end of the international route lacks market power; or (3) require a carrier to identify the foreign carrier and publicly file data indicating that the foreign carrier possesses less than 50 percent market share in each of the relevant markets or file a petition for declaratory ruling that a foreign carrier with greater than 50 percent market share nevertheless lacks market power.<sup>70</sup>

43. We decline to adopt any of the proposals set forth in the *Notice*. Rather, we adopt the proposal of Cable & Wireless, which asserted that the Commission should make an affirmative finding that carriers possess market power in specific foreign markets, and make a list of such carriers public.<sup>71</sup> Carriers would thus be precluded from exchanging traffic outside of the ISP with carriers on the list unless otherwise allowed.<sup>72</sup> We find that this approach will best advance our policy of allowing U.S. carriers to enter into arrangements with foreign carriers that lack market power with a minimum of regulatory oversight, while maintaining the ISP for certain arrangements with foreign carriers that possess market power in the foreign market.<sup>73</sup> As discussed above, the Commission's rules include a presumption that a foreign carrier does not possess market power in a foreign market if it possesses less than 50 percent market share in each of the relevant foreign markets.<sup>74</sup> We thus issue, concurrently with the release of this *Order*, a public notice containing a list of foreign carriers that we believe do not qualify for this presumption, for the purposes of identifying arrangements that are not required to comply with the ISP and the Commission's No Special Concessions rule. This list is based on publicly available information, compiled from official sources, including the International Telecommunication Union (ITU). Interested parties may challenge the inclusion or exclusion of any carrier on the list by submitting a petition for declaratory ruling and the appropriate supporting documentation to demonstrate that a carrier included on the list lacks market power or that a carrier excluded from the list has market power. The Commission may also amend the list on its own motion. The list will be updated periodically and posted on the Commission's web page. Carriers are responsible for ensuring that arrangements they enter into outside of the ISP comply with our rules in the event of additions to the list.

44. We find that Cable and Wireless' proposal is the best of the options proposed in the *Notice*

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<sup>69</sup> *Notice*, 13 FCC Rcd at 15,329-30, ¶ 23.

<sup>70</sup> *Id.*

<sup>71</sup> C&W comments at 13-14; *see also* Star Telecom reply at 3.

<sup>72</sup> *See infra*, Section III.B.

<sup>73</sup> As discussed below in Section III.B.1, we remove the ISP for all arrangements on routes where U.S. carriers are able to terminate at least 50 percent of their U.S. billed traffic in the foreign market at rates that are 25 percent below the applicable benchmark settlement rate or less, including for arrangements with foreign carriers that possess market power.

<sup>74</sup> *See supra* ¶¶ 38-40. The relevant markets include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end. *See Foreign Participation Order*, 12 FCC Rcd at 23,952-3, ¶ 145; *see also Foreign Carrier Entry Order*, 11 FCC Rcd at 3917, ¶ 116.

or advocated by commenting parties. The first option suggested in the *Notice* was to allow carriers to determine themselves whether a particular foreign carrier lacks market power and require no filing to substantiate such a claim.<sup>75</sup> This option would provide no guidance for the carrier concluding the arrangement and would lack a mechanism for the Commission or other parties to resolve an issue of whether a particular foreign carrier lacks market power. Thus, it would fail to provide certainty to carriers seeking to enter into new arrangements outside of the ISP that such arrangements comply with our rules.

45. The second option proposed in the *Notice* is problematic as well. This option would require that a carrier entering into an arrangement with a foreign carrier that lacks market power make a filing with the Commission that identifies the route and certifies that the foreign carrier lacks market power in all relevant foreign markets.<sup>76</sup> We find that this solution would not provide the carriers concluding the arrangement with sufficient certainty that a particular foreign carrier possesses or lacks market power. This option would depend entirely on the judgment of the carrier entering into the arrangement to determine whether the foreign carrier lacks market power and, unless the certification were public, would provide no mechanism for other interested parties to challenge that judgment. Further, we are concerned that some foreign carriers may be unwilling to enter into procompetitive settlement arrangements with U.S. carriers if their existence could be discerned from publicly available information.

46. We also find the third option proposed in the *Notice* to be problematic as well. This option would require a carrier that proposes to enter into an arrangement with a foreign carrier that lacks market power to identify the foreign carrier and publicly file data indicating that the foreign carrier possesses less than 50 percent market share in each of the relevant markets or file a petition for declaratory ruling that a foreign carrier with greater than 50 percent market share nevertheless lacks market power.<sup>77</sup> This option would publicly disclose the existence of an arrangement with a foreign carrier that deviates from the ISP. We find that if the Commission were to adopt such a disclosure requirement some foreign carriers may be unwilling to enter into pro-competitive arrangements with U.S. carriers, thus defeating the purpose of exempting arrangements with foreign non-dominant carriers from the ISP.<sup>78</sup>

47. We also find that other options proposed by commenters are problematic. AT&T supports requiring all parties that seek to enter into an arrangement with a foreign carrier that lacks market power to demonstrate to the Commission, with public notice, that the particular foreign carrier lacks market power. If satisfied, the Commission would then include the foreign carrier on a list of approved foreign carriers that lack market power and with which U.S. carriers may enter into arrangements that deviate from the ISP.<sup>79</sup> Under AT&T's proposal, a U.S. carrier that seeks to enter into an arrangement with a foreign carrier that had not before been found to lack market power by the Commission would have to identify the foreign carrier and demonstrate, subject to notice-and-comment procedures, that the foreign carrier lacks market power. In many cases, a foreign carrier may decline to agree to such an arrangement if the existence of the arrangement would have to be made public. AT&T's proposal could thus inhibit carriers from entering into pro-competitive arrangements. In addition, as commenting parties have suggested, a

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<sup>75</sup> *Notice*, 13 FCC Rcd at 15,329-30, ¶ 23.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> We discuss above how public disclosure requirements can put a chilling effect on innovative settlement arrangements. *See supra* ¶ 28.

<sup>79</sup> AT&T reply at 26-27.

new prior approval process would "both delay the benefits stemming from the new agreements as well as inhibit the development of emerging U.S. and foreign carriers and the additional competition they bring to the market."<sup>80</sup>

48. AT&T argues that affirmative findings are required to determine whether a foreign carrier possesses market power. Otherwise, it argues, many "ambiguities" requiring resolution will not be raised with the Commission.<sup>81</sup> We find that providing a list of foreign carriers that do not qualify for the Commission's presumption that they lack market power will provide the affirmative finding sought by AT&T and ample opportunities to address any "ambiguities" that may exist with respect to a specific foreign carrier's market power.

49. We will amend Sections 43.51 and 64.1001 to remove the ISP and related contract filing requirements for arrangements between U.S. carriers and foreign carriers that lack market power. Section 43.51 will also specify procedures for modifying the list of foreign carriers that do not qualify for the presumption that they lack market power. We also amend our No Special Concessions Rule, Section 63.14, to eliminate the requirement that a carrier seeking to enter into an exclusive arrangement with a foreign carrier that lacks market power submit with the Section 43.51 contract filing, which we here eliminate, information to demonstrate that the foreign carrier lacks market power.<sup>82</sup> This rule change will permit carriers to rely on the Commission's published list of foreign carriers for purposes of determining which foreign carriers are the subject of the prohibitions contained in Section 63.14.

## **B. Eliminating the ISP on Selected Routes**

### **1. Eliminating the ISP**

50. We sought comment in the *Notice* on whether to remove the ISP completely on selected routes, including for arrangements with foreign carriers that possess market power in the foreign market. We also sought comment on what standard we should use to identify routes where we should no longer apply the ISP. We expressed concern that continued application of the ISP on liberalized routes would impede the development of real competition among U.S. carriers.<sup>83</sup> We suggested several standards and tentatively concluded that we should remove the ISP on all routes that comply with the Commission's ISR standard.<sup>84</sup> We reasoned that where the conditions for allowing ISR are met, there is a significantly reduced threat that U.S. consumers will be injured as a result of allowing U.S. carriers to enter into arrangements with foreign carriers that do not comply with the ISP.<sup>85</sup> We also sought comment in the

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<sup>80</sup> Telelobe comments at 6 (footnote omitted); *see also* SBC reply at 3.

<sup>81</sup> AT&T reply at 26-27.

<sup>82</sup> *See supra* ¶ 32.

<sup>83</sup> *Notice*, 13 FCC Rcd at 15,331, ¶ 26.

<sup>84</sup> The Commission allows ISR on routes to World Trade Organization (WTO) Member countries where 50 percent of the settled, U.S. billed traffic is settled at or below benchmark settlement rates established by the Commission, *or* where the foreign market offers equivalent resale opportunities. For service to non-WTO Member countries, ISR is authorized only where 50 percent of the traffic is settled at benchmark rates, *and* where the foreign market offers equivalent resale opportunities. *See supra* ¶ 15.

<sup>85</sup> *Notice*, 13 FCC Rcd at 15,331-32, ¶ 27.

*Notice* on several alternative proposals for determining whether to apply the ISP on a particular route. These alternatives included, for example, removing the ISP only where the foreign carrier settles U.S. traffic at the 8 cent best practices rate, adopted in the *Benchmarks Order*,<sup>86</sup> and removing the ISP only on routes where traffic is settled at benchmark rates *and* where the foreign market also offers equivalent resale opportunities.<sup>87</sup>

51. The proposal in the *Notice* to remove the ISP on all routes approved under the Commission's ISR standard elicited a wide range of views from commenting parties. In general, most parties favor lifting the ISP completely on certain routes. Differences exist, however, on the standard parties advocate for determining whether a route qualifies for removing the ISP. Many parties support our proposal to lift the ISP on routes that qualify for ISR.<sup>88</sup> Other parties offered alternative standards for relaxing the ISP and opposed the proposal for relaxing the ISP on ISR routes that was set out in the *Notice*.<sup>89</sup> Still other parties urged the Commission to go further and extend the proposal to remove the ISP more widely than proposed in the *Notice*.<sup>90</sup>

52. We conclude that it would serve the public interest to remove the ISP completely on certain routes, including for arrangements with foreign carriers that possess market power in the foreign market. We find that lifting the ISP has significant merits where the potential harm due to a foreign carrier's abuse of market power is limited. We decline, however, to adopt the standard proposed in the *Notice* to remove the ISP on all routes where we allow ISR. Instead, as proposed by MCI WorldCom, we remove the ISP completely only on those routes where U.S. carriers have the ability to settle U.S. traffic at

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<sup>86</sup> *Benchmarks Order*, 12 FCC Rcd at 19,870-71, ¶¶ 134-135.

<sup>87</sup> *Notice*, 13 FCC Rcd at 15,30-32, ¶¶ 25-31; *see also supra*, note 23 (discussing the Commission's equivalency standard).

<sup>88</sup> *See, e.g.*, BTNA comments at 7-8 (it is superfluous to retain the ISP on ISR routes because carriers are permitted to bypass the ISP by carrying switched traffic over private lines); SBC comments at 8 (where the conditions for allowing ISR are met, the benefits of removing the ISP outweigh the costs of retaining it); Comptel comments at 6-7 (the ISP appears to have no useful purpose on routes where ISR is authorized); Qwest comments at 4-5 (the ISP is essentially superfluous on routes where ISR has been approved, and there is no basis for its retention); *see also* Telia comments at 5; RSL com comments at 3; *but see* AT&T reply at 16-17 (parties supporting the proposal ignore "whipsaw risks" that exist because of margins between benchmark settlement rates and cost).

<sup>89</sup> *See, e.g.*, AT&T comments at 9-10 (the ISP only should be lifted where foreign carriers settle at best practices rates or where the "ability to obtain viable ISR arrangements exists"); GSA comments at 6, reply at 3-5 (GSA opposes any move to eliminate the ISP with respect to foreign carriers that possess market power); TRA comments at 5-8; MCI WorldCom comments at 5-6 (the ISP should be lifted only for arrangements with foreign carriers from markets that offer equivalent resale opportunities or where at least 50 percent of traffic is settled within 2 cents of the best practices rate).

