Before the
Federal Communications Commission
Washington, D.C. 20554 FCC 96-459

In the Matter of	)	
	)	
	)	Docket No. CC 90-337
Regulation of International	)	Phase II
Accounting Rates	)	

Fourth Report and Order

Adopted: November 26, 1996 **Released: December 3, 1996**

By the Commission:

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I. Introduction

1. This *Report and Order* creates a framework for competition in the market for U.S. international telecommunications services that is more closely patterned on our competitive market for domestic long distance services. This new framework will permit significant progress toward a truly competitive market for international services. It is an important further step away from a U.S. regulatory system premised for the last century on managing the relationship between national monopolists. Even after the entry of new U.S. competitors into the international message telephone service (IMTS) market, the fundamentals of our regulation of the accounting rate system have remained unchanged. This *Report and Order* takes a critical step towards a systematic transformation by adopting a framework for permitting flexibility in our accounting rate policies where appropriate market and regulatory conditions exist. In essence it provides a roadmap for a transition from traditional accounting rates to a competitive market for originating and terminating international traffic.

2. We asked for comments on whether allowing flexibility in our International Settlements Policy (ISP) might be an appropriate way to achieve lower, cost-based accounting rates as facilities-based competition is permitted in foreign markets.[1] We now authorize U.S. carriers to propose methods to pay for terminating international calls other than by the traditional method of bilateral accounting rates. We will permit, subject to certain competitive safeguards, alternative payment arrangements that deviate from our ISP between any U.S. carrier and any foreign correspondent in a country that satisfies the effective competitive opportunities (ECO) test adopted in our *Foreign Carrier Entry Order*.[2] We will also consider alternative settlement arrangements between a U.S. carrier and a foreign correspondent in a country that does not satisfy the ECO test, where the U.S. carrier can demonstrate that deviation from the ISP will promote market-oriented pricing and competition, while precluding abuse of market power by the foreign correspondent.

3. We adopt the following safeguards to ensure that our new flexibility policy does not have anticompetitive effects in the international market: (i) alternative arrangements between affiliated carriers and those involved in non-equity joint ventures affecting the provision of basic services must be filed with the Commission and publicly available; and (ii) alternative arrangements affecting more than twenty-five percent of either the inbound or outbound traffic on a particular route must be filed with the Commission and publicly available and not contain unreasonably discriminatory terms and conditions.

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[1] *Regulation of International Accounting Rates*, CC Docket No. 90-337 *(Phase II)*, *Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 8040 (1992); Public Notice DA 96-105, 11 FCC Rcd 3152 (1996).

[2] *Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order*, FCC 95-475, 11 FCC Rcd 3873 (1995) *(Foreign Carrier Entry Order)*.

4. In this *Report and Order* we also codify our proportionate return policy. Finally, we decline at this time to apply the requirements of our ISP to the global mobile satellite services (MSS) industry.

5. This more flexible approach to the accounting rate system will stimulate competition and thus benefit both consumers and suppliers. It will enable U.S. carriers to respond more rapidly to changing conditions in the global telecommunications market, reduce their call termination costs and the U.S. net settlement payments, and provide for lower calling prices. Lower calling prices will stimulate additional service growth, expand market size, and increase revenue, which will attract entry and benefit both U.S. and foreign consumers.

II. Background

6. U.S. carriers have for many years been required to comply with our ISP in their bilateral accounting rate negotiations with monopoly foreign carriers. This policy prevents foreign carriers from discriminating among U.S. carriers and requires: (1) the equal division of accounting rates; (2) nondiscriminatory treatment of U.S. carriers; and (3) proportionate return of inbound traffic.[3] Our recent *Accounting Rate Policy Statement,*[4] however, addressed the need for reforming our accounting rate policies, including the ISP, in light of the opportunities created by the emergence of competition in other national markets. Specifically, we proposed to tailor our approach to accounting rates to reflect the evolution of diverse national markets for telecommunications services.[5]

7. As part of this new approach, we announced our intent to introduce a more flexible framework for regulating accounting rates that could, when appropriate, rely on competitive forces to determine termination costs and efficient resource allocation. We indicated that, in markets where the legal, regulatory, and economic conditions support competition, U.S. carriers should have the flexibility to negotiate alternative settlement or payment arrangements with their foreign correspondents that deviate from one or more of the requirements imposed by our ISP. In the *Accounting Rate Policy Statement* we announced that

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[3] *See Implementation and Scope of the International 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).

[4] *Policy Statement on International Accounting Rate Reform*, 11 FCC Rcd 3146 (1996) ("*Accounting Rate Policy Statement*").

[5] *Id.* at ¶ 24.

we would consider the framework for such alternative payment arrangements in this proceeding.[6] The Commission issued a Public Notice concurrently with the *Accounting Rate Policy Statement* in which it invited interested parties to file supplemental comments in this proceeding on our proposal to allow flexibility in light of the *Accounting Rate Policy Statement*.[7]

8. Our fundamental goal is to create a competitive market for international telecommunications services. There is significant evidence that the current market structure for international services in the United States is not producing sufficiently competitive results. As we noted in the *AT&T International Non-dominance Order*,[8] part of the performance problem is attributable to lack of competition in other countries and part is due to high accounting rates. However, analysis of Commission data has convinced us that even within these limitations, the price performance of the U.S. market for IMTS is not satisfactory. Our hope is that the steps we take in this *Report and Order* will help ensure that settlement rate reforms result in lower prices to U.S. consumers.

9. This *Report and Order* is one of two proceedings designed to spur competition in international services. In this proceeding we allow flexibility for the provision of services in competitive markets. The other proceeding will address our current accounting rate benchmark ranges consistent with our stated intention in the *Accounting Rate Policy Statement* to update our benchmarks to reflect recent technological improvements and their associated cost reductions, as well as market structure changes occurring in the global telecommunications markets.[9] The

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[6] We first raised the issue of whether allowing some flexibility in our International Settlements Policy might be an appropriate means of achieving lower accounting rates as facilities-based competition is introduced in foreign countries in *Regulation of International Accounting Rates*, CC Docket No. 90-337 *(Phase II), Second Report and Order and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 8040 at ¶ 33 (1992) (*Second Further Notice*). Because of the significant market changes that have occurred since that proceeding was initiated, we reopened the record to solicit supplemental comments and replies on the issue of permitting flexible settlement arrangements.

[7] Public Notice DA 96-105, 11 FCC Rcd 3152.

[8] *In the Matter of Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, FCC 96-209 (rel. May 14, 1996) (*AT&T International Non-dominance Order*).

[9] *Accounting Rate Policy Statement* at ¶¶42-43. MCI and AT&T address the Commission's stated intention to update the benchmark accounting rates. MCI Supp. Comments at 9-10; AT&T Supp. Reply at 12-13. AT&T also suggests that the Commission pursue efforts with other governments and international organizations to gather and publish accounting rate information to assist U.S. carriers in accounting rate negotiations. AT&T Supp. Comments at 32-33. We transfer MCI and AT&T's comments on the issue of accounting rate benchmarks and AT&T's comments on accounting rate negotiations to our upcoming proceeding where we will propose revisions to the benchmark accounting rates.

United States paid roughly $5 billion in settlements to the rest of the world in 1995, up from $2.8 billion in 1990. Because accounting rates are not cost-based, these settlements represent a large transfer payment from U.S. consumers to foreign countries and carriers. As long as accounting rates remain substantially above costs, foreign countries will be reluctant to introduce competition in their telecommunications market to protect this source of revenue. We thus believe that revising and updating our benchmarks to achieve accounting rates that more closely reflect costs will reinforce our commitment to encourage the development of competitive markets for IMTS in the United States and other countries. Accordingly, we will be issuing in the future a Notice of Proposed Rulemaking to update and revise our accounting rate benchmarks to bring them closer to a cost-based level.

III. Discussion

A. Allowing Flexibility in Accounting Rate Policies

10. In our *Accounting Rate Policy Statement* we recognized 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.[10] These conclusions were fully consistent with our earlier proposal that, in countries where effective competition exists, we should allow carriers to negotiate alternative compensation arrangements without necessarily being bound by the ISP.[11]

Position of the Parties

11. Commenting parties agree almost unanimously that technological and market changes necessitate increased flexibility in our accounting rate policies.[12] Commenters believe that, as technologies advance and market structures change, the traditional accounting rate system may not be the most efficient way to allocate the cost of international services between carriers. Further, they agree that, as markets become competitive, the ISP might impede

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[10] *Accounting Rate Policy Statement* at ¶ 33.

[11] *Second Further Notice* at ¶ 33.

[12] *See generally*, AmericaTel Supp. Comments at 2; AT&T Supp. Comments at 1-2; Com Tech Supp. Comments at 1,4; ICO Supp. Comments at 1; MFSI Supp. Comments at 6; NYNEX Supp. Reply at 1; Cable and Wireless Supp. Reply at 6; TNZI Supp. Reply at 1.

competitive behavior and further inhibit the development of effectively competitive markets.[13] For example, Americatel states that it is "counterproductive to impose artificial restraints on competition" such as the ISP where there is no entity that can leverage market power in a way that harms competitors and stifles competition.[14] Many commenters also note that the Commission's promotion of alternative methods of providing international services has been successful in exerting downward pressure on accounting rates, and urge the Commission to continue that policy.[15] Sprint adds that encouragement of alternative services is likely to speed the ultimate demise of the accounting rate system and urges the Commission to consider new approaches to accounting rates.[16]

12. Although some commenters believe that flexible accounting rate policies might respond to and encourage emerging competition, many argue that relaxing our ISP now is premature because competitive markets do not yet exist.[17] These commenters contend that we should first eliminate discriminatory treatment of U.S. carriers by foreign carriers, including discriminatory accounting rates. For example, MCI contends that the Commission should focus primarily on strengthening policies that eliminate discrimination and continue strict enforcement of the ISP.[18] AmericaTel disagrees with the assertion that there are no effectively competitive markets in the world and cites Chile as one such market.[19] TNZI states that New Zealand is an

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[13] AmericaTel Supp. Comments at 3; Com Tech Supp. Comments at 2; ICO Supp. Comments at 5; NYNEX Supp. Reply at 5; TNZI Supp. Reply at 6.

[14] Americatel Supp. Comments at 3.

[15] *See, e.g.*, AT&T Supp. Comments at 26; Sprint Supp. Comments at 4; WorldCom Supp. Comments at 3.

[16] Sprint Supp. Comments at 7-8. Sprint cautions that alternative services are beneficial only when offered with safeguards to protect against the exercise of monopoly power. Sprint cites to TNZI's application to provide full circuit service between the United States and New Zealand as an example of an alternative service that will harm, rather than promote, competition. Sprint Supp. Comments at 4-6. TNZI argues that Sprint's claims have no merit. TNZI Supp. Reply at 5-7. We transfer Sprint and TNZI's comments on this issue to our proceeding which deals directly with TNZI's application. *See* Application of Telecom New Zealand Ltd. for Authority Under Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's Rules and Regulations to Acquire and Operate Facilities for the Provision of International Services Between the United States and New Zealand, ITC-96-097.

[17] MCI Supp. Comments at 7; Sprint Supp. Comments at 12; WorldCom Supp. Comments at 10; TRA Supp. Reply at 9.

[18] MCI Supp. Comments at 5-8; *see also*, WorldCom Supp. Comments at 6.

[19] AmericaTel Supp. Reply at 2-5.

example of "a market where the 'legal, regulatory, and economic conditions support competition.'"[20]

[20] TNZI Supp. Reply at 4. The framework we adopt in this *Report and Order* for permitting carriers to deviate from the ISP does not require that we identify in this *Report and Order* specific countries whose markets are effectively competitive. We therefore decline to address AmericaTel's specific claims with respect to Chile's market and TNZI's specific claims with respect to New Zealand's market.

Discussion

13. We conclude that we should establish a more flexible framework for regulating international accounting rates. As we stated in the *Accounting Rate Policy Statement*, greater flexibility is needed to create or replicate market-based incentives and prices for both suppliers and consumers of international telecommunications service.[21] Moreover, we agree with commenters who argue that in competitive markets, current accounting rate policies, including the ISP, limit options for terminating traffic and impede competition.[22] We also agree that, where competitive forces are emerging, the ISP's restraints on competition may be counterproductive.[23]

14. The Commission's ISP restricts market conduct in order to prevent distortions in competition and harm to U.S. consumers by foreign monopolists. The ISP focuses on maintaining parity among all U.S. competitors. Preserving the market positions of numerous suppliers at the expense of allowing freedom of pricing, supply and entry is not, however, an appropriate way to foster competition when better alternatives exist. The opening of competition in foreign markets provides such an alternative on some international routes. We conclude that the benefits from encouraging greater competition outweigh the risks of anticompetitive behavior on routes for international services where there are effective competitive opportunities for U.S. carriers. We maintain selective safeguards in markets where we grant flexibility, but the safeguards are far less restrictive than the requirements of our ISP.

15. The approach in this *Report and Order* differs from our current accounting rate policies in several ways. First, the framework we adopt here recognizes that some global telecommunications markets have begun to shift from the traditional monopoly model to a more competitive market structure that offers less costly alternatives for terminating international calls. Accounting rates were created at a time when each country had a monopoly provider of international services. They are a specialized form of interconnection tariff that treats international traffic differently than domestic traffic. An accounting rate is a negotiated rate between international carriers premised on the idea that the carriers jointly provide IMTS by handing off traffic to each other at the half-way point between two countries. Therefore, an accounting rate in effect bundles the provision of an international half-circuit, international gateway switching, and the fee for the domestic termination of the call by carriers at each end. When the accounting rate regime was devised, there was no conception that a single carrier

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[21] *Accounting Rate Policy Statement* at ¶ 20.

[22] *See, e.g.*, Com Tech Supp. Comments at 2; AmericaTel Supp. Comments at 4.

[23] *See, e.g.*, AmericaTel Supp. Comments at 2-3.

might want to control end-to-end service, including its own international gateway switch, or that a carrier could have direct access to the domestic network at the foreign end on an unbundled basis.

16. The introduction of effective facilities-based competition in some foreign markets creates the option of an international carrier acquiring control of both the international transport circuit and the international gateway switching facility. That carrier could then terminate an international call at domestic interconnection rates, a potentially far more efficient arrangement than the current settlements process. Moreover, the international carrier would have access to the unbundled functions of the domestic network as well as whatever facilities of its own that it has established in the foreign country.

17. The countries eligible for flexibility under the framework we adopt here must have competitive, nondiscriminatory terms available for interconnection to the domestic network by a new entrant. Providing carriers the option of obtaining access to the domestic market in a foreign country under the terms of such a domestic interconnection regime ensures U.S. carriers will have significantly more favorable cost arrangements for interconnection than under the present accounting rate system. Under these conditions, there is no economic justification for requiring the differential treatment of international traffic. Moreover, if the domestic interconnection regime is an alternative to the current high levels of accounting rates, foreign carriers will have to move accounting rates into closer alignment with the costs of domestic interconnection if they continue to offer traditional accounting rate arrangements. This downward pressure on accounting rates will benefit even U.S. carriers who wish to continue supplying international services under some system of accounting rates instead of negotiating alternative settlement arrangements.

18. Second, the ISP requires that a foreign carrier must offer every U.S. carrier the same accounting rate, while the framework we establish here lets the market set prices for terminating international traffic on competitive routes. The ISP imposes by regulatory fiat an identical international transfer price for every form of commercial relationship involving IMTS. This is a restriction that may limit more efficient alternatives as part of innovative commercial arrangements. In contrast, under our more flexible regulatory framework, we encourage innovative terms for terminating international traffic, while maintaining selective competitive safeguards.

19. Third, the ISP's requirement of proportionate return links the outbound and inbound markets for U.S. international traffic, while our new policy encourages the development of a separate competitive market for termination services. Under the proportionate return requirement, U.S. carriers receive the same share of IMTS inbound traffic to the U.S. from a foreign country as they send outbound to that country. This bundling of market shares of inward and outward-bound markets can discourage competition. These two markets have different attributes, and a potentially effective entrant in one might be less effective in the other. For

example, some new competitors may have strong domestic networks but less experience with international markets. In addition, a framework which facilitates arbitrage opportunities will also attract entrants seeking to compete in both originating and terminating service markets. Where there are effective competitive opportunities at the foreign end, there is no reason why such carriers should not be able to bid competitively to terminate inward-bound traffic to the United States. Removing the regulatory link between the two market segments should have the ultimate result of producing decentralized, more competitive market structures that improve economic performance and ultimately redound to the benefit of consumers.

20. Fourth, the ISP's guidelines become increasingly difficult to administer as markets become competitive, whereas our new flexibility policy relies on competitive markets, where possible, to guide the pricing and supply of international services. The emergence of digital technology, more competitors, more traffic routing options, and more aggressive marketing indicates that national carriers are generating new ways to market, price, and supply services for customers. We face the choice of increasing the complexity of our regulation in order to maintain the ISP in light of these innovations, or turning more to the market to guide the pricing and supply of international services. We prefer to rely on the market.

21. Finally, the ISP hinders competition by both U.S. and foreign carriers in the U.S. market for international services. The regulatory framework we adopt here, on the other hand, further opens the U.S. market to vigorous competitive entry by foreign carriers. As in our *Foreign Carrier Entry Order,* we adopt a policy that will prevent foreign carriers from leveraging their market power in foreign markets to engage in anticompetitive conduct in the U.S. market. However, we also welcome the benefits to U.S. consumers from entry by carriers whose market power is limited by the existence of effective competition.

22. Commenters who argue that we should delay adopting a more flexible regulatory framework essentially contend that, until effectively competitive markets exist, it would be improper to create a more flexible regulatory framework. We disagree. We believe that our policies, including our accounting rate policies, should be conducive to the development of competitive market conditions in other countries to the maximum extent possible.[24] While alternative arrangements alone may not create competitive market conditions in other countries where market imperfections exist, a more flexible ISP policy will provide existing carriers with a greater incentive and an increased capability to seek more economically efficient contractual arrangements for terminating service. Such alternative arrangements will enable carriers to reduce their call termination costs and respond more rapidly to changing market conditions. Facilities-based entry, moreover, already has emerged in several foreign markets. As a matter of established policy, similar entry is planned for many more countries in 1997 and 1998. We therefore conclude that creating a more flexible regulatory framework at this time will serve our

[24] *Accounting Rate Policy Statement* at ¶ 2.

objectives to promote competitive behavior, improve economic performance, and rely on competitive market forces to determine call termination charges to the maximum extent permitted by market conditions.

23. This more flexible approach to the ISP is a logical step beyond the existing opportunities we accord U.S. carriers to terminate international traffic outside of the settlements process through our policy encouraging resale of international private line services. Pursuant to our *International Resale Order*, U.S. carriers may resell their international private lines to provide switched services, provided the destination foreign country affords resale opportunities equivalent to those available under U.S. law.[25] Resale of international private lines to provide switched services can offer U.S. carriers a more cost- efficient alternative to terminating international switched traffic than the accounting rates system. We noted in the *International Resale Order* that resale is "one of a number of steps" toward "our goal of lower, more economically-efficient, cost-based accounting and collection rates."[26] The ISP flexibility policy we adopt here will expand the opportunities for U.S. carriers to reduce their call termination costs and is another step towards our goal.

24. Some commenters who argue for a delay contend that we should not introduce a more flexible and pro-competitive framework until we have eradicated discriminatory

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[25] *Regulation of International Accounting Rates*, CC Docket No. 90-337 (*Phase II), First Report and Order*, 7 FCC Rcd 559 (1991) (*International Resale Order*). NYNEX urges the Commission to revise its rules governing the provision of switched traffic over resold international private lines by allowing one-way resale by any carrier that is not affiliated with a foreign entity having market power at the foreign end. NYNEX Supp. Reply at 7-10. NYNEX's request, which it raised only in Reply Comments in this proceeding, is outside the scope of, and not properly considered in, this proceeding. The issue raised by NYNEX has been generally raised in the *Foreign Carrier Entry Order* reconsideration proceeding, and we will incorporate NYNEX's Reply Comments in the record of that proceeding. MCI also raises an issue related to provision of switched traffic over international private lines. MCI requests that the Commission reverse what MCI reads as a Commission decision in the *Foreign Carrier Entry Order* to allow a U.S. facilities-based carrier to provide switched services over their private lines that are interconnected to the public switched network (PSN) at one end only, provided the U.S. carrier does not have a correspondent relationship with the foreign carrier providing the foreign half circuit. MCI Supp. Comments at 2-3. AT&T states that MCI misconstrues the rules adopted by the Commission. It argues that the Commission's restriction is properly read to permit U.S. facilities-based carriers to offer switched services over international private lines that are interconnected to the PSN at one end only, provided the U.S. carrier corresponds with a foreign carrier that resells rather than owns the underlying foreign half circuit. AT&T Supp. Reply at 11-12. AT&T is correct that MCI has misconstrued the Commission's holding, and AT&T's reading of the *Foreign Carrier Entry Order* is accurate. We note that parties have requested reconsideration of this aspect of our international private line resale policy in the *Foreign Carrier Entry Order* reconsideration proceeding.

[26] *International Resale Order* at ¶ 1.

accounting rates.[27] These commenters assert that discrimination is a persistent problem and that ending such discrimination should be our first priority.[28]

25. We agree that a foreign monopolist should not be allowed to use its market power to charge discriminatory accounting rates. Such abuses of market power disadvantage individual U.S. carriers and, by inflating carriers' costs, impede competitive behavior in the U.S. international services market. Our ISP thus requires nondiscriminatory treatment of U.S. carriers and the International Bureau has responded vigorously to U.S. carrier complaints about specific instances of discrimination.[29] We do not, however, believe that allowing more flexibility in accounting rate arrangements in appropriate circumstances will impair our ability to continue to control discrimination by carriers with market power. The framework for flexibility that we adopt here permits carriers to deviate from the ISP only with carriers in markets where the legal, regulatory, and economic conditions support competition and in certain other limited circumstances. Moreover, we adopt competitive safeguards to ensure that where we do permit flexibility, it does not lead to anticompetitive effects in the U.S. market for international services.