<sup>90</sup> *See, e.g.*, NTTA.com comments at 10 (The Commission should remove the ISP on all WTO Member routes and rely on GATS dispute resolution and Commission enforcement efforts to deal with any anticompetitive conduct); GTE comments at 9 (GTE supports removing the ISP on all WTO Member routes).

rates that are 25 percent below the benchmark, or less.<sup>91</sup> As discussed below, we believe that the proposal by MCI WorldCom provides the proper balance between, on the one hand, our goal in this proceeding of eliminating regulations that impede the development of competition, and, on the other hand, the longstanding goal of the ISP of preventing anticompetitive behavior that can harm U.S. consumers. We find, in this *Order*, that on those routes where U.S. carriers have the ability to settle U.S. traffic at rates that are 25 percent below the benchmark, or less, the ISP is no longer necessary in the public interest as a result of meaningful economic competition, pursuant to Section 11(a)(2) of the Act. We therefore repeal this rule, as applied in such cases, as it is no longer in the public interest, as required under Section 11(b).<sup>92</sup>

53. We agree with AT&T and MCI WorldCom that the proposal in the *Notice* to remove the ISP on all routes where we allow ISR would not adequately protect U.S. consumers against the harmful effects of the exercise of foreign market power.<sup>93</sup> Under the Commission's ISR standard, ISR is approved on routes where at least 50 percent of the traffic is settled at benchmark rates or below. In some markets, settlement rates will fall to benchmark levels not because of competitive pressures, but because of action by the Commission and U.S. carriers to enforce the benchmark settlement rate requirement.<sup>94</sup> As a result, MCI WorldCom points out, ISR could be approved on routes where there is a dominant carrier whose market power is not constrained by competitive pressures.<sup>95</sup> We are concerned that lifting the ISP on such routes would enable a foreign carrier with market power to exercise its market power to evade our 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.<sup>96</sup> On the other hand, it is likely that on routes where rates to terminate traffic are significantly below benchmark levels, competitive forces exist which can constrain the market power of the dominant foreign carrier. These competitive forces may be from within the foreign market or from without, such as may exist when neighboring markets have low rates for terminating international traffic. The existence of competitive forces to restrain the market power of a dominant carrier substantially reduces our concern about the exercise of foreign market power and one-way bypass. We thus conclude that removing the ISP where rates to terminate traffic are significantly below benchmark levels is a preferable standard to removing the ISP on all routes where the Commission allows ISR.

54. We find that removing the ISP has significant merit even on those routes where we already allow ISR. Where we allow ISR, U.S. facilities-based carriers have the option of negotiating either a traditional settlement arrangement with a foreign carrier under the ISP or an ISR arrangement. Where carriers enter into an ISR arrangement, the arrangement is not bound by the requirements of the ISP. On some routes, U.S. carriers are reluctant to enter into ISR arrangements. One reason for this reluctance may be that under an ISR arrangement, U.S. carriers would not be entitled to allocation of return traffic under the proportionate return regime. As discussed above, we find that proportionate allocation of return traffic can have a detrimental effect on competition where the market power of the foreign carrier is limited by

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<sup>91</sup> Letter to Magalie Roman Salas, Secretary, Federal Communications Commission, from Robert Koppel and Scott Shefferman, MCI WorldCom (March 16, 1999) (*MCI WorldCom ex parte*).

<sup>92</sup> 47 U.S.C. § 11(a)-(b).

<sup>93</sup> AT&T comments at 8-9; MCI WorldCom comments at 4-6.

<sup>94</sup> The Commission stated in the *Benchmarks Order* that it would ensure that U.S. carriers satisfy the benchmark requirements. *Benchmarks Order*, 12 FCC Rcd at 19,848, ¶ 85.

<sup>95</sup> MCI WorldCom *ex parte* at 3.

<sup>96</sup> See AT&T comments at 8-10.

market forces.<sup>97</sup> We find that removing the option of relying on the ISP will foster greater competition among U.S. international carriers by reducing their ability to engage in collusive negotiations with foreign carriers in competitive markets. In addition, on some routes where we allow ISR, foreign carriers are reluctant to enter into ISR arrangements. By removing the ISP, U.S. carriers may have greater leverage in negotiating non-traditional settlement arrangements with the foreign carrier.

55. We agree with MCI WorldCom that a reasonable threshold for concluding that the ability of a dominant carrier to exercise its foreign market power is constrained by the existence of market forces is where rates to terminate traffic in the foreign market are at least 25 percent below the benchmark level. In addition, this standard provides certainty for parties seeking to interpret our rules. This standard is also straightforward and easy for the Commission to administer. Rates at this level are sufficiently below the benchmark level to indicate that a dominant carrier is facing competitive pressures to lower rates. Unless a dominant carrier were subject to competitive pressures, either from within its own market or from without, it would have little incentive to reduce its rates substantially below the benchmark levels.<sup>98</sup> At the same time, the 25 percent threshold is not so low as to retain the ISP in markets where the dominant carrier is subject to competitive pressures from both within and without its market. For example, countries that currently qualify under this standard are Canada, the United Kingdom, Sweden, Germany, France, Hong Kong, the Netherlands, Denmark, and Norway. Each of these countries have competitive telecommunications markets, with low interconnection rates. In addition, we note that where settlement rates are below benchmark levels, but not 25 percent or more below the benchmark, carriers remain free to exchange traffic with foreign carriers pursuant to an ISR arrangement.

56. We further find that removing the ISP on routes where settlement rates are at least 25 percent below the benchmark levels will more effectively protect U.S. consumers against the harmful effects of one-way bypass than removing the ISP on all routes that meet the ISR standard.<sup>99</sup> As the Commission recognized in the *Benchmarks Order*, the settlement rate benchmarks are substantially above-cost.<sup>100</sup> As a result, a foreign carrier still has an incentive to engage in one-way bypass on routes where U.S. carriers are paying benchmark rates to terminate traffic in the foreign market.<sup>101</sup> This could raise the costs U.S. carriers incur to terminate traffic on a route and, ultimately, raise the calling prices U.S. consumers pay. The extent to which U.S. consumers may be harmed by one-way bypass is directly related to the difference between the rate at which U.S. carriers can terminate traffic in the foreign market and the cost of terminating foreign traffic in the United States. Where a foreign carrier charges substantially

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<sup>97</sup> See *supra* ¶¶ 25, 26.

<sup>98</sup> MCI WorldCom *ex parte* at 3.

<sup>99</sup> The term "one-way bypass" traditionally refers to one-way bypass of the settlements system, whereby U.S.-inbound traffic is routed outside the ISP into the U.S. to terminate at low rates, while a foreign carrier uses its market power to require that outbound traffic be settled pursuant to a high accounting rate. We use this term more broadly here to refer to any practice by which a foreign carrier terminates U.S. inbound traffic at low rates and exercises its market power to require that U.S. carriers pay much higher rates to terminate traffic in the foreign market. See *supra* ¶ 14.

<sup>100</sup> *Benchmarks Order*, 12 FCC Rcd at 19,827, ¶ 44.

<sup>101</sup> The Commission addressed this concern in the *Benchmarks Order* by adopting a mechanism to detect one-way bypass on ISR routes. The Commission adopted a presumption that one-way bypass is occurring if the percentage of outbound traffic relative to inbound traffic increases by 10 percent or more in two successive quarterly measurement periods. *Benchmarks Order*, 12 FCC Rcd at 19,919-22, ¶¶ 248-257.

above-cost rates to terminate U.S. traffic in the foreign market, and the foreign carrier can terminate foreign-originated traffic in the United States at low, more cost-based rates, there is a significant risk of harm due to one-way bypass. The lower the differential between the rate to terminate traffic in the foreign market and the U.S. rate, however, the lower the incentive the foreign carrier has to engage in one-way bypass. In addition, the lower this differential, the lower the potential increased cost to U.S. carriers due to the loss of return traffic. Thus, where the foreign termination rate is substantially below the benchmark rate, there is a limit on the extent to which U.S. carriers' costs of providing international service could increase as a result of one-way bypass made possible by removing the ISP. Where rates to terminate traffic are at benchmark levels, however, there is a greater risk that consumers will be harmed by one-way bypass because there remains a significant differential between the rate to terminate traffic in the foreign market and the cost of terminating traffic in the U.S. market.

57. We further find that removing the ISP where U.S. carriers are able to terminate traffic at rates that are at least 25 percent below the benchmark will provide a significant incentive for foreign carriers to lower their settlement rates below benchmark levels. As competitive pressures develop in foreign markets, foreign carriers will have an incentive to lower their rates to take advantage of increased opportunities to enter into innovative arrangements as a result of lifting the ISP.<sup>102</sup>

58. We remove the ISP on all routes where settlement rates are 25 percent below the benchmark settlement rate, or less, regardless of whether the foreign country is a WTO Member or a non-WTO Member country. We find that there is unlikely to be a risk of harm due to the exercise of a foreign carrier's market power from a settlement arrangement conducted outside the ISP where settlement rates are at least 25 percent below the benchmark, regardless of membership in the WTO. In both WTO and non-WTO Member countries, the existence of settlement rates that are at least 25 percent below the applicable benchmark rate, is an indication that competitive market forces exist to constrain the ability of a foreign carrier to exercise market power. For the reasons discussed above, we also find that it is unlikely that restricting this policy only to WTO members countries would encourage foreign countries to join the WTO.<sup>103</sup>

59. AT&T urges us to remove the ISP only where foreign carriers settle at best practices rates or where the "ability to obtain viable ISR arrangements exists."<sup>104</sup> Although it subsequently modified its position, MCI WorldCom argued in its initial comments that the ISP should be lifted only for arrangements with foreign carriers from markets that offer equivalent resale opportunities or where at least 50 percent of traffic is settled within 2 cents of the best practices rate.<sup>105</sup> Each of the parties that suggests a more stringent standard for identifying routes on which we should lift the ISP justifies its proposed standard on

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<sup>102</sup> MCI WorldCom *ex parte* at 3.

<sup>103</sup> *See supra*, ¶ 37.

<sup>104</sup> *See, e.g.*, AT&T comments at 9-10.

<sup>105</sup> MCI WorldCom comments at 5-6. In a subsequently filed *ex parte*, MCI WorldCom proposed an alternative standard to "strike [the] balance" between the Commission's "goal of removing the ISP on all routes where it is no longer necessary while at the same time preventing competition distortion in the United States." MCI WorldCom *ex parte* at 2. MCI WorldCom's alternative standard is the one we adopt here, to remove the ISP on routes where rates to terminate traffic are at least 25 percent below the benchmark rates.

the need to guard against one-way bypass of the settlements process and/or whipsawing.<sup>106</sup> We find, however that these more restrictive standards would maintain the ISP under circumstances in which competitive pressures constrain foreign carriers' market power and in which the potential harm to consumers is slight or nonexistent. Adopting the standards proposed by these parties would thus unnecessarily limit the routes for which the ISP would be lifted.<sup>107</sup> We therefore decline to adopt the standards proposed by AT&T and MCI WorldCom.<sup>108</sup>

60. We find that the standard we adopt here will adequately address the concerns of parties that suggest more restrictive standards for removing the ISP. Moreover, we find that adopting a more restrictive standard would be unnecessary and could inhibit competition. We note that there are significant costs associated with maintaining the ISP on routes where it is not necessary to prevent the exercise of foreign market power that could harm U.S. consumers. Precluding U.S. carriers from negotiating arrangements with foreign carriers outside of the nondiscrimination and proportionate return requirements of the ISP will limit opportunities for small U.S. carriers that do not carry substantial volumes of outbound traffic. As discussed above, the proportionate return requirement can limit opportunities for small carriers to compete with carriers that carry substantial amounts of traffic.<sup>109</sup> Indeed, Cable & Wireless notes that the proportionate return requirement can act as an entry barrier for new carriers seeking to enter the market.<sup>110</sup> In addition, removing the nondiscriminatory settlement rate requirement may further promote competition among U.S. international carriers by creating greater uncertainty regarding U.S. carriers' costs. This uncertainty should lead to more aggressive negotiating by U.S. carriers, which may result in lower rates for terminating international traffic for U.S. carriers.<sup>111</sup> Such uncertainty regarding U.S. carriers' costs can also create incentives for U.S. carriers to compete more aggressively in the retail market.

61. We find that it is not necessary to require all traffic that is terminated in a foreign market to be settled at 25 percent below the applicable benchmark settlement rate, or less, in order to lift the ISP. Rather, we find that removing the ISP where at least 50 percent of U.S.-billed traffic is terminated at such rates will ensure that the ISP is maintained only where it is necessary. In the *Benchmarks Order*, we imposed a condition that limited ISR to only those routes where settlement rates for at least 50 percent of the settled, U.S. billed traffic are at or below the appropriate benchmark.<sup>112</sup> We found that it was not necessary to require that all traffic on a particular route be settled at benchmark rates because any carrier, or combination of carriers, that carried at least 50 percent of traffic on a particular route would likely have

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<sup>106</sup> See, e.g., AT&T comments at 13-15; TRA comments at 5-8.