26. We do not agree, moreover, that we should delay implementing a more pro-competitive regulatory framework until the potential for monopolists exercising their market power is eliminated. As we stated in the *Accounting Rate Policy Statement*, we do not believe that all markets will develop at the same rate. Competitive market structures will develop more rapidly and be characterized by more robust competitive behavior in some countries than others. Our aim in providing for a more flexible regulatory framework is to accommodate and promote emerging competitive market conditions because we believe such conditions are the most effective safeguard against abuses of market power. Commenters who argue for a delay in implementing our ISP flexibility policy ignore the anticompetitive implications of the ISP,

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[27] Sprint Supp. Comments at 10; WorldCom Supp. Comments at 2-8; MCI Supp. Comments at 1.

[28] *See, e.g.*, Sprint Supp. Comments at 8-10; WorldCom Supp. Comments at 5-6.

[29] *See, e.g., In the Matter of AT&T Corp. Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina, Order*, DA 96-378 (rel. March 18, 1996); *In the Matter of AT&T Corp., MCI Telecommunications Corp., Sprint, and LDDS WorldCom Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Peru, Order and Authorization*, DA 96-696 (rel. May 7, 1996); *In the Matter of AT&T Corp. and MCI Telecommunications Corp., Petition for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Bolivia, Order and Authorization*, DA 96-714 (rel. May 7, 1996); Letter from Scott Blake Harris, Chief, International Bureau, to Alexander Anthony Arena, The Telecommunications Authority, September 18, 1995; and Letter from Scott Blake Harris, Chief, International Bureau, to Hao Weimin, Deputy Director General, Directorate General of Telecommunications, P&T, October 27, 1995. *See also* the discussion at ¶171, *infra*.

including the ways that it may discourage emerging competition. We believe that a more flexible framework that allows for relaxing regulatory rules and removing entry barriers will best support the development of competitive market structures and deliver the benefits of such structures to consumers.

27. We emphasize, however, that in monopoly and non-competitive markets, we will continue to safeguard U.S. carriers from the exercise of a foreign carrier's market power by vigorously enforcing the ISP. Moreover, in a separate proceeding we will be considering revisions to our benchmark settlement rates for IMTS service between the United States and other countries to bring them closer to cost. The more flexible regulatory framework which we adopt here will support already developing competitive market conditions by relaxing unnecessary regulatory rules. This new framework will allow U.S. carriers to negotiate diverse arrangements to serve their international customers.[30] Individual initiative will be rewarded as carriers seek to avoid the distortions in existing settlement arrangements caused by accounting rates in excess of call termination costs. Allowing U.S. carriers the flexibility to negotiate creative, more efficient agreements for terminating international traffic should increase service options and reduce prices for U.S. consumers.

B. Framework for Implementation

28. In a Public Notice accompanying our *Accounting Rate Policy Statement*, we invited interested parties to file supplemental comments addressing the framework for alternative payments arrangements in response to our earlier request for comments on whether allowing some flexibility in our ISP might help to reduce accounting rates.[31] We address in this section the standard we will apply to determine whether U.S. carriers may negotiate alternative settlement arrangements with foreign correspondents. We discuss in Section III.D., *infra*, the procedures for Commission review and approval of U.S. carriers' requests to enter alternative payment arrangements with foreign carriers.

Position of the Parties

29. While most commenting parties agree that increased flexibility in the ISP is necessary in light of changes in the international telecommunications market, many urge the Commission to limit the scope of flexibility to guard against anticompetitive abuses by certain categories of carriers. For example, many commenters support increased flexibility for

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[30] We note that the alternative payment arrangements we allow under our flexibility policy are supported by International Telecommunications Union regulations that permit special arrangements between individual members. *See* International Telecommunications Regulations, Article 9. Special Arrangements (Melbourne, 1988).

[31] Public Notice DA 96-105, 11 FCC Rcd 3152; *Second Further Notice* at ¶ 33.

alternative payment arrangements between a non-dominant U.S. and a non-dominant foreign carrier, while urging caution in extending flexibility to dominant carriers.[32] Many commenters express concern about allowing dominant foreign carriers to negotiate alternative payment arrangements, but they differ on whether any U.S. carriers should be precluded from entering such arrangements.

30. AT&T argues that alternative arrangements should be limited to arrangements negotiated with a non-dominant foreign carrier and that the Commission should continue to apply the ISP to arrangements with dominant foreign carriers.[33] AT&T believes that the ISP should continue to apply until full and effective competition has removed a foreign incumbent carrier's market power.[34] Sprint agrees, arguing that dominant foreign carriers will use their market power to whipsaw smaller U.S. carriers.[35] Cable & Wireless however, argues that we should not limit a dominant foreign carrier's ability to enter into alternative arrangements if other foreign carriers are allowed to negotiate such arrangements. Cable & Wireless argues that allowing U.S. carriers to negotiate alternative arrangements only with non-dominant foreign carriers would allow U.S. carriers to whipsaw other foreign carriers -- which is something U.S. policy does not allow domestically.[36]

31. WorldCom suggests that we should limit flexibility to non-dominant U.S. and non-dominant foreign carriers because dominant carriers might use alternative arrangements to manipulate the market, even where the dominant carrier shares the market with other, smaller, carriers.[37] WorldCom argues that even the U.S. market is not sufficiently competitive to permit

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[32] AmericaTel Supp. Comments at 4; MFSI Supp. Comments at 3; Sprint Supp. Reply at 7; WorldCom Supp. Comments at 8; *c.f.* AT&T Supp. Reply at 13.

[33] AT&T Supp. Comments at 15; AT&T Supp. Reply at 3-5.

[34] AT&T Supp. Reply at 13. AT&T expresses concern that incumbent carriers will abandon proportionate return in retaliation for a U.S. carrier negotiating an alternative arrangement with a new entrant and urges the Commission to make clear that such retaliation is not permitted under the ISP. AT&T Supp. Comments at 30. As discussed in para. 25, *supra*, our ISP requires nondiscriminatory treatment of U.S. carriers, and we have responded vigorously in the past, and will in the future, to U.S. carrier complaints about specific instances of discrimination.

[35] Sprint Supp. Reply at 8.

[36] Cable & Wireless Supp. Reply at 3.

[37] WorldCom Supp. Comments at 8-9. WorldCom argues that AT&T is dominant in its provision of IMTS and therefore should be precluded from negotiating alternative arrangements. After WorldCom filed its Supplemental Comments the Commission found AT&T non-dominant in its provision of IMTS on all U.S. international routes. *See AT&T International*

all U.S. carriers to negotiate alternative payment arrangements.[38] AmericaTel suggests that we should consider whether a dominant U.S. carrier can exploit its market power to disadvantage foreign carriers and U.S. ratepayers.[39] Com Tech submits that flexibility should be limited to "small carriers" because if large carriers with market power were permitted to negotiate alternative payment arrangements, they could effectively raise barriers of entry for new carriers.[40] Sprint argues that flexibility should be permitted for any non-dominant U.S. carrier, not just "small" carriers.[41]

32. MFSI argues that small carriers will be "frozen out of the market" as the large U.S. carriers negotiate exclusive arrangements that advance their "oligopolistic self interest."[42] MFSI urges the Commission to allow flexibility only for U.S. carriers with less than five percent of U.S.-outbound traffic on a given route and for all U.S. carriers negotiating with foreign carriers with less than five percent of the market at the foreign end of a route.[43] TRA supports MFSI's proposal to limit flexibility to U.S. carriers carrying less than five percent of U.S.-outbound traffic on any given international route.[44] AT&T disagrees, arguing that MFSI's size-based criteria would promote certain carriers, instead of competition, would increase the leverage of foreign carriers, and would limit the effectiveness of our flexibility policy.[45] WorldCom also opposes MFSI's size-based criteria, arguing that "[t]here is no principled

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Non-dominance Order. We will not revisit that finding here. We do address, however, the argument that AT&T should be precluded from negotiating alternative settlement arrangements.

[38] WorldCom Supp. Comments at 8-10; *see also*, MFSI Supp. Reply at 3, n. 5.

[39] AmericaTel Supp. Comments at 4-5, n.11.

[40] Com Tech Supp. Comments at 4. Com Tech does not define what it means by a "small carrier."

[41] Sprint Supp. Reply at 7.

[42] MFSI Supp. Comments at 6.

[43] MFSI Supp. Comments at 6-7 (Under MFSI's proposal, any carrier handling less than five percent of U.S.-outbound traffic would be considered a "small" carrier; all other carriers would be considered "large."); *see also* TRA Reply at 10-11; Com Tech Supp. Comments at 4, 10.

[44] TRA Supp. Reply at 10.

[45] AT&T Supp. Reply at 6-8.

distinction among U.S. international carriers except on the basis of market power."[46] AmericaTel disagrees with all proposals to establish classifications of carriers that will be permitted flexibility, arguing that the ability to distort competition is not dependent on the size of the carrier involved.[47]

33. Several commenters urge that AT&T be prohibited from entering into any alternative payment arrangements. They argue that AT&T would have an "unwarranted advantage" based on its "historic dominance" in international long distance service.[48] MFSI, for example, argues that flexibility would increase AT&T's competitive advantage because AT&T would likely obtain unique concessions due to its control of a majority of U.S.-originated traffic. As a result, MFSI suggests that AT&T be prohibited from negotiating alternative arrangements, and that any rate concessions negotiated by AT&T be available simultaneously to all carriers.[49] In opposition, AT&T argues that it lacks market power over U.S. international services and that precluding it from entering into alternative arrangements would lessen the pressure on foreign incumbents to lower accounting rates. AT&T suggests that the Commission address on a case-by-case basis concerns about specific arrangements that it negotiates with a foreign carrier.[50]

34. Some commenters argue that we should apply the effective competitive opportunities (ECO) test adopted in our *Foreign Carrier Entry Order* to determine whether to suspend application of the ISP on a particular U.S. international route.[51] AmericaTel and NYNEX, for example, argue that the ECO test is consistent with the idea expressed in the *Accounting Rate Policy Statement* that flexibility is warranted where the "legal, regulatory, and economic conditions in the destination market support competition."[52] NYNEX also argues that the ECO test is straightforward and that any other approach would lead to inconsistent results

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[46] WorldCom Supp. Reply at 9.

[47] AmericaTel Supp. Reply at 6-7.

[48] MCI Supp. Comments at 8; *see also* AmericaTel Supp. Comments at 4-5; MFSI Supp. Reply at 3; Sprint Supp. Comments at 12-13; WorldCom Supp. Comments at 9.

[49] MFSI Supp. Reply at 2-4.

[50] AT&T Supp. Reply at 11, n.17.

[51] NYNEX Supp. Reply at 6; AmericaTel Supp. Reply at 5-6.