<sup>107</sup> Under AT&T's proposed standard, only 4 countries (Canada, Hong Kong, the Netherlands and Sweden) would currently qualify as having settlement rates lower than the 8 cent "best practices" rate, adopted in the *Benchmarks Order*. Under MCI WorldCom's proposed standard, only 6 countries would currently qualify as having rates that are lower than 2 cents plus the best practices rate (the four listed above plus Germany and the United Kingdom).

<sup>108</sup> See AT&T comments at 10-14; MCI WorldCom comments at 6.

<sup>109</sup> See *supra* ¶ 26.

<sup>110</sup> C&W comments at 5.

<sup>111</sup> See *supra* ¶¶ 24-27.

<sup>112</sup> *Benchmarks Order*, 12 FCC Rcd at 12,917, ¶ 243.



the capacity to handle all traffic from U.S. carriers.<sup>113</sup> Likewise here, we find that the ability of U.S. carriers to terminate at least 50 percent of the U.S.-billed traffic in the foreign market at rates that are 25 percent below the benchmark rate or less is convincing evidence that competitive pressures exist in the foreign market to constrain the market power of the foreign carrier. We thus find that where at least 50 percent of traffic is terminated at rates 25 percent lower than the benchmark, or less, a foreign carrier is unlikely to have the ability to exercise market power to harm U.S. consumers and that the ISP is thus unnecessary.

62. We find that it continues to be necessary to maintain a distinction between routes the Commission approves for ISR and routes on which the Commission removes the ISP. Carriers providing service to WTO Member countries where settlement rates are below the benchmark may enter into arrangements with foreign carriers in such markets outside of the ISP, even where settlement rates are not at least 25 percent below the benchmark.<sup>114</sup> In the *Notice*, we stated, in support of our tentative conclusion to remove the ISP on all ISR routes, that deviation from the ISP is already allowed on ISR routes as long as traffic flows over private lines. Upon further consideration, we find that this point does not support removing the ISP on all ISR routes. Where the Commission approves ISR, carriers providing service on the route are subject to a safeguard, adopted in the *Benchmarks Order*, that compares on a route-specific basis, the volume of U.S. inbound and outbound minutes that are settled under the ISP.<sup>115</sup> As MCI WorldCom points out, if we remove the ISP completely on a particular route, this safeguard would effectively be nullified, as no traffic would be settled under the ISP. We believe, as pointed out by MCI WorldCom, that this safeguard has a "significant deterrent effect," and is useful in detecting actions by foreign carriers that could increase costs for U.S. carriers.<sup>116</sup> Thus, without this safeguard on routes where we remove the ISP, there is no effective deterrent to prevent foreign carriers from engaging in one-way bypass or otherwise acting to exercise their market power to the disadvantage of U.S. carriers. We thus find that removing the ISP poses a greater risk, generally, than allowing ISR on a particular route. We therefore decline to adopt our proposal to remove the ISP completely on all ISR routes and instead remove the ISP only where the settlement rate is significantly below the benchmark.

63. Some commenting parties urge the Commission to go further than the proposal in the *Notice* and to remove the ISP completely on all routes between the United States and WTO Member countries.<sup>117</sup> We find that these proposals would open U.S. carriers and consumers to potential abuse from foreign monopoly carriers and therefore decline to adopt them. We disagree with the contention of GTE that U.S. carriers can negotiate with alternative carriers in "most" WTO markets when faced by an attempt at whipsawing. U.S. carriers have the option of negotiating with alternative carriers in many WTO Member markets, but some markets of WTO Member countries remain closed to competition. We are

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<sup>113</sup> *Benchmarks Order*, 12 FCC Rcd at 12,918, ¶ 244.

<sup>114</sup> For a description of ISR, see *supra*, ¶ 13.

<sup>115</sup> *Benchmarks Order*, 12 FCC Rcd at 19,919-20, ¶¶ 247-250 (adopting a safeguard that presumes a market distortion has occurred if the ratio of outbound (U.S.-billed) to inbound (foreign-billed) settled traffic increases 10 or more percent in two successive quarterly measuring periods).

<sup>116</sup> MCI WorldCom comments at 5-6.

<sup>117</sup> See, e.g., NTTA.com comments at 5-8; GTE comments at 9 (suggesting that the Commission should create a presumption that the ISP does not apply unless necessary to overcome a very high risk to competition); see also Comptel comments at 7-8 (urging the Commission to conduct an inquiry within 12 months on whether the ISP is necessary on any WTO country routes).

aware, as GTE points out, that "services and technologies that bypass the settlements regime," such as refile, are available for carriers seeking to avoid the legal monopoly of a foreign incumbent carrier in some countries that are legally closed to competition.<sup>118</sup> We find it encouraging that such activity is putting pressure on settlement rates in those countries. Such methods of termination may not be a realistic alternative, however, for the termination of large amounts of traffic, particularly where termination of traffic in such a manner is illegal in the foreign country.<sup>119</sup> Moreover, in countries that have high settlement rates with U.S. carriers, the potential harm to U.S. consumers from one-way bypass and/or whipsawing could be significant. In cases where settlement rates are high, and the foreign market does not offer equivalent resale opportunities, the risk of harm from lifting the ISP is great, and is not outweighed by the potential procompetitive effects of lifting the ISP on such routes. We therefore find that the benefits of removing the ISP for service to all WTO Member markets, as GTE proposes, are outweighed by the risks.

64. Some commenting parties urge the Commission to allow U.S. carriers to exchange limited amounts of traffic outside of the ISP on all routes.<sup>120</sup> For instance, Sprint urges us to lift the ISP and all filing requirements for arrangements that affect less than 25 percent of the traffic on a route. Again, we find that lifting the ISP on all routes, even for arrangements affecting limited amounts of traffic, would expose U.S. carriers to significant risk with little corresponding benefit. Foreign markets where there are not equivalent resale opportunities and where settlement rates are above the benchmark pose a significant potential risk of one-way bypass and/or whipsawing by the dominant foreign carrier. Further, if agreements are not filed with the Commission, there would be no effective means to prevent a foreign carrier with market power from diverting substantial volumes of traffic through multiple arrangements with different U.S. carriers, each affecting amounts of traffic below the applicable threshold. We therefore do not adopt the proposals for removing the ISP from all routes for limited amounts of traffic.

65. We will amend our rules establishing procedures for carriers seeking to enter into an arrangement that does not comply with the ISP with a foreign carrier that possesses market power on a route for which the ISP has not previously been lifted. Such carriers 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 settlement rate, or less.<sup>121</sup> For upper income routes, 25 percent below the benchmark rate is 11.25 cents; for upper middle income routes, 25 percent below the benchmark rate is 14.25 cents; and for lower income routes, 25 percent below the benchmark rate is 17.25 cents. Carriers filing such petitions should include the appropriate supporting documentation demonstrating that the route qualifies for exemption from the ISP. Such documentation may include settlement rate or other data published by the Commission. The Commission will issue a public notice upon the filing of such a petition and may, in each case, determine an appropriate deadline for filing comments. Unopposed requests may be granted by public notice. We will publish and periodically update a list of international routes exempt from the ISP on our web page.

## 2. Filing Requirements

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<sup>118</sup> GTE comments at 8.

<sup>119</sup> Internet telephony is a promising means of bypassing the traditional settlements system. At present, however, such services remain cumbersome for the average user and account for a minimal amount of international voice traffic.

<sup>120</sup> See, e.g., Level 3 comments at 3-4 (10%); Sprint comments at 5 (25%).

<sup>121</sup> The rate for terminating traffic includes all rates for terminating traffic, including settlement rates and ISR rates.

66. Section 43.51 of our rules currently requires that all U.S. carriers file, within 30 days of execution, a copy of certain arrangements entered into with a foreign carrier.<sup>122</sup> This requirement applies to all arrangements with foreign carriers for the exchange of traffic, regardless of whether such arrangements concern traffic settled in a traditional manner, pursuant to a flexible settlement arrangement, or under an ISR arrangement.<sup>123</sup> In addition, Section 64.1001 of our rules requires that carriers file with the Commission detailed information regarding changes in accounting rates entered into with foreign carriers.<sup>124</sup>

67. In the *Notice*, the Commission sought comment on whether it should remove the Section 43.51 contract filing requirement and the Section 64.1001 accounting rate filing requirement for arrangements on routes where the Commission has removed the ISP. We noted that requiring public filing of contracts could preclude carriers from negotiating some arrangements that could be pro-competitive. We also noted, however, that a carrier with market power in the foreign market may have the ability to exercise market power, even on routes where we remove the ISP.<sup>125</sup> In section III.A.1, above, we remove the requirement that carriers file contracts and related information for arrangements with foreign carriers that lack market power. We conclude here that we should amend the Commission's filing requirements to allow that settlement rate information and copies of contracts required to be filed under Section 43.51 be filed confidentially for arrangements with foreign carriers that possess market power on routes where we remove the ISP.

68. Commenting parties express concern that confidential agreements with foreign carriers that possess market power in the foreign market can permit the foreign carrier to leverage its market power to the detriment of U.S. consumers and competition.<sup>126</sup> Other parties, however, argue that public disclosure of arrangements conducted outside of the ISP is not necessary and could stifle competition on routes that the Commission has approved for ISR.<sup>127</sup> Cable & Wireless states that rates currently disclosed for service provided on ISR routes are not indicative of actual prices carriers pay to terminate traffic in the foreign market and that disclosure of inaccurate information may actually harm competition.<sup>128</sup>

69. We find that requiring carriers to file copies of arrangements entered into with foreign carriers that possess market power in the relevant foreign telecommunications markets provides a valuable tool to ensure that U.S. carriers do not enter into arrangements that would allow the foreign carrier to exercise its market power to the detriment of U.S. consumers. We also find, however, that public disclosure of such contracts may have a chilling effect on pro-competitive termination arrangements

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<sup>122</sup> 47 C.F.R. § 43.51. This requirement applies to all arrangements entered into with foreign carriers for the exchange of service, the interchange or routing of traffic, and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances. *Id.* § 43.51(a)(1)-(2).

<sup>123</sup> 47 C.F.R. § 43.51(a).

<sup>124</sup> 47 C.F.R. § 64.1001; *see also Regulation of International Settlement Rates*, CC Docket 90-337, Phase I, *Report and Order*, 6 FCC Rcd 3552 (1991).

<sup>125</sup> *Notice*, 13 FCC Rcd at 15,332, ¶ 30.

<sup>126</sup> *See, e.g.*, MCI WorldCom comments at 8.

<sup>127</sup> *See, e.g.*, C&W comments at 8-9; Qwest comments at 5-6.

<sup>128</sup> C&W comments at 8-9.

because parties may be more reluctant to conclude arrangements that must be disclosed publicly.<sup>129</sup> Our goal in this proceeding is to balance these two competing concerns of promoting competition, while precluding the abuse of foreign market power.<sup>130</sup> We find that these two goals can be accommodated by amending our filing requirements to allow confidential treatment of information for arrangements to which we no longer apply the ISP. We will therefore amend Section 43.51 and section 64.1001 of the Commission's rules to require carriers that exchange traffic with foreign carriers that possess market power on routes where we have lifted the ISP to file information on rates paid for the origination and/or termination of international traffic and copies of their contracts with these foreign carriers with the Commission. Such information may be filed with the Commission under confidential seal.<sup>131</sup> This filing requirement covers all arrangements between U.S. and foreign carriers that possess market power, including arrangements currently classified as ISR arrangements and alternative settlement arrangements.