[52] *Accounting Rate Policy Statement* at ¶ 33; NYNEX Supp. Reply at 6; AmericaTel Supp. Reply at 5-6.

and cause "needless additional uncertainty" in the development and planning of potential business relationships.[53] AT&T argues, however, that we should focus on the market power possessed by the individual foreign carrier rather than the competitiveness of the foreign country's market.[54] According to AT&T, the number of service providers in a market may suggest that the market is effectively competitive when, in fact, such competition is illusory.[55]

35. Finally, MFSI urges us to adopt special rules restricting alternative arrangements between U.S. and foreign carriers that are affiliated or involved in a non-equity joint venture.[56] MFSI argues that for any carrier with a foreign affiliate, if that foreign affiliate's market share exceeds five percent of U.S.-inbound traffic from a foreign country, special reporting requirements should apply and any accounting rate or transiting arrangement offered by the foreign carrier to its U.S. affiliate should be available to any other U.S. carrier.[57] MCI also raises concerns about the potential for anticompetitive conduct as a result of the expansion of global alliances, partnerships, and consortia between U.S. and foreign carriers.[58] MFSI further argues that any agreement reached by "a large carrier" under a non-equity arrangement should be made available to all other carriers.[59] AT&T opposes applying special rules to non-equity joint ventures. It argues that, just as we declined to adopt special rules for non-equity arrangements in the *Foreign Carrier Entry Order*, we should decline to do so here.[60]

Discussion

36. We adopt here a framework for alternative payment arrangements that affords U.S. carriers maximum flexibility to take advantage of competitive pressures in foreign markets

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[53] NYNEX Supp. Reply at 6.

[54] AT&T Supp. Reply at 10.

[55] AT&T Supp. Comments at 27-29.

[56] MFSI Supp. Comments at 5-6.

[57] MFSI Supp. Comments at 5-6.

[58] MCI Supp. Comments at 7-8.

[59] MFSI Supp. Comments at 6.

[60] AT&T Supp. Reply at 6, n. 10.

to negotiate alternative arrangements that will enhance competition. At the same time, this framework continues to safeguard against anticompetitive behavior of foreign carriers that favors one correspondent U.S. carrier at the expense of its U.S. competitors. In particular, we conclude that any U.S. carrier may negotiate alternative settlement arrangements that deviate from the ISP with all carriers in a foreign country that satisfies the effective competitive opportunities (ECO) test adopted in our *Foreign Carrier Entry Order*. We also conclude that alternative arrangements between a U.S. carrier and a carrier in a foreign country that does not satisfy the ECO test may be considered in certain circumstances, particularly where the foreign carrier is non-dominant. However, to safeguard against potential anticompetitive behavior, we will require full transparency of the terms and conditions of alternative settlements arrangements between affiliated carriers and those with significant non-equity joint ventures by requiring that such arrangements be publicly filed. We also require full transparency of the terms and conditions of alternative settlement arrangements affecting more than twenty-five percent of either the outbound or inbound traffic on a particular route and will require that such arrangements not contain unreasonably discriminatory terms and conditions. This framework is consistent with our goal of achieving lower, cost-based accounting rates by relying on and promoting, where possible, continued development of competitive market structures.[61]

37. As we stated in our *Accounting Rate Policy Statement*, where markets are becoming competitive, the ISP's requirements of an equal division of accounting rates, proportionate return of traffic, and uniform accounting rates may impede competitive behavior and the development of effectively competitive markets.[62] For example, our proportionate return policy may deter U.S. and foreign terminating carriers from offering innovative pricing and supply arrangements and from negotiating alternative commercial contractual arrangements for handling international telephone service. Thus, we concluded in our *Accounting Rate Policy Statement* that U.S. carriers should be allowed to pursue alternative settlement arrangements with carriers in countries where the legal, regulatory, and economic conditions support competition.[63]

38. We agree with NYNEX that our flexibility policy will be more effective if carriers are provided straightforward standards for determining when they may negotiate

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[61] If there is any need for modification to the regulatory framework we adopt here as a result of commitments in regard to basic telecommunications services undertaken by the United States at the World Trade Organization (WTO), we will amend our framework as necessary in the future. We believe, however, that the regulatory framework we adopt here is consistent with all of the proposed U.S. commitments at the WTO.

[62] *Accounting Rate Policy Statement* at ¶ 31.

[63] *Accounting Rate Policy Statement* at ¶ 33.

alternative payment arrangements.[64] We believe that the ECO test adopted in our *Foreign Carrier Entry Order* for facilities-based international carriers provides such a straightforward standard, and conclude that it should be applied to determine whether U.S. carriers may negotiate alternative payment arrangements with foreign correspondents in a particular foreign market. The factors enunciated in our *Foreign Carrier Entry Order* to determine when effective competitive opportunities exist for U.S. carriers measure whether the legal and regulatory environment in a foreign market permits effective competitive entry.[65] Thus, the test indicates whether the legal, regulatory and economic conditions in a foreign market support competition such that the ISP is no longer necessary to protect against abuse of market power by foreign carriers. In addition, as NYNEX states, applying the already established ECO test to determine when flexibility is permitted will avoid inconsistent results and uncertainty in the development and planning of potential business relationships.[66] Thus, we will allow U.S. carriers to negotiate alternative settlement arrangements that deviate from the ISP with foreign correspondents in countries that satisfy the ECO test set forth in Section 63.18(h)(6) of our regulations.

39. We believe that, where the ECO test has been satisfied, the ability of foreign carriers to exercise market power is constrained by the existence, or potential for, competitive entry.[67] The ECO test seeks to ensure that dominant foreign carriers do not have the ability to grant preferential interconnection to one carrier over another by requiring the existence of reasonable and nondiscriminatory charges, terms, and conditions for interconnection to a foreign carrier's domestic facilities for termination and origination of international services. The ECO test also considers whether the foreign country has implemented competitive safeguards to protect against the exercise of market power. In addition, contrary to the concern expressed by some commenters that allowing flexibility in markets where competitive entry in a foreign

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[64] NYNEX Supp. Reply at 6.

[65] The ECO test considers: (i) whether U.S. carriers are permitted, as a matter of law, to offer international facilities-based services in the foreign country; (ii) whether there exist reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities for termination and origination of international services, and whether there are adequate means to monitor and enforce these conditions; (iii) whether competitive safeguards exist in the foreign country to protect against anticompetitive practices; (iv) whether there is an effective regulatory framework in the destination country to develop, implement and enforce legal requirements, interconnection arrangements and other competitive safeguards. 47 C.F.R. §63.18(h)(6); *Foreign Carrier Entry Order* at ¶¶ 42-55.

[66] NYNEX Supp. Reply at 6.

[67] The Commission's ECO test emphasizes the role of regulators in making effective competition possible. It does not require that vigorous competition already have been established.

market is in its nascent stages will lead to anticompetitive behavior by incumbents, we believe that allowing flexibility in our ISP policy under such circumstances will promote and strengthen the development of competitive market structures.[68] Where we permit flexibility in our ISP, new entrants in foreign markets will have both the incentive and the opportunity to compete with the incumbent foreign carrier to terminate U.S.-originated traffic.

40. While we believe that the ECO test provides an effective measure of whether sufficient competitive conditions exist in a foreign market to warrant flexibility in the ISP, we recognize that departures from the ISP may be justified in some circumstances where the ECO test is not satisfied. For example, a departure from the ISP may be warranted where a non-dominant U.S. carrier seeks to negotiate an alternative arrangement with a foreign entity that does not have economic market power in a foreign market,[69] or where a foreign regulator guarantees cost-based interconnection for international traffic. In such cases, the potential for abuse of market power by a foreign carrier to the detriment of U.S. carriers would be constrained, and alternative settlement arrangements may foster competition and benefit U.S. consumers. Therefore, we will consider alternative settlement arrangements between a U.S. carrier and a foreign correspondent in a country that does not satisfy the ECO test where the U.S. carrier can demonstrate that deviation from the ISP will promote market-oriented pricing and competition, while precluding abuse of market power by the foreign correspondent.

41. We decline, as some commenters urge, to limit our ISP flexibility policy to certain categories of carriers, such as non-dominant foreign and U.S. carriers or "small" carriers. Instead, we conclude that, subject to certain safeguards, any U.S. carrier should be allowed to negotiate alternative payment arrangements with any carrier in a foreign country that satisfies the ECO test. This conclusion is consistent with our policy of allowing market forces, where possible, to determine the allocation of resources. Moreover, allowing flexibility in the ISP is the best support for development of more competitive market structures and therefore should not be unduly restricted.

42. We also note that, as a practical matter, many countries will be reluctant to allow these procompetitive alternatives if their dominant carrier is precluded from participating. Even during the early stages of competition in the domestic market for U.S. long distance services, the Commission did not preclude AT&T from competing on terms similar to new entrants. Instead, it enacted competitive safeguards to protect against potential abuses of AT&T's market power.

43. Commenters who urge us to limit our flexibility policy to non-dominant or small

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[68] See the discussion at paras. 22 and 26, *supra*.

[69] As we stated in the *Foreign Carrier Entry Order*, foreign entities without market power in a foreign market generally are not a source of regulatory concern. *Foreign Carrier Entry Order* at ¶¶ 100-102.

carriers express concern that large carriers can use their market position to gain an unfair advantage over other U.S. carriers or to discriminate among U.S. carriers.[70] AT&T states that the market power of foreign incumbents is undiminished even in markets where new entrants have the legal authority to compete or where incipient facilities-based competition exists.[71] Such concerns, however, do not require us to refuse to allow alternative payment arrangements in circumstances where either the U.S. carrier or the foreign correspondent is dominant. Such a limitation on the scope of our flexibility policy would restrict unduly our efforts to rely on competitive market structures to encourage lower, cost-based termination charges and innovative supply options. We also reject MFSI's proposal to preclude U.S. carriers with market shares of greater than five percent of U.S.-outbound traffic from entering into alternative settlement arrangements. As AT&T notes, MFSI's proposal would impede our flexibility policy's effectiveness in reducing U.S. carrier costs to terminate traffic and in otherwise increasing competitive pressure on an incumbent because U.S. carriers representing over 95 percent of U.S.-outbound traffic would be prevented from pursuing alternative arrangements.[72]

44. We are concerned, however, that allowing carriers with a significant share of the market to negotiate alternative arrangements may have unanticipated anticompetitive effects in the U.S. market for IMTS services. For example, dramatic and sudden shifts in return traffic away from a U.S. carrier may impede that carrier's ability to compete effectively in the IMTS market, at least in the short term. Moreover, we agree with AT&T and other commenters that there may be circumstances under which a foreign carrier with a significant share of its market may have the ability and incentive to misuse its market power to discriminate against U.S. carriers, notwithstanding the existence of effective competitive opportunities in the foreign market. Similarly, a U.S. carrier with a significant share of the market may be in a position to extract anticompetitive special concessions from foreign carriers to the detriment of other U.S. carriers.

45. Therefore, while we decline to preclude dominant or large carriers from negotiating alternative arrangements, we adopt competitive safeguards to protect against potential anticompetitive actions by foreign and U.S. carriers with a significant share of their markets, and to provide a "safety net" for possible unanticipated consequences of our ISP flexibility policy. In particular, we will require that a copy of all alternative settlement arrangements affecting more than either twenty-five percent of the outbound traffic on a particular route or twenty-five percent of the inbound traffic on a particular route be filed with

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[70] *See, e.g.*, MFSI Supp. Comments at 3; TRA Supp. Reply at 9; WorldCom Supp. Comments at 9.

[71] AT&T Supp. Comments at 16.

[72] AT&T Supp. Reply at 6-7.

the Commission and made public. We will also require that any alternative arrangement that affects more than twenty-five percent of the outbound traffic or twenty-five percent of the inbound traffic on a particular route not contain unreasonably discriminatory terms and conditions. This safeguard will require carriers that negotiate innovative price and return traffic terms in agreements that affect more than twenty-five percent of either the inbound or outbound traffic on a given route to demonstrate that the terms are not unreasonably discriminatory, or to offer such terms on a nondiscriminatory basis to competing carriers. This safeguard will apply whether the arrangement is between separate carriers on the U.S. and foreign ends, between two affiliates, or when a carrier is self-corresponding.

46. We adopt a twenty-five percent threshold for our competitive safeguards because we believe that this threshold provides a reasonable balance between our goal of encouraging alternative arrangements that offer more efficient terms for terminating international traffic, on the one hand, and, on the other, our concern that alternative arrangements not result in significant disruptions of the U.S. market for international services. A twenty-five percent threshold affords carriers considerable discretion in negotiating alternative arrangements and is high enough to provide carriers the incentive to negotiate alternative arrangements. At the same time, however, it limits the potential anticompetitive effect of any one agreement. It also limits the ability of the largest carriers to obtain more favorable terms and conditions than their smaller competitors, unless they can demonstrate that such terms are not unreasonably discriminatory. By requiring increased scrutiny of alternative arrangements affecting a significant percentage of traffic on a given route, this safeguard will further mitigate potential anticompetitive effects of our ISP flexibility policy.

47. We note that we will not permit carriers to circumvent this twenty-five percent threshold by negotiating two or more agreements with one individual correspondent carrier or its affiliate, each of which affects less than twenty-five percent of the inbound or outbound traffic on a particular route. We are particularly concerned that carriers not negotiate such separate agreements in order to circumvent our requirement that the terms and conditions of an agreement affecting more than twenty-five percent of the inbound or outbound traffic on a particular route not be unreasonably discriminatory. As discussed at paragraph 59, *infra*, we require that carriers file a summary of the terms and conditions of all arrangements that do not trigger our safeguards and a full copy of all alternative arrangements that do trigger our safeguards. In addition, we reserve the right to request a full copy of arrangements that do not trigger our safeguards. This will permit us to detect any potential circumvention of our safeguards by carriers.

48. We agree with MFSI that alternative payment arrangements between carriers that are affiliated or involved in a non-equity joint venture may also require special scrutiny. U.S. carriers that are affiliated with foreign carriers or that have non-equity joint ventures affecting the provision of basic services with foreign carriers may have an advantage in obtaining a preferential arrangement with their foreign carrier affiliates. Thus, we will require that a copy of the settlement arrangement be filed with the Commission and made public in those cases

involving arrangements between affiliated carriers[73] or those with non-equity joint ventures affecting the provision of basic services on the route for which the parties to the joint venture have entered an alternative arrangement.[74] We decline, however, to adopt MFSI's proposal that we require a carrier to file quarterly reports of revenue, number of minutes and messages for originating and terminating traffic on the routes where its foreign affiliate holds a greater than five percent market share and to require that accounting rate arrangements offered to the carrier's foreign affiliate be available to any other requesting carrier. We believe our existing rule requiring annual traffic reports will address this need, and we emphasize that this rule will apply to require all carriers to file reports detailing traffic volumes under alternative arrangements to assist in our periodic review of alternative arrangements.[75] Requiring full transparency of the terms and conditions of settlement arrangements between affiliated carriers is sufficient to safeguard against discrimination and preferential treatment. These steps are consistent with our efforts to remedy the accounting rate distortions inherent in the existing international settlement process and institute a more flexible regulatory framework that permits U.S. carriers to take advantage of market opportunities and stimulate competitive behavior while guarding against anticompetitive conduct.

49. As an additional measure to guard against unintended market disruptions as a result of our flexibility policy, we will not permit U.S.-inbound traffic that still is subject to the ISP (*i.e.*, traffic from a foreign carrier with whom a U.S. carrier does not have an alternative payment arrangement) to be routed through a foreign carrier that has an alternative payment arrangement with a U.S. carrier. Such rerouting of U.S.-inbound traffic through a carrier that has an alternative payment arrangement with a U.S. carrier could potentially allow significant amounts of U.S.-inbound traffic from a country to be diverted from the settlements process, while U.S.-outbound traffic to that country would be subject to the settlements process.[76] The

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[73] The Commission's Rules provide, *inter alia*, that a U.S. carrier is considered to be affiliated with a foreign carrier when a foreign carrier owns a greater than twenty five percent interest in, or controls, the U.S. carrier. *See Foreign Carrier Entry Order* at ¶¶ 73 and 47 C.F.R. § 63.18(h)(1)(i).

[74] *Cf. Foreign Carrier Entry Order* at ¶ 253 ("non-equity business relationships between a U.S. and dominant foreign carrier that affect the provision of U.S. basic international services could potentially create a risk of anticompetitive conduct that requires regulatory scrutiny").

[75] *See* para. 61, *infra*.

[76] This is consistent with our decision in the *Foreign Carrier Entry Order* rejecting a proposal that carriers be permitted to provide switched service over resold international private lines to points beyond a country for which the Commission has made an equivalency finding. We concluded that the competitive benefits of the proposal do not "outweigh the potential for significant amounts of U.S.-inbound traffic to be diverted from the settlements process, with no opportunity for U.S. facilities-based carriers to offset lost settlements revenues by routing traffic over

result would be a substantial increase in U.S. net settlements payments to that country.

50. We do not at this time believe that additional safeguards are necessary to safeguard against potential anticompetitive actions by foreign or U.S. carriers, or other possible unanticipated consequences of our ISP flexibility policy. However, we reserve the right to impose additional safeguards on a case-by-case basis as a condition of granting approval to enter an alternative payment arrangement if we find that such safeguards are necessary to prevent market distortions in the U.S. IMTS market or to prevent significant adverse results on net settlements payments with a foreign country. We also note that, if our experience with alternative settlement arrangements indicates a need, we will not hesitate in the future to adopt additional safeguards.[77]

51. Finally, we recognize that adoption of this flexibility policy has an impact on the no special concessions policy which we set forth in the *Foreign Carrier Entry Order*. In that order we prohibited all U.S. carriers from agreeing to accept any special concessions from any foreign carrier.[78] We now create an exception to our no special concessions rule for alternative payment arrangements to the accounting rate system that satisfy the terms and conditions established in this *Report and Order*. We emphasize that this exception applies only to alternative payment arrangements that meet the criteria we identify in this *Report and Order* for permitting flexibility in our ISP. Thus, it will apply only to arrangements between U.S. carriers and foreign carriers in countries that satisfy the ECO test, or foreign carriers in countries that do not satisfy the ECO test where the U.S. carrier can demonstrate that deviation from the ISP will promote market-oriented pricing and competition. Where these criteria have not been met, we will continue to enforce vigorously our no special concessions policy. We thus amend Section 63.14 of our rules to reflect this limited exception to the no special concessions policy for accounting rate issues.

C. Developing Countries

52. In our *Accounting Rate Policy Statement* we noted that developing countries receive a large and growing share of the net settlement payments transmitted by U.S. carriers to foreign carriers and that the above-cost portion of these payments places a highly disproportionate, economically inefficient financial burden on U.S. industry and consumers.[79]

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resold private lines in the reverse direction." *Foreign Carrier Entry Order* at ¶ 168.

[77] We also note that carriers operating in the U.S. market, including foreign carriers, are subject to antitrust regulations.

[78] *Foreign Carrier Entry Order* at ¶ 41; *see* 47 C.F.R. § 63.14.

[79] *Accounting Rate Policy Statement* at ¶ 36.

We recognized, however, that because settlement payments received from U.S. and other foreign carriers are often a source of hard currency available to purchase facilities and equipment necessary to improve telecommunications networks in developing countries, reductions in settlement rates may disrupt plans to make communications service more widely accessible in those countries.[80] We noted that greater emphasis should be placed on creating competitive market structures that would encourage private capital markets to meet the financing needs of these countries. We concluded that, given these concerns, we may need to tailor our policies regarding the developing world. We stated that we would consider alternative ways for U.S. carriers to work with foreign governments and carriers to facilitate the transition to more competition and lower termination charges.[81]

Position of the Parties

53. Cable & Wireless supports the concept of assisting in the establishment of alternative and additional sources of financing for developing country infrastructure, and asserts that the quickest way to diminish call and cost imbalances between developed and developing countries is to raise network quality and telephone penetration levels to near OECD levels everywhere in the world.[82] TRW and AT&T also support additional measures to encourage developing countries to fund infrastructure development though more efficient methods than the use of above-cost accounting rates.[83] Sprint, on the other hand, opposes any attempt to create an explicit subsidy mechanism targeted at infrastructure development, contending that such a policy would put the Commission in the position of deciding which countries qualify for foreign aid.[84] Sprint, however, urges the Commission to be cognizant of the impact of accounting rate reductions on developing countries.[85] MCI recognizes that there may be a need to tailor our policies regarding developing countries, but opposes any deviation from our current policy of proportionate return allocations. MCI states that a deviation from our proportionate return policy for developing countries "may create the need for the adversely affected U.S. carriers to

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[80] *Id.* at ¶ 37.

[81] *Id.* at ¶ 40-41.

[82] Cable & Wireless Supp. Reply at 6-7.

[83] TRW Supp. Reply at 6, n.17; AT&T Supp. Comments at 30-32.

[84] Sprint Supp. Comments at 14.

[85] Sprint Supp. Reply at 15.

increase prices for outbound calling to offset the increase in net outpayment."[86]

Discussion

54. We believe that the issue of how to tailor our settlement policies to address the special circumstances presented by developing countries is better considered in the context of a separate proceeding to update our accounting rate benchmarks. In that proceeding we will consider methods for revising our benchmark settlement rates and steps that can be taken to implement the benchmark rates in a way that takes into account the particular challenges for developing countries posed by the introduction of competition and cost-based rates. We will also address whether and under what conditions it may be appropriate to consider additional alternatives to our international settlements policies for carriers in developing countries. We therefore transfer the record on this issue to our future benchmarks proceeding.