70. We decline to adopt the proposal of MCI WorldCom that we require that U.S. carriers continue to file publicly arrangements with affiliated foreign carriers and non-equity joint venture partners where the affiliate or partner possess market power.<sup>132</sup> We find that a confidential filing requirement will adequately deter the kind of anticompetitive conduct in which affiliated carriers or joint venture partners could engage. We recognize, however, that the potential exists for a foreign carrier with market power to leverage its market power into the U.S. market through a U.S. affiliate. We thus adopt a safeguard below to address this issue.<sup>133</sup>

### 3. Competitive Safeguard for Affiliated Carriers

71. In the *Notice*, we sought comment on whether we should adopt additional safeguards to prevent a competitive distortion in the market for U.S. international services that could occur as a result of lifting the ISP. We also recognized, however, that any safeguards we adopt may, to the extent they are not necessary, preclude carriers from responding to market influences and concluding arrangements that may bring settlement rates closer to cost.<sup>134</sup>

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<sup>129</sup> See BTNA comments at 9 (filing requirements inhibit U.S. carriers from entering into innovative arrangements that would be procompetitive and could reduce rates for U.S. customers); see also Comptel comments at 10 (Comptel supports removing filing requirements "because the benefits to be gained from lifting the requirements overwhelmingly outnumber any theoretical justification for their retention").

<sup>130</sup> We note that our concerns regarding public disclosure of rates, terms and conditions are different in this context than in the retail context. In a recent item, we removed tariffs on domestic interexchange service completely. We also required, however, that carriers disclose their rates, terms and conditions in order to meet the needs of consumers. See *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Order on Further Reconsideration and Erratum, FCC 99-47 (rel. March 31, 1999).

<sup>131</sup> Under the rules adopted in this Order, carriers entering into arrangements with foreign carriers that possess market power on routes that are exempt from the ISP are required to file accounting rate information as specified in new Section 43.51(f). Such information should be filed with the Commission, as well as with the Chief, International Bureau. See *infra*, Appendix B.

<sup>132</sup> MCI WorldCom comments at 8.

<sup>133</sup> See *infra*, ¶ 71-72.

<sup>134</sup> See *Notice*, 13 FCC Rcd at 15,337, ¶ 42.

72. We recognize that arrangements between U.S. carriers and affiliated carriers and joint venture partners that possess market power in the foreign market pose special competitive concerns. The Commission has adopted a set of foreign-affiliated dominant carrier safeguards that apply to carriers affiliated with foreign carriers that possess market power. Our dominant carrier safeguards also apply to joint ventures or other arrangements that present a substantial risk of anticompetitive effects in the U.S. international services market.<sup>135</sup> Removing the ISP could exacerbate the concern about anticompetitive behavior by allowing a foreign carrier to adopt a strategy that would raise the costs of its U.S. affiliate's rivals and thus improve the position of the joint enterprise. Such a strategy could take the form of a foreign carrier with market power charging unaffiliated carriers significantly higher rates to terminate traffic in the foreign market. A foreign carrier could also route substantially all of its return traffic to its affiliate, thereby depriving the unaffiliated carriers of settlement credits they receive from terminating foreign-originated traffic and raising their costs to terminate traffic in the foreign market. We find, for the reasons discussed above, however, that on routes where we remove the ISP, the danger of harm from such action, generally, is significantly reduced.<sup>136</sup> Nevertheless, we find that there is heightened concern about anticompetitive arrangements between U.S. carriers and their affiliates and joint venture partners. We thus find it necessary to adopt an additional safeguard to deter such arrangements. We adopt a safeguard that prohibits U.S. carriers that are affiliated or non-equity joint venture partners with foreign carriers that possess market power in the foreign market from entering into arrangements that may present a significant adverse impact on competition on the international route.<sup>137</sup> If we find that carriers have entered into such arrangements, we reserve the right to take appropriate action to remedy the situation, including reimposing the ISP on the route.

### C. Expanding the Current ISR Policy

73. We sought comment in the *Notice* on whether we should permit authorized carriers to provide service via ISR on more routes to encourage alternatives to the international accounting rate system, in order to put pressure on above-cost settlement rates. We noted that our current policy places significant limits on the routes on which carriers may route traffic via ISR, in order to prevent one-way inbound bypass.<sup>138</sup> Many commenting parties with affiliates that possess market power in foreign markets and other small carriers favor the proposal to permit ISR on more routes, either for all WTO countries or for limited amounts of traffic.<sup>139</sup> All large U.S. international carriers oppose an expansion of the routes on which we permit ISR. These carriers argue that the risk of one-way bypass is substantial on routes that fail to qualify under our current ISR rules. They state that there would be little pro-competitive benefit from

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<sup>135</sup> See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3969, ¶ 253; see also *Foreign Participation Order*, 12 FCC Rcd 23,987-24,030, ¶¶ 215-86. The dominant carrier safeguards applicable to foreign affiliated U.S. carriers include: a limited structural separation requirement and quarterly reporting requirements on traffic and revenue, provisioning and maintenance, and circuit status.

<sup>136</sup> See *supra* Section III.B.1.

<sup>137</sup> Cf. *1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations*, IB Docket No. 98-118, FCC 99-51, (rel. March 23, 1999), at ¶ 23 (delegating to the International Bureau the authority to further scrutinize a streamlined application where it presents "a significant potential impact on competition").

<sup>138</sup> *Notice*, 13 FCC Rcd at 15,334-35, ¶¶ 37-38.

<sup>139</sup> See, e.g., C&W comments at 4; NTTA.com comments at 12; GTE comments at 13; PrimeTEC comments at 10; Star Telecom reply at 6; see also TRA comments at 8; ACTA reply at 7.

removing the ISP on such routes because most lack a means of terminating international traffic other than through the incumbent international carrier.<sup>140</sup>

74. We agree with the commenting parties that argue that it is premature to expand the ISR standard to additional routes, even for limited amounts of traffic. We find that the other steps we take in this *Order* are likely to have a significant pro-competitive impact in the U.S. international services market. Removing the ISP for all arrangements with foreign carriers that lack market power in the foreign market is likely to have a significant pro-competitive impact on routes that we have not approved for ISR. On such routes, U.S. facilities-based carriers will be authorized to provide service outside the ISP in correspondence with foreign carriers that lack market power. In addition, we allow U.S. private line resellers to engage in ISR in correspondence with foreign carriers that lack market power.<sup>141</sup> Thus, the effect of loosening our ISR rules on routes that do not qualify for ISP relief would only be to increase the extent to which U.S. carriers could enter into arrangements with foreign carriers that possess market power. We find that where settlement rates are high, and/or where the foreign market does not provide equivalent opportunities for ISR, the risk of one-way inbound bypass is too great to authorize ISR with a carrier with market power in a foreign market, even for limited amounts of traffic. We thus decline to modify our standard for providing ISR.

#### IV. Alternative Settlement Arrangements

75. In 1996, the Commission adopted the *Flexibility Order*, which established a framework for permitting flexibility in our accounting rate policies where appropriate market and regulatory conditions exist.<sup>142</sup> Under the flexibility policy, the Commission maintains a presumption in favor of allowing flexible settlement arrangements with carriers in WTO Member markets that can be rebutted only by a showing that the foreign carrier that is a party to the flexible settlement arrangement does not face competition from multiple facilities-based carriers.<sup>143</sup> Even where the presumption is rebutted, the Commission could approve a flexible settlement arrangement where it finds the arrangement "promotes market-oriented pricing and competition, while precluding the abuse of market power by the foreign correspondent."<sup>144</sup> Under the flexibility policy, carriers must file with the Commission, subject to notice and comment procedures, a petition for declaratory ruling requesting authority to enter into a particular flexible arrangement with a foreign carrier. The flexibility policy also includes safeguards to guard against anticompetitive arrangements.<sup>145</sup>

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<sup>140</sup> AT&T comments at 28-33; MCI WorldCom comments at 9; Sprint comments at 10-11.

<sup>141</sup> See *infra* ¶¶ 105-109.

<sup>142</sup> *Flexibility Order*, 11 FCC Rcd 20,063.

<sup>143</sup> See *Foreign Participation Order*, 12 FCC Rcd at 24,024-30, ¶¶ 297-313. For arrangements between U.S. carriers and foreign carriers in non-WTO Member markets, the Commission applies the "effective competitive opportunities" (ECO) test. We note that the *Flexibility* policy was modified in the *Foreign Participation Order* to remove the ECO test for arrangements between U.S. carriers and foreign carriers in WTO Member markets. *Id.* at 24,026-30, ¶¶ 302-313.

<sup>144</sup> *Flexibility Order*, 11 FCC Rcd at 20,080, ¶ 40.

<sup>145</sup> The Commission adopted two safeguards in the *Flexibility Order*. First, flexible settlement arrangements that affect over 25 percent of the traffic on the route must be publicly disclosed and not contain unreasonably discriminatory terms and conditions. Second, arrangements between U.S. carriers and

76. In the *Notice*, we observed that, to the extent the ISP does not apply to arrangements with particular foreign carriers on particular routes, our flexibility policy would be irrelevant. We thus sought comment on whether any modifications to our flexibility policy were necessary in light of the exemptions to the ISP that we proposed in the *Notice*. We also put forth two proposals to modify our flexibility policy safeguards and filing requirements in the event we retained the flexibility policy.<sup>146</sup>

77. AT&T and MCI WorldCom both addressed the issue of whether we should maintain the flexibility policy. AT&T questions whether we should maintain the flexibility policy if we adopt the proposals in the *Notice*. It states that removal of the ISP for arrangements on certain routes and with certain foreign carriers, as the Commission proposed, would "largely achieve the flexibility originally sought in adopting the original *Flexibility Order* in 1996."<sup>147</sup> MCI WorldCom agrees that the "Flexibility Policy will be largely superseded if the Commission modifies its ISP rules," but nonetheless urges the Commission to retain the flexibility policy. It states that there may be unique, unforeseen circumstances for allowing a waiver of the ISP even though the standard for removing the ISP has not been met.<sup>148</sup>

78. We find that the changes we make in this *Order* to exempt from the ISP arrangements between U.S. and foreign carriers that lack market power, and between U.S. and all foreign carriers on routes that allow U.S. carriers to terminate at least 50 percent of their traffic at rates that are at least 25 percent below the applicable benchmark settlement rate largely supersede the policies adopted in the *Flexibility Order*. We therefore find that maintaining the flexibility policies and procedures would needlessly complicate our accounting rate policies. As more carriers enter the market for international services, it is increasingly important that the Commission's policy on the exchange of international traffic be easy to administer and understand.

79. The flexibility policy has been a valuable first step in reforming our international settlements policy. With the other actions we take in this *Order*, however, we go far beyond the incremental steps we took in the 1996 *Flexibility Order*. The flexibility policy allows for limited exceptions to the ISP and requires U.S. carriers to obtain advance approval from the Commission for arrangements that deviate from the ISP. The policies we adopt in this *Order*, on the other hand, exempt all arrangements from the ISP, except those with foreign carriers with market power in markets where U.S. carriers are unable to terminate at least 50 percent of their traffic at rates that are 25 percent below the benchmark or lower. The flexibility policy would thus be relevant, in WTO Member markets, for only a limited class of arrangements. We find that maintaining the flexibility policy's detailed and complex procedures and standards for exempting settlement arrangements from the ISP makes little sense in light of the limited application it would have upon adoption of the new rules we adopt in this *Order*.

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foreign affiliates and joint venture partners must be publicly disclosed. *Flexibility Order*, 11 FCC Rcd at 20,081-83, ¶¶ 44-51.

<sup>146</sup> *Notice*, 13 FCC Rcd at 15,334, ¶ 36. We proposed to limit the filing of commercial information on routes that qualify for flexible treatment by removing the requirement that carriers reveal the terms and conditions of arrangements that do not trigger the flexibility policy's safeguards. *Id.* ¶ 35. Second, we sought comment on whether we should remove the requirement that arrangements between affiliated carriers be made public where the foreign affiliate lacks market power in the relevant foreign markets. *Id.* ¶ 36.

<sup>147</sup> AT&T comments at 18.

<sup>148</sup> MCI WorldCom comments at 8.

80. We agree with MCI WorldCom, however, that there may be "unforeseen circumstances" in which it may be in the public interest to allow an arrangement with a foreign carrier with market power to deviate from the ISP, even though the standard for removing the ISP has not been met. We will therefore entertain waivers of the ISP for individual settlement arrangements. Among the factors we will consider are whether granting such a waiver would promote the public interest in achieving cost-based rates for terminating international traffic, while precluding the abuse of foreign market power.<sup>149</sup>

81. Finally, because we abolish the flexibility policy, we decline to adopt any of the proposals in the *Notice* for modifying the filing requirements and safeguards applicable to flexible settlement arrangements. We also note that all settlement arrangements that we have in the past approved under our flexibility policy would either qualify for exemption from the ISP under our new rules or the route that the arrangement concerns would be eligible for ISR. Therefore, arrangements approved under our flexibility policy will remain in effect.

## V. Competitive Safeguards

### A. The No Special Concessions Rule

82. The "No Special Concessions" rule prohibits a U.S. international carrier from agreeing to accept special concessions from a foreign carrier that has sufficient market power in the destination market to affect competition adversely in the United States.<sup>150</sup> The Commission has found that special concessions granted to a particular U.S. carrier by a foreign carrier with market power pose an unacceptable risk of anticompetitive harm in the U.S. international services market.<sup>151</sup> Prior to adoption of the *Foreign Participation Order*, the Commission prohibited the acceptance of special concessions from all foreign carriers. In the *Foreign Participation Order*, the Commission modified the rule so that it applies only to U.S. carrier dealings with foreign carriers that possess market power in the foreign market.<sup>152</sup> The Commission reasoned that special concessions granted by a foreign carrier that does not possess market power can serve the public interest, for example, by allowing carriers to offer innovative services that reduce rates for U.S. consumers.<sup>153</sup>

83. In the *Notice*, we sought comment on the extent to which the No Special Concessions Rule should apply on routes where we remove the ISP.<sup>154</sup> We also sought comment in the *Notice* on two specific issues concerning the interplay of the No Special Concessions rule and the ISP.

84. First, we sought comment on whether the No Special Concessions rule should apply to the terms and conditions under which traffic is settled, including the allocation of return traffic, on a route where we remove the ISP. We tentatively concluded that it should not. We noted that the No Special Concessions rule would still prohibit exclusive arrangements with carriers that possess market power regarding interconnection of international facilities, private line provisioning and maintenance, as well as quality of service on routes where we remove the ISP.<sup>155</sup> All parties commenting on the issue agreed with our tentative conclusion.<sup>156</sup>

<sup>149</sup> The Commission has ample authority to waive its rules. *See, e.g., BellSouth v. FCC*, 162 F.3d 1215.

<sup>150</sup> The No Special Concessions rule prohibits a U.S. international carrier from agreeing to accept special concessions with respect to traffic or revenue flows directly or indirectly from any foreign carrier that possesses market power in the foreign market. *See Foreign Participation Order*, 12 FCC Rcd at 23,957-65, ¶¶ 156-170 (1997). A "special concession" is defined as "any arrangement that affects traffic or revenue flows to or from the United States that is offered exclusively by a foreign carrier or administration to a particular carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route." *Id.*; *see also Foreign Carrier Entry Order*, 11 FCC Rcd 3873.

<sup>151</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd at 3971-72, ¶¶ 256-259.

<sup>152</sup> *See Foreign Participation Order*, 12 FCC Rcd at 23,956-65, ¶¶ 150-170.

<sup>153</sup> *See id.*, 12 FCC Rcd at 23,957, ¶ 156.

<sup>154</sup> *Notice*, 13 FCC Rcd at 15,335-37, ¶¶ 39-43.

<sup>155</sup> *Notice*, 13 FCC Rcd at 15,336, ¶ 41.

<sup>156</sup> *See, e.g.,* Telia comments at 6; MCI WorldCom comments at 10; FT comments at 6; AT&T comments at 15.



85. We agree with the commenting parties and find that there is no valid reason to apply the No Special Concessions rule to the terms and conditions under which traffic is settled, including the allocation of return traffic, on a route where we remove the ISP. We agree that it makes no sense for the No Special Concessions rule to impose a nondiscrimination requirement for settlement arrangements on routes where we remove the ISP. The point of removing the ISP is to allow market forces to determine the types of arrangements into which carriers enter. We therefore will amend Section 63.14 of the Commission's rules to clarify that the No Special Concessions rule does not apply to the terms and conditions under which traffic is settled, including the allocation of return traffic, on routes where we remove the ISP. We discuss below application of the No Special Concessions rule to other matters on routes where we remove the ISP.

86. Second, we sought comment on whether the No Special Concessions rule should apply to interconnection of international facilities, private line provisioning and maintenance, and quality of service on routes where we remove the ISP.<sup>157</sup> Most parties that commented on the matter argued that, with respect to matters other than the terms and conditions under which traffic is settled, the No Special Concessions rule should continue to apply to arrangements with foreign carriers that possess market power in the foreign market, even where we no longer apply the ISP.<sup>158</sup> We agree with the commenting parties that there is still a risk of anticompetitive conduct for arrangements with foreign carriers that possess market power, even on routes where we remove the ISP. We disagree with the comments of SBC, which argues that continued application of the No Special Concessions rule on routes where we remove the ISP would be unnecessary and counter-productive.<sup>159</sup> Even on routes where we remove the ISP, foreign carriers may retain significant market power that could enable them to discriminate among U.S. carriers. As PrimeTEC notes, discrimination with respect to "interconnection terms, private line provisioning, quality of service and the like" can undermine competition significantly.<sup>160</sup> We find that removing the ISP will accord U.S. carriers adequate freedom to negotiate with foreign carriers for the exchange of international traffic. We therefore will maintain the No Special Concessions rule, as modified above, on all routes, regardless of whether the ISP applies.

87. SBC urges us to modify the manner in which we apply the No Special Concessions rule. The rule currently prohibits a carrier from accepting an exclusive arrangement from a foreign carrier that possesses market power in any of the relevant foreign markets identified by the Commission. The relevant markets generally include: international transport facilities or services, inter-city facilities or services, and local access facilities or services on the foreign end.<sup>161</sup> SBC argues that the No Special Concessions rule should apply only to exclusive arrangements "affecting facilities, services or functions in the particular market in which the carrier has market power." SBC states that limiting the No Special Concessions rule in this manner would "eliminate unnecessary and anticompetitive restrictions on U.S. carriers' ability to negotiate efficient arrangements for the exchange of international traffic with foreign carriers."<sup>162</sup>

88. We decline to adopt the change that SBC proposes because we find that it would be a significant change in our policies that was not raised in the *Notice* and that inadequate record support exists for such a change. SBC urges us to adopt a change that would significantly alter the manner in which the Commission applies the No Special Concessions rule. No party other than SBC addressed this issue in their comments and the issue was not raised in the *Notice*. We therefore find that this issue is beyond the scope of this proceeding. We therefore decline, at this time, to adopt SBC's proposal.

#### **B. "Grooming" of International Traffic**

89. In the *Notice*, we sought comment on whether removing the ISP and related filing requirements may allow carriers to enter into arrangements that may have anticompetitive effects. In particular, we noted that U.S. carriers have, in the past, expressed concern regarding whether their competitors may negotiate arrangements to accept "groomed" traffic, *i.e.* traffic that terminates in particular geographic regions. We sought comment on whether such arrangements present a potential for anticompetitive effects, particularly with respect to arrangements between incumbent local exchange carriers (ILECs) and foreign carriers with market power.<sup>163</sup>

90. Several parties oppose allowing ILECs to engage in grooming arrangements with foreign carriers that possess market power on routes where we remove the ISP.<sup>164</sup> They argue generally that grooming arrangements between U.S. carriers with market power in local exchange markets and carriers with market power in foreign markets can lead to anticompetitive effects. AT&T and MCI WorldCom make two specific arguments for prohibiting grooming arrangements between ILECs and foreign carriers with market power. They argue that above-cost access charges give ILECs the ability to "subsidize entry into the international market or raise other U.S. carriers' costs."<sup>165</sup> ILECs could achieve this end, according to AT&T, first by offering foreign carriers unfairly low rates to terminate traffic in their region, subsidized by above-cost access charges.<sup>166</sup> Second, AT&T argues that ILECs could raise their rivals costs by "distorting the mix of traffic available to other carriers."<sup>167</sup> AT&T also argues that

<sup>157</sup> *Notice*, 13 FCC Rcd at 15,335-36, ¶ 40.

<sup>158</sup> *See, e.g.*, BTNA comments at 9-10; Ameritech comments at 7; MCI WorldCom comments at 10; GSA comments at 11.

<sup>159</sup> *See* SBC comments at 19-20.

<sup>160</sup> *See* PrimeTEC reply at 10.

<sup>161</sup> *See Foreign Participation Order*, 12 FCC Rcd at 19,953, ¶ 145.

<sup>162</sup> SBC comments at 19-20.

<sup>163</sup> *Notice*, 13 FCC Rcd at 15,337, ¶ 43.

<sup>164</sup> *See, e.g.*, MCI WorldCom comments at 10, reply at 7-9; PrimeTEC comments at 9, reply at 11; Star Telecom reply at 5-6.

<sup>165</sup> AT&T comments at 33; MCI WorldCom reply at 8.

<sup>166</sup> AT&T comments at 33-34.

<sup>167</sup> AT&T comments at 33; MCI WorldCom reply at 8.

ILECs could raise rivals costs by offering foreign carriers lower rates to terminate U.S. inbound traffic, which would deprive established carriers of return traffic that U.S. carriers rely on to offset above-cost settlements payments on outbound traffic.<sup>168</sup>

91. We find that the danger of anticompetitive effects of grooming arrangements cited by AT&T and MCI WorldCom are unlikely. First, we find that it would be irrational for an ILEC to offer "a lower inbound rate than other carriers," because of its "lower cost for access," as AT&T argues.<sup>169</sup> AT&T's argument ignores the opportunity cost of access charge revenue the ILEC would forego if it carried traffic over its own international termination facilities, instead of receiving the traffic in its local network from an unaffiliated international carrier. If an ILEC agrees to transport and terminate groomed international traffic in its local exchange service area, the ILEC would carry traffic that otherwise would be handled by a competing international carrier. The ILEC's competitor, however, would have handed the traffic to the ILEC, and would have paid the ILEC an access charge for doing so. By terminating the groomed international traffic itself, therefore, the ILEC forfeits a payment it otherwise would have received from its competitor. Thus, the ILEC has an opportunity cost it must consider when determining the price it will charge a foreign carrier for terminating traffic in the ILEC's region. If it agrees to terminate traffic at a rate that fails to take into account the opportunity cost of lost access charge revenue, it would earn a lower profit than it would if it had let another international carrier terminate the traffic. If it is assumed that the ILECs seek to maximize their profits, then any pricing strategy for terminating international traffic that does not recover the access charge would not be a rational strategy. We thus conclude that allowing ILECs to accept "groomed" traffic does not provide them with the economic incentive to engage in the anticompetitive strategy described by AT&T and MCI WorldCom. We therefore find that a prohibition against ILECs accepting "groomed" international traffic is unnecessary.

92. AT&T and MCI's second argument also is unpersuasive. They argue that an ILEC would raise U.S. carriers' costs by terminating low-cost traffic in its local exchange service area at low rates, which would leave other U.S. international carriers with only high-cost traffic to terminate outside of the ILEC's region. We conclude that this scenario does not present a significant danger. So long as grooming arrangements are limited to routes where we remove the ISP, all carriers will have the freedom to negotiate rates with foreign carriers for the termination of U.S. inbound traffic on those routes. Thus, if the cost of terminating traffic in the U.S. market increases for some carriers because an ILEC negotiates an arrangement to terminate low-cost foreign traffic in its region, carriers left with only higher cost traffic to terminate outside of the ILEC's region may negotiate a termination rate which reflects such increased costs.

93. Finally, we reject AT&T's argument that, because ILECs will agree to terminate the traffic of foreign carriers at low rates on routes where we remove the ISP, grooming arrangements will harm other U.S. carriers by depriving them of settlement revenue used to offset the cost of outbound service. We find that this argument bears little relation to the grooming of international traffic by an ILEC because any carrier has an incentive to capture inbound traffic by offering low rates, except a carrier that already receives return traffic subject to a bilaterally agreed settlement arrangement. We find above that allowing carriers freely to negotiate agreements for the exchange of international traffic on routes where we remove the ISP will lead to procompetitive benefits.<sup>170</sup> We therefore find that it is not in the public interest to adopt a broad prohibition on the geographic selection of inbound international traffic by incumbent ILECs on routes where we remove the ISP.