D. Procedural Implementation

55. In the *Second Further Notice*, we requested comment on what modifications to our ISP would be necessary to allow flexibility.[87] In our *Accounting Rate Policy Statement*, we encouraged carriers to pursue alternative payment arrangements where appropriate market conditions exist, and stated that such arrangements would be subject to approval by the Commission and the correspondent carrier's government.[88] We noted that we will work with U.S. carriers to facilitate alternative agreements where possible. We also stated that we will monitor the results of these arrangements via measures like U.S. carrier progress reports and average net settlements per minute.[89]

Position of the Parties

56. AT&T argues that no arrangement, including arrangements with a "new foreign carrier" should receive blanket approval.[90] AT&T further suggests that the current ISP waiver process is an appropriate vehicle for review of requests on a case-by-case basis. Sprint states

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[86] MCI Supp. Comments at 8-9.

[87] *Second Further Notice* at ¶ 33.

[88] *Accounting Rate Policy Statement* at ¶ 34.

[89] *Id.*

[90] AT&T Supp. Reply at 9, n.15.

that any requests for waiver from the ISP should be placed on public notice with an opportunity for public comment.[91]

Discussion

57. We agree with AT&T that alternative payment arrangements should not be given blanket approval. We are concerned, however, that U.S. carriers not face undue delay in implementing alternative payment arrangements that comply with the criteria adopted in this proceeding for deviating from the ISP. We therefore establish an expedited process whereby U.S. carriers may obtain approval to enter an alternative payment arrangement by filing a detailed petition for declaratory ruling that the alternative payment arrangement is permitted under the criteria for deviating from the ISP adopted in this proceeding. We will place each petition for declaratory ruling on public notice and allow interested parties to file a formal opposition to the petition within twenty one days of the date of public notice. If no formal opposition is filed and the International Bureau has not notified the carrier that grant of the petition may not serve the public interest and that implementation of the alternative arrangement must await formal staff action on the petition, the petition will be deemed granted and the alternative settlement arrangement may be implemented as of the twenty-eighth day after the date of public notice without any formal staff action being taken. If a formal opposition is filed, the requesting carrier may file a response pursuant to §1.45 of the Commission's rules, and implementation of the alternative payment arrangement must await formal action by the International Bureau.[92]

58. We anticipate that, in many instances, a U.S. carrier will seek approval to enter an alternative payment arrangement with a foreign carrier in a country that has already been found to satisfy the ECO test in the context of a prior Section 214 facilities application to serve that country. However, a U.S. carrier may also seek approval to enter an alternative payment arrangement with a carrier in a foreign country where we have not yet made an ECO determination. In that case, a petitioning carrier must submit sufficient evidence to support a finding that either the ECO test has been satisfied, or that deviation from the ISP will promote market-oriented pricing and competition, while precluding abuse of market power by the foreign correspondent.[93] In all cases, a petitioning carrier must state whether the alternative arrangement triggers our safeguards, either because the arrangement affects more than twenty-five percent of the inbound or twenty-five percent of the outbound traffic on the affected route,[94] or because the

[91] Sprint Supp. Comments at 13, n.15.

[92] We delegate authority to the International Bureau to review and decide these petitions for declaratory ruling.

[93] *See* para. 40, *supra*.

U.S. carrier and its foreign correspondent are affiliated or involved in a non-equity joint venture affecting the provision of basic services on the affected route.

59. We will require that a full copy of all negotiated alternative arrangements that trigger our safeguards be filed with each petition. Where an alternative arrangement does not trigger our safeguards, we will require that a summary of the terms and conditions be filed with each petition, although we reserve the right to request a copy of the arrangement. Where an alternative arrangement does not trigger our safeguards, our review generally will focus on whether the criteria for allowing flexibility adopted in this *Report and Order* have been met, rather than on the specific terms of the alternative arrangement. We reserve the right, however, to review and, if need be, reject the terms and conditions of all alternative arrangements, regardless of whether they trigger our safeguards, to ensure that they meet our policy objectives and will not have a significant adverse impact on U.S. net settlement payments and resulting traffic volumes.

60. We will conduct periodic reviews of alternative settlement arrangements to ensure that the arrangements meet our policy objectives of creating a competitive market for IMTS and achieving cost-based accounting rates. In particular, we will monitor the operating results of alternative arrangements along with foreign market conditions to ensure that the arrangements fulfill our objective of achieving market-determined terms and conditions of payment that approximate competitive levels. As part of our evaluation of alternative arrangements, we will compare the results of each individual arrangement with other alternative arrangements and with our benchmark accounting rates. We expect the market determined alternative arrangements to be lower than the relevant Commission benchmark ranges and to outperform adjustments in the ranges.[95]

61. We also will monitor the operating results of alternative arrangements we have approved to ensure that they do not have significant adverse impacts on traffic volumes and U.S. net settlement payments. To facilitate our review, we will require that U.S. carriers include in their annual report of international telecommunications traffic filed pursuant to Section 43.61 of our rules[96] the number of minutes of outbound and inbound traffic settled pursuant to each alternative arrangement. In the event an alternative arrangement causes significant increases in

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[94] The petitioning carrier shall bear the burden of demonstrating that the alternative arrangement does not affect more than twenty-five percent of the inbound or twenty-five percent of the outbound traffic on the affected route.

[95] We have recognized that while our benchmark rates are closer to the cost of terminating international traffic than current accounting rates, they remain well in excess of such costs. *Second Further Notice* at ¶ 10.

[96] 47 C.F.R. §43.61.

net settlement payments with a foreign country, we will consider appropriate action, including unilaterally ordering an end to the arrangement and reinstituting traditional settlement practices. We emphasize that we are concerned about increases in net settlement outpayments that result from distortions in market competition that harm consumer interests. For example, we would not be concerned if the level of U.S. outpayments increases as a result of increased traffic flows from the United States. However, we would be concerned if U.S. outpayments increase as a result of significantly higher termination costs in a foreign country.

62. Finally, in this *Report and Order*, we also amend Sections 43.51 and 64.1001 of our rules to refer to "waiver requests" submitted under Section 64.1001 as "modification requests". We make this change in order to conform our rules to the International Bureau's historic practice of treating waiver requests filed under Section 64.1001 as non-restricted proceedings, in the same manner as Section 214(a) proceedings are treated under the Commission's *ex parte* rules.[97] Because this change in our rules involves agency practice and procedure, the notice and comment provisions of the Administrative Procedure Act are inapplicable.[98]

E. Other Issues

1.Codification of Proportionate Return

63. We proposed in our *Foreign Carrier Entry* proceeding to codify our proportionate return policy as a rule of general applicability to all facilities-based carriers.[99] We also proposed, however, to grant waiver requests in the public interest. After reviewing the comments, we decided that this issue would be better addressed in the context of this proceeding and transferred the record here.[100]

Position of the Parties

64. Commenters supporting codification argue that such a requirement is essential in

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[97] These rules are contained in 47 C.F.R. § 1.1200, *et seq.* *See* Public Notice, *Ex Parte Status of Waiver Requests filed under Section 64.1001 of the Commission's Rules*, DA 96-1135, released July 17, 1996.

[98] 5 U.S.C. § 553(b)(A).

[99] *Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket No. 95-22, *Notice of Proposed Rulemaking*, 10 FCC Rcd 4844 (1995).

[100] *Foreign Carrier Entry Order* at ¶ 274.

order to keep foreign carriers from discriminating in favor of affiliated U.S. carriers.[101] They also argue that some carriers, such as AT&T, have the incentive and the opportunity to command, and in some cases have received, more than their proportionate share of return traffic.[102] Commenters opposing codification argue that proportionate return confers a competitive advantage to established international correspondents by encouraging the entrenchment of existing market arrangements.[103] Further, they believe that codification could contravene the spirit of fostering competition and reducing international accounting rates, and may eliminate the flexibility the Commission now has.[104]

65. MCI opposes our proposal to grant requests for waiver of the proportionate return policy that are in the public interest. MCI notes that, by returning a disproportionate share of traffic to one U.S. carrier, a foreign carrier could provide that carrier with a lower effective settlement rate on that route. MCI argues that disproportionate return could increase the settlement costs of competing U.S. carriers, creating the need for such U.S. carriers to increase prices for outbound calls to offset their increase in net settlement payments. In contrast, SCT believes that we should retain our proportionate return policy in the immediate future but also urges us to be open to other alternatives that may be more appropriate for competitive markets.[105]

Discussion

66. We agree with those commenters who suggest that we should codify our proportionate return policy. Although, as other sections of this *Report and Order* explain, proportionate return can and should be replaced by a more flexible regime in competitive markets, these market conditions do not prevail in most countries. In the vast majority of countries, we will continue to need safeguards against anticompetitive behavior by foreign carriers with market power. Requiring that U.S. carriers receive back the same proportion of traffic that they send to a foreign carrier restricts a foreign carrier's ability to manipulate the allocation of return traffic and whipsaw U.S. carriers. This policy has long been a cornerstone of

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[101] MCI Comments, IB 95-22, at 24; *see generally*, AT&T Comments, IB 95-22, at 15-16; AT&T Reply, IB 92-22, at 21-22.

[102] Sprint Comments, IB 95-22, at 31; TLD Reply, IB 95-22, at 9,16.

[103] GTE Comments, IB 95-22, at 9.

[104] *Id*; *see also* SCT Comments, IB 95-22, at 16.

[105] SCT Comments, IB 95-22, at 16.

our ISP.[106] By codifying this requirement we send a strong signal to foreign carriers that we will not allow U.S. carriers to be whipsawed.

67. We also agree, however, that under certain circumstances, requiring U.S. carriers to receive only their proportionate share of return traffic may impede the development of competitive markets. As we recognized in our *Accounting Rate Policy Statement*, in effectively competitive markets, our proportionate return policy may actually deter U.S. terminating carriers from negotiating innovative supply and pricing arrangements.[107] We do not agree with the concerns raised by MCI about allowing deviation from the proportionate return policy. We agree instead with SCT that we should be receptive to other alternatives which may be more appropriate in competitive markets. As discussed in Section III.D., *supra*, we will create an exception to the general rule of proportionate return for alternative payment arrangements that satisfy the terms and conditions established in this *Report and Order*.

2.Discrimination Issues

68. The ISP seeks to prevent foreign carriers from using their market power to obtain discriminatory accounting rate concessions from competing U.S. carriers by, *inter alia*, requiring nondiscriminatory treatment of U.S. carriers. We did not propose in our *Second Further Notice* or *Accounting Rate Policy Statement*, and we do not intend now, to eliminate this requirement where the criteria for allowing ISP flexibility are not met. Some parties, however, raise concerns that foreign carriers engage in discriminatory behavior despite our ISP, and suggest that we take actions to strengthen our ISP to deter such discrimination.

Position of the Parties

69. Several commenters state that discrimination against U.S. carriers by foreign carriers is still a problem, and urge that we expand and strengthen our protections against foreign carrier retaliation and discrimination.[108] MCI, TRA and WorldCom also note that U.S. carriers offering new services such as call-back have been subject to the risk of retaliation by foreign administrations and urge the Commission to adopt policies that will protect U.S. carriers.[109]

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[106] *See, e.g., Second Further Notice* at ¶ 30; *Telefonica Larga Distancia de Puerto Rico*, 8 FCC Rcd 106 (1992); *Atlantic Tele-Network*, 8 FCC Rcd 4776 (1993), *aff'd Atlantic Tele-Network v. FCC*, 59 F.3d 1384 (D.C. Cir. 1995).