94. Given our conclusion that grooming arrangements are not a cause for concern on routes where we have removed the ISP, we remove here the condition that the International Bureau has imposed on BOC international Section 214 certificates that requires these carriers to obtain prior Commission approval of grooming arrangements.<sup>171</sup>

#### VI. Accounting Rate Filings

95. Under the procedures set out in the Commission's rules, carriers must seek approval for changes in accounting rates. Carriers seeking such approval must file either a modification request or a notification.<sup>172</sup> The notification requirement applies to simple reductions in the applicable accounting rate. Such notifications must be filed prior to the effective date of the change in the accounting rate and go into effect one day after filing. The accounting rate modification filing procedures apply to all other changes in accounting rates (except flexibility filings), including retroactive changes in the applicable accounting rate. Modification filings are automatically granted 21 days after filing if the filing is unopposed and the International Bureau has not notified the applicant that approval of the modification may not serve the public interest. Where a filing is not automatically granted, approval is only granted by formal action of the International Bureau.

96. The Commission sought comment in the *Notice* on whether it should continue to afford carriers the option of filing either a notification or a modification notice for simple changes in accounting rates negotiated with foreign carriers.<sup>173</sup> We observed in the *Notice* that the existence of two procedures for accounting rate filings has caused confusion and that few filings are made under the notification procedure. For instance, in many cases carriers seek to use notification filing procedures for accounting rate arrangements that should be filed under modification procedures, causing increased staff workload and additional paperwork for filing parties. We thus noted that having two procedures for accounting rate filings has made our accounting rate filing policies more complicated than they need to be. We therefore tentatively concluded that we should remove the option of filing a notification and require that all accounting rate filings be governed under the existing procedures for accounting rate modifications.<sup>174</sup>

<sup>168</sup> AT&T comments at 33.

<sup>169</sup> AT&T comments at 33.

<sup>170</sup> *See supra* Section III.B.

<sup>171</sup> *See, e.g., Bell Atlantic Communications, Inc. and NYNEX Long Distance Company, Order, Authorization and Certificate, DA 97-285 (Int'l Bur. rel. Feb. 7, 1997) (requiring that "any agreements that BACI and NYNEX LD negotiate with foreign carriers to route U.S. in-bound switched traffic to their respective in-region service areas via their authorized international private lines are subject to our Section 43.51(d) filing requirements").*

<sup>172</sup> 47 C.F.R. § 64.1001 (1998).

<sup>173</sup> *Notice*, 13 FCC Rcd at 15,337-39, ¶¶ 44-49.

<sup>174</sup> *Id.* at 15,338, ¶ 46.

97. Few commenting parties addressed this issue. MCI WorldCom supported our proposal, and Sprint opposed it.<sup>175</sup> Sprint argues that it is useful to have the option of filing an accounting rate notification to allow accounting rate changes to go into effect on one day's notice. It argues further that the fact that our policy is confusing does not justify removing it. We find, contrary to Sprint's contention, that our desire to simplify a confusing regulatory construct does, indeed, justify removing the notification procedure. We find that adopting our tentative conclusion to maintain a single procedure for accounting rate changes will simplify our regulatory structure and avoid confusion for parties seeking to make the required filings with the Commission.

98. We also note that there will be little practical impact from our decision to maintain a single procedure for accounting rate changes, the modification procedure. As discussed above, few carriers have taken advantage of our notification procedures. In 1997, the Commission received seven notification filings and 808 modification filings. In addition, although accounting rate modification filings cannot go into effect until after a 21 day comment period, all modification filings may be drafted or negotiated to have retroactive effect. There is therefore little practical difference between the modification procedures, which entail a 21 day delay before the modification is effective, and the notification procedures, which entail only a one day delay.

99. We also sought comment on the extent to which we should continue to require that carriers making accounting rate filings serve every carrier that provides service on the international route with a copy of the filing. We noted that the number of international carriers is growing on many routes and sought comment on whether another approach is warranted. We also noted that we had been urged to require that accounting rate filings be placed on public notice, as is required for petitions seeking approval of flexible settlement arrangements. Further, we noted that the Commission has introduced an electronic filing mechanism for accounting rate filings, and that information contained in such filings would be available on the Commission's web site.<sup>176</sup>

100. The Commission's electronic filing system for accounting rate filings was introduced very recently.<sup>177</sup> We have had insufficient experience with the system to determine whether the information available on the Commission's web site will be an adequate substitute for the existing service requirement. We therefore decline to remove the existing service requirement at this time. We anticipate, however, that we may remove the service requirement in the near future, as the Commission implements the new electronic filing system. We will therefore eliminate the existing service requirement within 3 months of the release of this Order. We delegate to the Chief, International Bureau the authority to implement this change and direct the Bureau to issue a Public Notice at that time to make this change in our rules.

## VII. Issues on Reconsideration

### A. Petitions for Reconsideration in CC Docket 90-337

101. In the *Notice*, we stated that we would address in this proceeding the petitions for reconsideration of the *Flexibility Order*.<sup>178</sup> The petitioners urged us to modify in various ways the competitive safeguards the Commission adopted in the *Flexibility Order*. We sought comment on the petitioner's proposals in light of the changes we proposed to the ISP. In light of our decision to abolish the flexibility policy, we decline to adopt any of the petitioner's proposals. We therefore deny the petitions for reconsideration of the *Flexibility Order*.

### B. Petitions for Reconsideration in IB Docket 95-22

102. We also have pending two remaining issues on reconsideration of the *Foreign Carrier Entry Order*.<sup>179</sup> In that order, we adopted the requirement that U.S. facilities-based carriers obtain separate Section 214 authority and demonstrate that equivalency exists when such carriers seek to provide ISR over their *facilities-based* U.S. international private lines.<sup>180</sup> This action conformed the treatment of facilities-based private lines to that adopted for resold private lines used to provide switched, basic services via ISR. We adopted an exception to this general rule, however, to permit a carrier to use its U.S. facilities-based private lines to carry switched traffic without

<sup>175</sup> Sprint comments at 13; MCI WorldCom comments at 11-12.

<sup>176</sup> *Notice*, 13 FCC Rcd at 15,338-40, ¶¶ 47-49.

<sup>177</sup> *International Bureau On-Line Reports and Electronic Filing Pilot Program*, Public Notice, Report No.: IBFS-99-0001, Feb. 10, 1999; (announcing a two month pilot program for electronic filing of accounting rate information).

<sup>178</sup> *Notice*, 13 FCC Rcd at 15,339-40, ¶¶ 50-51; AT&T Petition for Reconsideration in CC Docket 90-337; PB Comm Petition for Reconsideration in CC Docket 90-337; NYNEX Petition for Reconsideration in CC Docket 90-337; TMI Petition for Reconsideration in CC Docket 90-337.

<sup>179</sup> WorldCom, Inc. Petition for Reconsideration in IB Docket No. 95-22 [hereinafter WorldCom Petition]; BT North America Inc. Petition for Reconsideration in IB Docket No. 95-22 [hereinafter BTNA Petition]. We stated in the *Foreign Participation Order* that we would address these issues in the instant *Flexibility Order* reconsideration proceeding (CC Docket No. 90-337). See *Foreign Participation Order*, 12 FCC Rcd at 24,055, ¶ 383.

<sup>180</sup> See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3931-36, ¶¶ 153-164. See also *supra* ¶ 13. Our rule governing the provision of ISR by U.S. facilities-based carriers is currently codified at 47 C.F.R. § 63.18(e)(4). We recently reorganized our part 63 rules governing international common carriers and moved this portion of the rules to new Section 63.22(e)(2). See *1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations*, IB Docket No. 98-118, FCC 99-51, (rel. March 23, 1999). The rule changes become effective on May 19, 1999.

demonstrating equivalency where two conditions are met: (1) the private line is interconnected to the public switched network on one end only — either the U.S. end or the foreign end; and (2) the foreign correspondent with which the U.S. facilities-based carrier is interchanging switched traffic is not the owner of the underlying foreign private line half-circuit.<sup>181</sup> This general rule, and its exception, remain in effect, although we have since modified our standard for permitting ISR by both facilities-based carriers and private line resellers.<sup>182</sup>

103. WorldCom asks that we allow a carrier to interconnect its U.S. facilities-based private line with the public switched network at one end without demonstrating that our ISR standard is met, even if the foreign correspondent owns the foreign private line half-circuit, whenever the foreign correspondent is a "non-dominant U.S.-affiliated" carrier.<sup>183</sup> Our rule on one-end interconnection currently prohibits such an arrangement with any carrier that owns the foreign half-circuit, whether or not the foreign carrier has market power or is affiliated with a U.S. carrier. The policy we adopted, WorldCom argues, has the unintended result of preventing U.S. carriers or their affiliates from buying foreign half-circuits in order to provide one-end interconnection services.<sup>184</sup> Impsat supports WorldCom's proposal but would not limit it to U.S.-affiliated foreign carriers; it suggests that we allow a U.S. facilities-based carrier to interconnect its private line with the public switched network at one end, without demonstrating that our ISR standard is met, even if the foreign correspondent owns the foreign half-circuit, as long as that correspondent lacks market power.<sup>185</sup> AT&T opposes WorldCom's proposal, arguing that it would limit the Commission's protections against one-way bypass of the settlements process. Any facilities-based carrier in the foreign market, AT&T argues, should be encouraged to grant cost-based settlement rates and should not be granted greater opportunities to benefit from one-way settlements bypass than any other carrier.<sup>186</sup>

104. We have allowed U.S. facilities-based private line carriers to provide one-end interconnection service without demonstrating that our ISR standard is met in order to promote competitive entry in foreign markets and ultimately lower prices for U.S. consumers. Our intent, in limiting the carriers with whom U.S. carriers could exchange switched traffic, was to prevent incumbent foreign carriers from sending their switched traffic into the United States outside the settlements process. Such conduct would exacerbate the settlements deficit without promoting new entry into the foreign market. In an environment where foreign governments now are permitting new entrants to obtain ownership interests in international facilities, however, the standard we adopted for one-end interconnection service is not tailored to accomplish our goals. Indeed, as we have already concluded based on the entire record of this proceeding, there are significant public interest benefits to permitting U.S. facilities-based carriers to provide switched services, without limitation, outside the ISP in correspondence with foreign carriers that lack market power.<sup>187</sup> In light of this conclusion, the provision we adopted in the *Foreign Carrier Entry Order* permitting one-end interconnection by U.S. facilities-based carriers is superfluous. Removing the ISP for arrangements with carriers that lack market power allows U.S. facilities-based carriers to carry switched traffic over international circuits interconnected on one or both ends in correspondence with foreign carriers that lack market power. Our decision to lift the ISP for all U.S. carrier arrangements with foreign carriers that lack market power thus effectively subsumes our rule that permits one-end interconnection by U.S. facilities-based carriers.<sup>188</sup> We therefore eliminate that rule.

105. BTNA seeks reconsideration of our decision not to allow resellers on the U.S. end to offer one-end interconnection services.<sup>189</sup> Allowing resellers to offer the service, BTNA argues, would bolster our efforts to open foreign markets, and any harm to U.S. facilities-based carriers would be *de minimis* because those carriers

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<sup>181</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd at 3933-35 ¶¶ 157-161. *See also Foreign Participation Order*, 12 FCC Rcd at 24,054, ¶ 382.

<sup>182</sup> *See supra* ¶ 15.

<sup>183</sup> *See generally*, WorldCom Petition.

<sup>184</sup> Reply of WorldCom, Inc. (IB Docket No. 95-22) at 1-2.

<sup>185</sup> Impsat Comments (IB Docket No. 95-22) at 3.

<sup>186</sup> AT&T Opposition (IB Docket No. 95-22) at 5-6.

<sup>187</sup> We find no support in the record, moreover, for limiting this conclusion to U.S.-affiliated foreign carriers that lack market power in the foreign country.

<sup>188</sup> We are aware that the current rule on one-end interconnection could be construed to permit a U.S. facilities-based carrier to exchange switched traffic outside the ISP with a foreign carrier that leases the foreign private line half-circuit from the incumbent provider of international services but that has market power in the foreign country's local access market. Unless the U.S. international route is approved for ISR, this arrangement would not be permitted under the policy we adopt in this order of lifting the ISP for U.S. arrangements with foreign carriers that lack market power in each relevant market in the foreign destination country, including the local access market. We find it reasonable to prohibit such arrangements given our finding in this proceeding that a carrier with market power in the local access and transport market of a foreign country could well affect the market for termination of international services. *See supra* ¶ 88.