[107] *Accounting Rate Policy Statement* at ¶ 32.

[108] *See, e.g.*, AT&T Supp. Comments at 18-20; Sprint Supp. Comments at 9-11; WorldCom Supp. Comments at 5.

[109] MCI Supp. Comments at 3-4; TRA Supp. Reply at 5-8; WorldCom Supp. Comments at 4. MFSI supports these arguments. MFSI Supp. Reply at 5, n. 9.

WorldCom argues that we should refine or clarify our ISP to assure that foreign carriers do not discriminate against U.S. carriers in the timing of implementation of lower accounting rates.[110] WorldCom also submits that it is a violation of the ISP if a carrier fails to disclose that it is paying a lower accounting rate than it has filed with the Commission.[111] Some commenters argue that we should prohibit growth based rates that are based on volumes attainable only by the largest carriers.[112]

70. Some commenters propose that we take specific actions to counter discrimination. AT&T submits that in response to discrimination by a foreign carrier, we should (i) demand prompt remedial action by the foreign correspondent; (ii) if that action fails, order all U.S. carriers to settle with the correspondent at the lowest effective accounting rate in effect between any U.S. carrier and that correspondent; and (iii) if discrimination still persists, initiate a rulemaking to determine the maximum rate that U.S. carriers should pay to the correspondent.[113] Sprint supports AT&T's proposal.[114] Sprint further suggests that where a foreign correspondent retaliates against a U.S. carrier, we may require all U.S. carriers to suspend payment to that correspondent for so long as the retaliation lasts.[115] Cable and Wireless disagrees with proposals to allow U.S. carriers essentially to abrogate their contractual obligations, arguing that such actions would undermine the concept of comity and result in disarray.[116] Cable and Wireless

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[110] WorldCom Supp. Comments at 6-8; *see also*, MCI Supp. Reply at 3-4. MFSI also complains that rate decreases are not implemented simultaneously for all carriers. MFSI Supp. Reply at 5, n. 7.

[111] WorldCom Supp. Comments at 7, n. 1.

[112] Sprint Supp. Comments at 8-9; MCI Supp. Comments at 6; MCI Supp. Reply at 3, n. 6; MFSI Supp. Comments at 4; WorldCom Supp. Reply at 9-10.

[113] AT&T Supp. Comments at 21-22. AT&T also suggests that carriers would be assisted in their accounting rate negotiations if we required all accounting rate agreements to have annual expiration dates. AT&T Supp. Comments at 23-26. Several parties oppose AT&T's proposal of time-bounded rate agreements, arguing that it would harm small carriers or could be disruptive to carrier negotiations. *See, e.g.*, MCI Supp. Reply at 4-5; WorldCom Supp. Reply at 1; TRA Supp. Reply at 11; MFSI Supp. Reply at 4; Sprint Supp. Reply at 5-7, 10-11. We believe that the issue of whether to require time-bounded rates is better considered in a separate proceeding that will consider methods to update and enforce our benchmarks. Therefore, we will transfer the record on this issue to that proceeding.

[114] Sprint Supp. Reply at 3-4.

[115] Sprint Supp. Reply at 8-9.

[116] Cable and Wireless Supp. Reply at 3-4.

states that the Commission has rejected self-help measures domestically, and should apply the same policies to international services.[117]

Discussion

71. We emphasize that, in monopoly and non-competitive markets, we will continue to safeguard U.S. carriers from the exercise of a foreign carrier's market power by vigorously enforcing our ISP. Application of our ISP in these markets is unaffected by the flexibility policy we adopt here for competitive markets. The International Bureau has made clear that behavior by foreign carriers in violation of the ISP will not be tolerated. The Bureau has recently taken strong actions against foreign carriers in response to complaints of discrimination by U.S. carriers that reinforce our commitment to enforcing the ISP and address the concerns raised by commenters here. For example, in response to Telintar of Argentina's unilateral blocking of AT&T's circuits to Argentina and USADirect Service, the International Bureau ordered U.S. carriers to suspend settlement payments to Telintar until AT&T's international circuits and USADirect service were restored.[118] The Bureau has also, in response to discriminatory accounting rates, directed U.S. carriers to negotiate agreements with foreign correspondents at the lowest rate negotiated with any U.S. carrier, and in the interim, to settle at the lowest rate offered to any U.S. carrier.[119] Finally, our policy regarding nondiscriminatory treatment includes the effective date of an accounting rate change, and the International Bureau has taken action to enforce that policy.[120] These recent actions establish the Commission's willingness to respond to carriers' complaints of discrimination. The International Bureau will continue to enforce vigorously the nondiscrimination requirement of our ISP in the future.[121]

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[117] Cable and Wireless Supp. Reply at 4, n. 5.

[118] *In the Matter of AT&T Corp. Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina, Order*, DA 96-378 (rel. March 18, 1996).

[119] *In the Matter of AT&T Corp., MCI Telecommunications Corp., Sprint, and LDDS WorldCom Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Peru, Order and Authorization*, DA 96-696 (rel. May 7, 1996); *In the Matter of AT&T Corp. and MCI Telecommunications Corp., Petition for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Bolivia, Order and Authorization*, DA 96-714 (rel. May 7, 1996).

[120] Letter from Donald H. Gips, Acting Chief, International Bureau, to Henjo Groenewegan, PTT Telecom BV, August 12, 1996.

[121] We decline to address here the issue of growth-based accounting rate structures raised by several parties, because that issue will be considered in a separate proceeding.

3.Application of the ISP to Global MSS

72. ICO and Motorola urge us to exempt global mobile satellite service (MSS) providers from the requirements of the ISP. They state that the ISP is premised on the existence of a traditional correspondent relationship between a private U.S. carrier and a monopoly foreign carrier, and that this relationship will not be the norm with global MSS. They also contend that the MSS industry has the potential to be competitive.[122] MCI, however, submits that whether ICO's characterization of the MSS industry is correct is a question of fact to be determined on the basis of a full record.[123] Motorola states that MSS providers will not face a whipsawing risk because they will only carry traffic intended for or originated by their subscribers on an end-to-end basis.[124] TRW states that global MSS providers should be allowed to negotiate agreements in effectively competitive markets without being bound by the ISP, and suggests that the ISP may not be appropriate for the MSS industry even in markets where effective competition does not exist.[125] TRW also notes, however, that the Commission may need to develop measures to deter anticompetitive behavior in the MSS industry.[126]

73. We find, based on the record, that there is no clear indication at this time that the global MSS market structure requires application of our ISP. As ICO and Motorola note, our ISP is designed to prevent the anticompetitive abuses inherent in a market where international telecommunications are supplied through a bilateral correspondent relationship between national monopoly carriers. There is no clear evidence that the global MSS market necessarily shares these anticompetitive characteristics addressed by the ISP. A key difference between the global MSS and IMTS markets is that in the MSS industry, distribution in monopoly foreign markets will not necessarily be accomplished through a monopoly carrier. For example, Motorola

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[122] ICO Supp. Comments at 4-8; Motorola Supp. Reply at 6-10.

[123] MCI Supp. Reply at 8.

[124] Motorola Supp. Reply at 3, 9-10. However, Motorola suggests regulatory action other than the ISP that we may take to facilitate competition in the MSS industry. Motorola Supp. Reply at 10-13. In particular, Motorola states that, as a condition of serving the U.S. domestic market, non-U.S. licensed satellite operators should be required to abide by the "no exclusive access" prohibition Section 25.143(h) of the Commission's rules. Motorola also contends that ICO's potential entry into the U.S. market should be conditioned on certain competitive safeguards. These issues raised by Motorola concerning the treatment of non-U.S. licensed MSS providers will be addressed in the Commission's DISCO II proceeding in IB Docket No. 95-41. We therefore transfer Motorola's comments on these issues to that proceeding.

[125] TRW Supp. Reply at 3-7.

[126] TRW Supp. Reply at 2, 4.

explains that the IRIDIUM System will for the most part provide the entire international circuit on many routes without the investment of foreign carriers.[127] Thus, we decline at this time to apply the requirements of our ISP to the global MSS industry. We encourage the MSS industry to adopt an approach to terminating international traffic that leads to more cost-based results than the current accounting rate regime. However, we reserve the authority to apply our ISP or other safeguards to the MSS industry in the future if we find that market conditions merit such actions.

IV. Conclusion

74. In this Order, we conclude that U.S. carriers should be permitted to negotiate alternative settlement payment arrangements that deviate from the ISP with foreign correspondents in countries that satisfy the ECO test adopted by the Commission in the *Foreign Carrier Entry Order*. We conclude that alternative settlement arrangements between a U.S. carrier and a foreign correspondent in a country that does not satisfy the ECO test will be considered where the U.S. carrier can demonstrate that deviation from the ISP will promote market-oriented pricing and competition, while precluding abuse of market power by the foreign correspondent. We also adopt the following safeguards to ensure that our new flexibility policy does not have anticompetitive effects in the international market: (i) alternative arrangements between affiliated carriers and those involved in non-equity joint ventures must be filed with the Commission and made public; and (ii) alternative arrangements affecting more than twenty-five percent of the inbound or twenty-five percent of the outbound traffic on a particular route must be filed with the Commission and made public and not contain unreasonably discriminatory terms and conditions. We conclude that this more flexible approach to our ISP will encourage the development of competitive market conditions in other countries and lead to more economically efficient contractual arrangements for terminating service that ultimately will benefit U.S. consumers through lower calling prices.

[127] Motorola Supp. Reply at 7.

V. Procedural Matters; Ordering Clauses

75. The analysis pursuant to the Regulatory Flexibility Act of 1980[128] is contained in Appendix B.

76. Accordingly, **IT IS ORDERED** that the policies, rules, and requirements adopted herein, except those needing OMB approval, **WILL BECOME EFFECTIVE** thirty days after publication in the Federal Register.

77. Matters subject to OMB approval, pursuant to the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, **WILL BECOME EFFECTIVE** upon such approval. When approval is received, the agency will publish a document announcing the effective date.

78. This action is taken pursuant to Sections 4(i), 4(j), 303(r), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r) and §201-§205, Constitution of the International Telecommunications Union, Special Arrangements Article, and International Telecommunications Regulations, Article 9. Special Arrangements.

Federal Communications Commission

William F. Caton
Acting Secretary

[128] 5 U.S.C. § 608 (1995).

APPENDIX A

FINAL RULES

Parts 43 and 64 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 43 -- REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES

1. The authority citation for Part 43 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 211, 219, 220, 48 Stat. 1073, 1077, as amended; 47 U.S.C. 211, 219, 220.

2. Section 43.51 is amended by revising newly redesignated paragraph (e) to read as follows:

§ 43.51 Contracts and concessions.

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(e) International settlements policy. (1) 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 notification letter or modification request, as appropriate, under § 64.1001 of this chapter. No carrier providing switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point shall bargain for or agree to accept more than its proportionate share of return traffic.

(2) 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 notification letter or modification request, as appropriate, under § 64.1001 of this chapter.

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3. Section 43.61 is amended by revising paragraph (b) to read as follows:

§ 43.61 Reports of international telecommunications traffic.

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(b) The information contained in the reports shall include actual traffic and revenue data for each and every service provided by a common carrier, divided among service billed in the United States, service billed outside the United States, and service transiting the United States. In addition, it shall include the number of minutes of outbound and inbound traffic settled pursuant to each alternative arrangement entered into pursuant to §64.1002 of this chapter.

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PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: Secs. 4, 201-205, 211, 218-220, 303, 48 Stat. 1066, 1070, 1072-73, 1077-78, as amended; 47 U.S.C. 154, 201-205, 211, 218-220, 303.

2. Section 64.1001 is amended by revising the section heading and paragraphs (d), (e), (f), (g), (i), (j), (k), and (l) to read as follows:

Subpart J - International Settlements Policy and Modification Requests

§ 64.1001 International settlements policy and modification requests.

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(d) If the operating agreement or amendment referred to in §§ 43.51(d)(1) and (d)(2) of this chapter is not subject to notification under paragraphs (b) and (c) of this section, the carrier must file a modification request under paragraph (f) of this section.

(e) ***

(7) A statement that there has been no other modification in the operating agreement with the foreign correspondent regarding the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, allocation of return traffic, or the basis of settlement of traffic balances.

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

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(g) Notification letters and modification requests must contain notarized statements that the filing carrier:

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(i) If a carrier files a notification letter for an operating agreement or amendment that should have been filed as a modification request, the Bureau will return the notification letter to the filing carrier and the Bureau will notify the carrier that, before it can implement the proposed modification, it must file a modification request under paragraph (f) of this section.

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

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

(l) 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.

3. New Section 64.1002 is added to read as follows:

§ 64.1002 Alternative settlement arrangements.

(a) A communications common carrier engaged in providing switched voice, telex, telegraph, or packet switched service between the United States and a foreign point may seek approval to enter into an operating agreement with a foreign telecommunications administration containing an alternative settlement arrangement that does not comply with the requirements of § 43.51(e)(1) and § 63.14 of this chapter and § 64.1001 by filing a petition for declaratory ruling in

compliance with the requirements of this section.

(b) A petition for declaratory ruling must contain the following:

(1) Information to demonstrate that either:

(i) The Commission has made a previous determination that the effective competitive opportunities test in § 63.18(h)(6)(i) of this chapter has been satisfied on the route covered by the alternative settlement arrangement; or

(ii) The effective competitive opportunities test in § 63.18(h)(6)(i) of this chapter is satisfied on the route covered by the alternative settlement arrangement; or

(iii) The alternative settlement arrangement is otherwise in the public interest.

(2) A certification as to whether the alternative settlement arrangement affects more than 25 percent of the outbound traffic or 25 percent of the inbound traffic on the route to which the alternative settlement arrangement applies.

(3) A certification as to whether the parties to the alternative settlement arrangement are affiliated, as defined in § 63.18(h)(1)(i) of this chapter, or involved in a non-equity joint venture affecting the provision of basic services on the route to which the alternative settlement arrangement applies.

(4) A copy of the alternative settlement arrangement if it affects more than 25 percent of the outbound traffic or 25 percent of the inbound traffic on the route to which the alternative settlement arrangement applies, or if it is between parties that are affiliated, as defined in § 63.18(h)(1)(i) of this chapter, or that are involved in a non-equity joint venture affecting the provision of basic services on the route to which the alternative settlement arrangement applies.

(5) A summary of the terms and conditions of the alternative settlement arrangement if it does not come within the scope of paragraph (b)(4) of this section. However, upon request by the International Bureau, a full copy of such alternative settlement arrangement must be forwarded promptly to the International Bureau.

(c) An alternative settlement arrangement filed for approval under this section cannot become effective until the petition for declaratory ruling required by paragraph (a) has been granted under paragraph (e) of this section.

(d) On the same day the petition for declaratory ruling has been filed, the filing carrier must serve a copy of the petition on all carriers providing the same or similar service with the foreign administration identified in the petition.

(e) All petitions for declaratory ruling shall be subject to a 21 day pleading period for objections or comments, commencing the day after the date of public notice listing the petition as accepted for filing. The petition will be deemed granted as of the 28th day without any formal staff action being taken: provided

(1) The petition is not formally opposed within the meaning of § 1.1202(e) of this chapter; and

(2) The International Bureau has not notified the filing carrier that grant of the petition may not serve the public interest and that implementation of the proposed alternative settlement arrangement must await formal staff action on the petition. If objections or comments are filed, the petitioning carrier may file a response pursuant to § 1.45 of this chapter. Petitions that are formally opposed must await formal action by the International Bureau before the

proposed alternative settlement arrangement may be implemented.

APPENDIX B

FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 ("RFA"), an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated into the *Second Report and Order and Second Further Notice of Proposed Rulemaking ("Second Further NPRM")* in CC Docket No. 90-337, Phase II. The Commission sought written public comments on the proposals in the *Second Further NPRM*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis ("FRFA") in this *Report and Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996 (CWAAA), Pub. La. No. 104-121, 110 Stat. 847 (1996).[129]

Need For and Objective of the Rules

2. This *Report and Order*: (1) permits U.S. carriers to deviate from the requirements of the Commission's International Settlements Policy (ISP) where appropriate market conditions exist; and (2) codifies the Commission's preexisting proportionate return policy, which is one of the requirements of the ISP, as a rule of general applicability to all facilities-based carriers.

3. With respect to our action permitting U.S. carriers to deviate from the requirements of the Commission's ISP where appropriate market conditions exist, our objective is to create a more flexible framework for regulating international accounting rates that permits U.S. carriers to take advantage of competitive market conditions in foreign countries to negotiate more economically-efficient settlement rates. This action is an important step toward a transition from the traditional accounting rate system to competitive markets for originating and terminating international traffic. A more flexible approach to the accounting rate system will enable U.S. carriers to respond more rapidly to changing conditions in the global telecommunications market, reduce their call termination costs and the U.S. net settlement payments, and provide for lower calling prices for U.S. consumers.

4. With respect to our action codifying the Commission's preexisting proportionate return policy, our objective is to restrict the ability of foreign carriers to manipulate the allocation of return traffic and whipsaw U.S. carriers. This policy has long been a cornerstone of our ISP, and codifying it will send a strong signal to foreign carriers that we will not allow U.S. carriers to be whipsawed. We note, however, the flexible regulatory framework we adopt in this *Report and Order* permits carriers to deviate from this requirement where appropriate market conditions exist.

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[129]Subtitle II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), codified at 5 U.S.C. § 601 *et seq*.

Summary of Issues Raised by the Public Comments in Response to the IRFA

5. No comments were submitted in direct response to the IRFA. We also reviewed the general comments for potential impact on small business. Some commenters raised the concern that allowing flexibility for large and/or dominant carriers would put smaller carriers at a disadvantage. These commenters contend that larger carriers will be able to negotiate more favorable terms and conditions than smaller carriers due to their greater traffic volumes. We believe that these concerns are addressed by the safeguards we adopt in this *Report and Order*.

Description and Estimate of Small Entities Subject to Which Rules Will Apply

6. The Commission has not developed a definition of small entities applicable to international facilities-based common carriers. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to Communications Services, Not Elsewhere Classified. This definition provides that a small entity is expressed as one with $11.0 million or less in annual receipts.[130] Based on preliminary 1995 data, at present there are 29 international facilities-based common carriers that qualify as small entities pursuant to the SBA's definition. The number of small international facilities-based common carriers has been growing significantly, and by the end of 1996 that number could increase to approximately 50. The flexibility rules adopted in this *Report and Order* will apply to these carriers only if they enter an alternative accounting rate arrangement with a foreign carrier, and the proportionate return rules codified in this *Report and Order* apply to all these carriers that enter into an operating agreement that provides for return traffic with a foreign carrier.

7. The IRFA and a *Public Notice* seeking supplemental comments were issued in November 1992 and January 1996, respectively. Therefore, the record in this proceeding was closed prior to the effective date of SBREFA. The Commission was thus unable to request information regarding the number of international facilities-based common carriers that qualify as small entities.

Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rules

8. International facilities-based common carriers must file a petition for declaratory ruling and obtain Commission approval before implementing an alternative settlement rate arrangement with a foreign carrier that deviates from the regulatory requirements of the Commission's ISP. In addition, carriers that implement such alternative arrangements must include in their annual report of international telecommunications traffic filed pursuant to

[130] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4899.

Section 43.61[131] of the Commission's rules the number of minutes of outbound and inbound traffic settled pursuant to each alternative arrangement. Carriers already are required to file this annual traffic report; this *Report and Order* requires only that carriers that enter alternative arrangements include in their annual traffic report a description of the minutes settled pursuant to those arrangements. This reporting requirement and the requirement that carriers obtain approval of alternative arrangements are necessary to enable the Commission to review and monitor alternative arrangements for possible adverse effects on the U.S. market for international telecommunications services. These rules apply only to those small entities that take advantage of the opportunity to negotiate alternative settlement arrangements that deviate from the regulatory requirements of the Commission's ISP. Compliance with these rules may require the use of accounting and legal skills.

9. A U.S. international facilities-based common carrier that enters into an operating agreement with a foreign correspondent may not receive an allocation of return traffic from the foreign correspondent to the U.S. carrier that is not proportionate to the amount of traffic that the U.S. carrier sends outbound to the foreign correspondent. This requirement previously has applied to all carriers, including small entities, as part of the Commission's ISP. This *Report and Order* also adopts a flexible regulatory framework that permits carriers to deviate from this requirement where appropriate market conditions exist. Compliance with this rule may require the use of accounting and legal skills.

Steps Taken to Minimize Significant Economic Impact on Small Entities Consistent with Stated Objectives

10. We have not identified, and commenters have not provided, any significant alternatives that may minimize the economic impact on small entities consistent with the stated objectives. We recognize that all carriers, including small entities, may have an increased paperwork burden; however, this *Report and Order* will reduce regulatory requirements on small entities that enter into operating agreements with foreign correspondents that include a negotiated accounting rate. Small entities entering alternative settlement arrangements pursuant to this *Report and Order* will not have to comply with the requirements of the Commission's ISP, including the proportionate return requirement that is codified in this *Report and Order*.

11. Several parties raised concerns that allowing flexibility in our ISP may harm smaller carriers because larger carriers may be able to obtain more favorable alternative arrangements due to their large market share. This *Report and Order* recognizes that there exists the potential for anticompetitive behavior by large carriers. However, rather than preclude large carriers from entering into alternative arrangements or postpone our flexibility policy, this *Report and Order* adopts competitive safeguards to help prevent potential anticompetitive

[131] 47 C.F.R. § 43.61.

behavior. These safeguards address the concerns raised by commenters, but at the same time enable the Commission to meet its objectives of allowing U.S. carriers, including small entities, to respond more rapidly to changing conditions in the global telecommunications market, reduce their call termination costs and the U.S. net settlement payments, and provide for lower calling prices for U.S. consumers.

12. Report to Congress: The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this *Report and Order*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.