<sup>189</sup> BTNA Petition at 2-4. In a later filing, BTNA appears to limit its request to routes where the reseller is not affiliated with a foreign carrier that has market power. BTNA Reply (IB Docket No. 95-22) at 4. Our response to this request would be the same.

would continue to earn revenue from provision of the private line half-circuit to the reseller and would be able to compete to provide the service themselves. BTNA also sees no reason to presume that all one-end interconnection traffic will flow inbound to the United States. AT&T responds that BTNA has not shown why its request would serve the public interest.<sup>190</sup> It contends that lost settlement revenues would not be sufficiently offset by revenues facilities-based carriers would receive from the provision of the underlying private line half-circuit.

106. We find merit to BTNA's argument that U.S. private line resellers should be accorded the same regulatory freedom as U.S. facilities-based carriers to exchange switched traffic in correspondence with foreign carriers that lack market power. We found in the *Foreign Carrier Entry Order* that allowing resellers to offer one-end interconnection services would allow resellers to gain at the direct expense of facilities-based carriers without creating any avenue for facilities-based carriers to recoup lost settlement revenues from return traffic.<sup>191</sup> We note, however, that our decision here to lift the ISP for U.S. carrier arrangements with foreign carriers that lack market power means that no U.S. facilities-based carrier is assured of any return traffic from such foreign carriers to offset the U.S. carrier's payments for terminating its U.S.-outbound traffic. Indeed, allowing private line resellers to engage in ISR in correspondence with non-dominant foreign carriers would create additional competition to U.S. facilities-based carriers, thereby exerting increased downward pressure on rates paid by U.S. consumers.

107. We also agree with BTNA that any harm to U.S. facilities-based carriers from lost settlement revenues they would otherwise receive for handling inbound traffic would be *de minimis*, because: private line resellers would be limited to corresponding with foreign carriers that lack market power; facilities-based carriers would earn revenues on the provision of the underlying U.S. private line half-circuits; and it is unlikely that U.S. private line resellers would have any undue advantage in negotiating with non-dominant foreign carriers for the termination of foreign-originated traffic. We see no reason, moreover, to expect that permitting private line resellers to compete for the termination of traffic originated by non-dominant foreign carriers will afford the foreign carriers any ability to whipsaw U.S. facilities-based carriers.<sup>192</sup>

108. For the foregoing reasons, we modify our rules to permit U.S.-authorized private line resellers to interconnect their private lines to the public switched network, at one or both ends, for the provision of switched basic services, and thus, to engage in ISR in either of the following circumstances: (1) on any route where the resale carrier exchanges switched traffic with a foreign carrier that lacks market power; or (2) on any route for which the Commission has authorized the provision of ISR.<sup>193</sup> This rule supersedes the condition that appears in the Section 214 authorizations of private line resellers that limits their ability to resell interconnected private lines to routes for which we have authorized ISR.<sup>194</sup>

109. We also direct all U.S. private line carriers to amend their international private line tariffs to track the policy and rules we adopt in this order. In particular, we shall require that a carrier's tariff explicitly state our policy that the private line user may engage in resale of the international private line for the provision of a switched, basic telecommunications service upon authorization from the Commission under Section 214 of the Communications Act of 1934, as amended, and provided that the private line is used only (1) on a route where the resale carrier exchanges switched traffic with a foreign carrier that the Commission has determined lacks market power;<sup>195</sup> or (2) on any route for which the Commission has authorized the provision of switched services over international private lines. Carriers will be required to amend their international private line tariffs within ten days after the effective date of the rules adopted in this order.

#### VIII. Administrative Matters

##### A. Final Regulatory Flexibility Certification

110. The Regulatory Flexibility Act (RFA)<sup>196</sup> requires that a regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."<sup>197</sup> The RFA generally defines

<sup>190</sup> AT&T Opposition (IB Docket No. 95-22) at 3-4.

<sup>191</sup> *Foreign Carrier Entry Order*, 10 FCC Rcd at 3934, ¶ 158.

<sup>192</sup> We find above that foreign carriers that lack market power pose little or no danger of whipsawing U.S. carriers. *See supra* ¶ 22.

<sup>193</sup> *See* Appendix A, § 63.23 (d).

<sup>194</sup> For example, the "Actions Taken" Public Notice that serves as the international Section 214 certificate of applications granted under the streamlined procedures contained in Section 63.12 of the Commission's rules provides that: "the carriers may not -- and their tariffs must state that their customers may not -- connect their private lines to the public switched network at either the U.S. end or foreign end, or both, for the provision of international switched basic services, unless the Commission has authorized the provision of switched services over private lines to the particular country at the foreign end of the private line."

<sup>195</sup> As discussed *supra* ¶ 43, the Commission will maintain on its web page a Public Notice containing a list of foreign carriers that do not meet our presumption that they lack market power.

<sup>196</sup> The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>197</sup> 5 U.S.C. § 605(b).

"small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>198</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>199</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>200</sup>

111. In the *Notice* in this proceeding, we certified that the proposed rules "[would] not, if promulgated, have a significant economic impact on a substantial number of small entities."<sup>201</sup> No comments were received concerning this certification. The purposes of this proceeding are to eliminate some regulatory requirements and to simplify and clarify other existing rules. These rule changes will affect facilities-based international telecommunications carriers exclusively -- in particular, approximately 10 facilities-based international telecommunications carriers. Neither the Commission nor SBA has developed a small business definition specifically applicable to such international carriers; therefore, we will utilize the definition under the SBA rules for Communications Services, Not Elsewhere Classified (NEC).<sup>202</sup> Under this definition, a small business is one with \$11.0 million or less in annual receipts.<sup>203</sup> Based on information filed with the Commission, the subject facilities-based international telecommunications carriers do not fall within the above definition of "small business" because they each have more than \$11.0 million in annual receipts. The rule modifications at issue do not impose any additional compliance burden on persons dealing with the Commission, including small entities. Rather, this action removes filing requirements in scaling back application of the Commission's International Settlements policy. Accordingly, we certify, pursuant to the RFA, that the rules adopted herein will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Report and Order and Order on Reconsideration*, including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the *Report and Order and Order on Reconsideration* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. *See* 5 U.S.C. § 605(b).

#### B. Supplemental Final Regulatory Flexibility Analysis

112. As required by the Regulatory Flexibility Act (RFA),<sup>204</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice* in IB Docket No. 95-22,<sup>205</sup> and a Final Regulatory Flexibility Analysis (FRFA) was incorporated into the *Report and Order* in that docket.<sup>206</sup> This present Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) conforms to the RFA.<sup>207</sup>

113. *Need for, and Objectives of, the Present Action.* This action creates greater opportunities for U.S. international private line resellers to carry U.S. international traffic outside of the settlements process. It also harmonizes the treatment of private line resellers with that of facilities-based carriers.

114. *Summary of Significant Issues Raised by Reconsideration Petitions.* No petitions were received in direct response to the FRFA in the *Report and Order*, nor were small business issues raised.

115. *Description and Estimate of the Number of Small Entities to which the Rules Will Apply.* As noted in the associated Final Regulatory Flexibility Certification in IB Docket No. 98-148, *supra*, the RFA directs agencies to provide a Regulatory Flexibility Analysis in notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." Our action on reconsideration in IB Docket No. 95-22 will affect telecommunications resellers, including resellers that are small businesses; therefore, we incorporate this present Supplemental FRFA into our *Report and Order and Order on Reconsideration*.

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<sup>198</sup> *Id.* § 601(6).

<sup>199</sup> *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632).

<sup>200</sup> Small Business Act, 15 U.S.C. § 632.

<sup>201</sup> *See Notice*, 13 FCC Rcd 15,339, ¶ 48.

<sup>202</sup> 13 CFR § 120.121, SIC code 4899. Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>203</sup> *Id.*

<sup>204</sup> *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>205</sup> *Notice*, 13 FCC Rcd at 15,340-41, ¶¶ 53-54.

<sup>206</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd at 3995-96.

<sup>207</sup> *See* 5 U.S.C. § 604.

116. In our reconsideration of the petitions in IB Docket No. 95-22, we modify our rules to allow U.S. international private line resellers to carry switched traffic over international private line circuits in correspondence with foreign carriers that lack market power. We expect that these changes will allow U.S. private line resellers, including small entities, to take advantage of new opportunities in the international telecommunications marketplace. As noted in the associated certification, *supra*, in instances where neither the Commission nor the SBA has developed a small business definition specifically applicable to the entities potentially affected by our action, we utilize the pertinent definition under the SBA rules.<sup>208</sup> Here, neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company other than a radiotelephone (wireless) company.<sup>209</sup> Below, we describe available statistics for telecommunications entities generally, including resellers, then give more particular information on resellers.

117. The SBA has developed a small business definition for establishments engaged in providing "Telephone Communications, Except Radiotelephone" (wireless) to be such businesses having no more than 1,500 employees.<sup>210</sup> The U.S. Bureau of the Census reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.<sup>211</sup> All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,295 small telephone communications companies other than radiotelephone companies are small entities that may be affected by present action.

118. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS).<sup>212</sup> According to TRS data, 339 reported that they were engaged in the resale of telephone service (including debit card providers).<sup>213</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the proposed rules, if adopted.

119. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* In our reconsideration of the petitions in IB Docket No. 95-22, we modify our rules to allow U.S. private line resellers to carry switched traffic over international private line circuits in correspondence with foreign carriers that lack market power. We expect that these changes will expand the ability of U.S. private line resellers, including small entities, to reap economic benefits by taking advantage of new opportunities in the international telecommunications marketplace.

120. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* As discussed above, in our reconsideration of the petitions in IB Docket No. 95-22, we modify our rules to allow U.S. private line resellers to carry switched traffic over international private line circuits in correspondence with foreign carriers that lack market power. Authorized private line resellers will be subject to no reporting, recordkeeping, or compliance requirements in order to carry switched traffic over international private line circuits in correspondence with foreign carriers that lack market power.

121. *Report to Congress.* The Commission will send a copy of the *Report and Order and Order on Reconsideration*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Report and Order and Order on Reconsideration*, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order and Order on Reconsideration* and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

### C. Paperwork Reduction Act of 1995 Analysis

122. This *Report and Order* contains either a new or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this order, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from date of publication of this Order in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Written comments must be submitted on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 12th Street S.W., Washington, DC 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov). For additional information concerning the information collections contained in the *Report and Order* contact Judy Boley at 202-418-0214.

<sup>208</sup> Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>209</sup> 13 C.F.R. § 121.201, SIC code 4813. *See also* Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987).

<sup>210</sup> *Id.*

<sup>211</sup> *1992 Census at Firm Size* 1-123.

<sup>212</sup> FCC, *Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier)* (Nov. 1997).

<sup>213</sup> *Id.* at Figure 2.

IX. Ordering Clauses

123. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 2, 4(i), 201, 203, 205, 214, 303(r), and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201, 205, 214, 303(r), 309, the policies, rules, and requirements discussed herein ARE ADOPTED and Parts 43 and 63 of the Commission's rules, 47 C.F.R. Secs. 43, 63, ARE AMENDED as set forth in Appendix A.

124. IT IS FURTHER ORDERED that the petitions for reconsideration in CC Docket No. 90-337 ARE DENIED.

125. IT IS FURTHER ORDERED that the petitions for reconsideration in IB Docket No. 95-22 ARE GRANTED IN PART and DENIED IN PART, as discussed herein.

126. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order and Order on Reconsideration*, including the Final Regulatory Flexibility Certification and the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

127. IT IS FURTHER ORDERED that the policies, rules, and requirements established in this decision shall take effect thirty days after publication in the Federal Register or in accordance with the requirements of 5 U.S.C. § 801(a)(3) and 44 U.S.C. § 3507.

Federal Communications Commission

Magalie Roman Salas  
Secretary



## Appendix A

## Final Rules

Parts 0, 43, 63, and 64 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) are amended as follows:

**PART 0 — COMMISSION ORGANIZATION**

1. The authority citation for part 0 continues to read as follows:

Authority: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.457 is amended by adding paragraph (d)(1)(vi) to read as follows:

**§ 0.457 Records not routinely available for public inspection.**

\*\*\*\*\*

(d) \*\*\*

(1) \*\*\*

(vi) The rates, terms and conditions in any agreement between a U.S. carrier and a foreign carrier that govern the settlement of U.S. international traffic, including the method for allocating return traffic, if the U.S. international route is exempt from the international settlements policy under § 43.51(g) of this chapter.

**PART 43 — REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES**

3. The authority citation for part 43 continues to read as follows:

Authority: 47 U.S.C. 154; Telecommunications Act of 1996, Pub. L. 104-104, secs. 402(b)(2)(B), (c), 110 Stat. 56 (1996) as amended unless otherwise noted. 47 U.S.C. 211, 219, 220 as amended.

4. Section 43.51 is amended by revising paragraphs (a), (b) and (e), and by adding paragraphs (f) and (g) and Note 1 to read as follows:

**§ 43.51 Contracts and concessions.**

(a) Any communications common carrier that: is engaged in domestic communications and has not been classified as nondominant pursuant to § 61.3 of this chapter or, except as provided in paragraphs (f)-(g) of this section, is engaged in foreign communications, and enters into a contract with another carrier, including an operating agreement with a communications entity in a foreign point for the provision of a common carrier service between the United States and that point; must file with the Commission, within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization, operating agreement or other arrangement to which it is a party and amendments thereto with respect to the following:

(1) The exchange of services;

(2) Except as provided in paragraph (c) of this section, the interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances; and

(3) The rights granted to the carrier by any foreign government for the landing, connection, installation, or operation of cables, land lines, radio stations, offices, or for otherwise engaging in communication operations.

(b) \*\*\* The Commission may, at any time and upon reasonable request, require any communication common carrier not subject to the provisions of this section to submit the documents referenced in this section.

\*\*\*\*\*

(e) International settlements policy. (1) Except as provided in paragraph (g) of this section, if a carrier files an operating agreement (whether in the form of a contract, concession, license, etc.) referred to in paragraph (a) of this section to begin providing switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point and the terms and conditions of such agreement relating to the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, the allocation of return traffic, or the basis of settlement of traffic balances, are not identical to the equivalent terms and conditions in the operating agreement of another carrier providing the same or similar service between the United States and the same foreign point, the carrier must also file with the International Bureau a modification request under § 64.1001 of this chapter. Unless a carrier is providing switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point pursuant to an operating agreement that is exempt from the international settlements policy under paragraph (g) of this section, the carrier shall not bargain for or agree to accept more than its proportionate share of return traffic.

(2) Except as provided in paragraph (g) of this section, if a carrier files an amendment to the operating agreement referred to in paragraph (a) of this section under which it already provides switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point, and other carriers provide the same or similar service to the same foreign point, and the amendment relates to the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, the allocation of return traffic, or the basis of settlement of traffic balances, the carrier must also file with the International Bureau a modification request under § 64.1001 of this chapter.

(f) Confidential treatment. (1) A carrier providing service on an international route that is exempt from the international settlements policy under paragraph (g)(2) of this section, but that is required by paragraph (a) or (b) of this section to file a contract covering that route with the Commission, may request confidential treatment under § 0.457 of this chapter for the rates, terms and conditions that govern the settlement of U.S. international traffic.

(2) Carriers requesting confidential treatment under this paragraph must include the information specified in § 64.1001(c) of this chapter. Such filings shall be made with the Commission, with a copy to the Chief, International Bureau. The transmittal letter accompanying the confidential filing shall clearly identify the filing as responsive to § 43.51(f).

(g) Exemption from the international settlements policy and contract filing requirements. (1) A carrier that enters into a contract, including an operating agreement, for the provision of a common carrier service between the United States and a foreign point with a carrier that lacks market power in that foreign market is not subject to the requirements of paragraphs (a)-(b) or (e) of this section.

(i) A foreign carrier lacks market power for purposes of paragraph (g)(1) of this section if it does not appear on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points. The list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points is available from the International Bureau's World Wide Web site at <http://www.fcc.gov/ib>.

(ii) The Commission will include on the list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points any foreign carrier that has 50 percent or more market share in the international transport or local access markets of a foreign point. A party that seeks to remove such a carrier from the Commission's list bears the burden of submitting information to the Commission sufficient to demonstrate that the foreign carrier lacks 50 percent market share in the international transport and local access markets on the foreign end of the route or that it nevertheless lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market. A party that seeks 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 has 50 percent or more market share in the international transport or local access markets on the foreign end of the route or that it nevertheless has sufficient market power to affect competition adversely in the U.S. market.

(2) A carrier that enters into a contract, including an operating agreement, with a carrier in a foreign point for the provision of a common carrier service between the United States and that point is not subject to the international settlements policy in paragraph (e) of this section if the foreign point appears on the Commission's list of international routes that the Commission has exempted from the international settlements policy. The list of exempt routes is available from the International Bureau's World Wide Web site at <http://www.fcc.gov/ib>.

(i) A party that seeks to add a foreign market to the list of markets that are exempt from the international settlements policy must show that U.S. carriers are able to terminate at least 50 percent of U.S.-billed traffic in the foreign market at rates that are at least 25 percent below the benchmark settlement rate adopted for that country in IB Docket No. 96-261.

(ii) A party that seeks to remove a foreign market from the list of markets that are exempt from the international settlements policy must show that U.S. carriers are unable to terminate at least 50 percent of U.S.-billed traffic in the foreign market at rates that are at least 25 percent below the benchmark settlement rate adopted for that country in IB Docket No. 96-261.

Note 1 to § 43.51: The Commission's benchmark settlement rates are available in International Settlement Rates, IB Docket No. 96-261, *Report and Order*, 12 FCC Rcd 19,806, 62 FR 45758 (August 29, 1997).

#### **PART 63 — EXTENSION OF LINES AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS**

5. The authority citation for part 63 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 160, 161, 201-205, 218, 403, 533 unless otherwise noted.

6. Section 63.14 is amended to revise paragraphs (a) and (c), to delete paragraph (d), and to add Note 1 to read as follows:

##### **§ 63.14 Prohibition on agreeing to accept special concessions.**

(a) Any carrier authorized to provide international communications service under this part shall be prohibited, except as provided in paragraph (c) of this section, from agreeing to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market and from agreeing to accept special concessions in the future.

(b) \*\*\*

(c) This section shall not apply to the rates, terms and conditions in an agreement between a U.S. carrier and a foreign carrier that govern the settlement of international traffic, including the method for allocating return traffic, if the international route is exempt from the international settlements policy under § 43.51(g)(2) of this chapter.

Note 1 to § 63.14: Carriers may rely on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points for purposes of determining which foreign carriers are the subject of the prohibitions contained in this section. The Commission's list of foreign carriers that do not qualify for the presumption that they lack market power is available from the International Bureau's World Wide Web site at <http://www.fcc.gov/ib>.

7. Section 63.16 is amended by revising paragraph (a) to read as follows:

##### **§ 63.16 Switched services over private lines.**

(a) Except as provided in §§ 63.22 (e)(2) and 63.23(d)(2), a carrier may provide switched basic services over its authorized private lines if and only if the country at the foreign end of the private line appears on a Commission list of destinations to which the Commission has authorized the provision of switched services over private lines. The list of authorized destinations is available from the International Bureau's World Wide Web site at <http://www.fcc.gov/ib>.

\*\*\*\*\*

8. Section 63.22 is amended by revising paragraph (e) to read as follows:

##### **§ 63.22 Facilities-based international common carriers.**

\*\*\*\*\*

(e)(1) Except as provided in paragraph (e)(2) of this section, the carrier may provide switched basic services over its authorized facilities-based private lines if and only if the country at the foreign end of the private line appears on a Commission list of countries to which the Commission has authorized the provision of switched services over private lines. See § 63.16. If at any time the Commission removes the country from that list or finds that market distortion has occurred in the routing of traffic between

the United States and that country, the carrier shall comply with enforcement actions taken by the Commission.

(2) The carrier may use its authorized facilities-based private lines to provide switched basic services in circumstances where the carrier is exchanging switched traffic with a foreign carrier that lacks market power in the country at the foreign end of the private line.

(3) A foreign carrier lacks market power for purposes of paragraph (e)(2) of this section if it does not appear on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points. This list is available from the International Bureau's World Wide Web site at <http://www.fcc.gov/ib>.

\*\*\*\*\*

9. Section 63.23 is amended by revising paragraph (d) to read as follows:

**§ 63.23 Resale-based international common carriers.**

\*\*\*\*\*

(d)(1) Except as provided in paragraph (d)(2) of this section, the carrier may provide switched basic services over its authorized resold private lines if and only if the country at the foreign end of the private line appears on a Commission list of countries to which the Commission has authorized the provision of switched services over private lines. See § 63.16. If at any time the Commission removes the country from that list or finds that market distortion has occurred in the routing of traffic between the United States and that country, the carrier shall comply with enforcement actions taken by the Commission.

(2) The carrier may use its authorized resold private lines to provide switched basic services in circumstances where the carrier is exchanging switched traffic with a foreign carrier that lacks market power in the country at the foreign end of the private line.

(3) A foreign carrier lacks market power for purposes of paragraph (d)(2) of this section if it does not appear on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points. This list is available from the International Bureau's World Wide Web site at <http://www.fcc.gov/ib>.

\*\*\*\*\*

**PART 64 — MISCELLANEOUS RULES RELATING TO COMMON CARRIERS**

10. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 160, 201, 218, 226, 228, 332 unless otherwise noted.

11. Section 64.1001 is amended by revising paragraphs (a) through (g) and by removing paragraphs (h) through (l) to read as follows:

**§ 64.1001 International settlements policy and modification requests.**

\*\*\*\*\*

(b) If the international settlement arrangement in the operating agreement or amendment referred to in § 43.51(e)(1) or (e)(2) of this chapter differs from the arrangement in effect in the operating agreement of another carrier providing service to or from the same foreign point, the carrier must file a modification request under this section unless the international route is exempt from the international settlements policy under § 43.51(g) of this chapter.

(c) A modification request must contain the following information:

- (1) The applicable international service;
- (2) The name of the foreign telecommunications administration;
- (3) The present accounting rate (including any surcharges);
- (4) The new accounting rate (including any surcharges);
- (5) The effective date;
- (6) The division of the accounting rate; and
- (7) An explanation of the proposed modification(s) in the operating agreement with the foreign correspondent.

(d) A modification request must contain a notarized statement that the filing carrier:

- (1) Has not bargained for, nor has knowledge of, exclusive availability of the new accounting rate;
- (2) Has not bargained for, nor has any indication that it will receive, more than its proportionate share of return traffic; and
- (3) Has informed the foreign administration that U.S. policy requires that competing U.S. carriers have access to accounting rates negotiated by the filing carrier with the foreign administration on a nondiscriminatory basis.

(e) An operating agreement or amendment filed under a modification request cannot become effective until the modification request has been granted under paragraph (g) of this section.

(f) Carriers must serve a copy of the modification request on all carriers providing the same or similar service to the foreign administration identified in the filing on the same day a modification request is filed.

(g) All modification requests will be subject to a twenty-one (21) day pleading period for objections or comments, commencing the date after the request is filed. If the modification request is not complete when filed, the carrier will be notified that additional information is to be submitted, and a new 21 day pleading period will begin when the additional information is filed. The modification request will be deemed granted as of the twenty-second (22nd) day without any formal staff action being taken: provided

(1) No objections have been filed, and

(2) The International Bureau has not notified the carrier that grant of the modification request may not serve the public interest and that implementation of the proposed modification must await formal staff action on the modification request. If objections or comments are filed, the carrier requesting the modification request may file a response pursuant to § 1.45 of this chapter. Modification requests that are formally opposed must await formal action by the International Bureau before the proposed modification can be implemented.

12. Section 64.1002 is removed.

**Section 64.1002 Alternative settlement arrangements.**

[Removed]

## Appendix B

## Commenting Parties

Parties filing comments

AT&T  
Ameritech  
Bell Atlantic  
BellSouth  
BT North America  
Cable & Wireless USA, Inc. (C&W)  
Competitive Telecommunications Association (Comptel)  
Deutsche Telekom AG and Deutsche Telekom, Inc. (DT)  
France Telecom (FT)  
GTE  
General Services Administration (GSA)  
Level 3  
MCI-WorldCom  
NTTA.com  
PrimeTEC International.  
Qwest  
RSL Com USA  
SBC  
Sprint  
Teleglobe  
Telia North America  
Telecommunications Resellers Association (TRA)  
Telegroup  
TMI Communications

Parties filing reply comments

America's Carriers Telecommunication Association (ACTA)  
Ameritech  
AT&T  
Bell Atlantic  
C&W  
GSA  
GTE  
Kokusai Denshin Denwa Co. Ltd. (KDD)  
MCI WorldCom  
PrimeTEC International  
RSL com  
SBC  
Star Telecommunications  
Telia N.A.  
Telefonica International S.A.