In spring 1999, the Federal Communications Commission ("FCC" or "Commission") released two orders affecting its international settlements policy and its policy of licensing U.S. carriers engaged in international telecommunications services. Both orders were the result of the FCC International Bureau's ("IB" or "Bureau") 1998 biennial regulatory review, as required under section 11 of the Communications Act. In this review, the International Bureau conducted a public forum and held many informal meetings with interested members of the telecommunications community, including the Federal Communications Bar Association, to seek ideas to simplify, streamline and eliminate burdens on the international telecommunications industry and the Commission. The Commission is required to conduct a similar review in 2000.

This article will focus on the initiatives and impact of the licensing reform and ISP reform orders on the international telecommunications community, how these orders affected their respective issue areas and what can be accomplished in the Year 2000 review. Part I will analyze the biennial review obligation of the Commission, which was mandated by Congress—among other regulatory reform initiatives—through Title IV of the Telecommunications Act of 1996. Part II provides a brief history of the Commission’s licensing of U.S. carriers engaged in the provision of international telecommunications, from the 1995 Market Entry Order through the implementation of the World Trade Organization’s Basic Telecommunications Agreement. Part II also explores how the 1999 Licensing Reform Order impacted this system. Part III will focus on the Commission’s international settlements policy, which governs how U.S. carriers compensate foreign carriers for the exchange of switched traffic. This section will provide background on how the Commission’s settlements policy has regulated the exchange of international traffic and how the ISP Reform Order impacts this regime. Finally, Part IV focuses on how the biennial review impacted these regulations and how the Commission could have provided more relief, and provides suggestions for the next biennial review in 2000.

I. THE COMMISSION’S BIENNIAL REVIEW OBLIGATIONS


addition to requiring in section 11 that the Commission review its regulations every other year and instituting several specific amendments to the Act, Title IV authorizes the Commission to forbear, with limited exceptions, from applying any regulation or provision of the Act when certain determinations are made. In assessing whether to forbear, the Commission must determine that such a rule or section of the Act is not necessary to effectuate certain goals, that enforcement is not necessary for the protection of consumers and that forbearance is consistent with the public interest. Section 10 directs the Commission to consider whether forbearance will promote competitive market conditions and enhance competition. Interested parties, including telecommunications carriers directly impacted by a particular rule or provision of the Act, may file a petition requesting that the Commission exercise its forbearance authority. The Commission must act within a year on any petition for forbearance unless an extension is granted and must explain its refusal or acceptance of forbearance, in whole or in part, on the record.

Under Title IV of the 1996 Act, the Commission must review, in every even-numbered year beginning with 1998, all regulations issued under the Act that apply to the activities of a telecommunications service provider. The review must determine whether the regulations remain in the public interest after meaningful economic competition has arisen between providers of such service. Upon review, the Commission is further mandated to repeal or modify any regulation it determines is no longer necessary to serve the public interest.

Unlike section 10, which provides the Commission authority to forbear from applying statutory provisions if the mandated test under section 10(a) is met, section 11 does not provide the Commission with the authority to repeal or modify any statute or provision of the Act. The biennial review is strictly limited to regulatory initiatives and determinations that are at the discretion of the Commission, but the authority to forbear from applying a statutory obligation may be exercised at any time.

Beginning in January 1998, the Commission initiated a series of rulemaking proceedings as part of its 1998 Biennial Regulatory review. Thirty-one different proceedings, in the Common Carrier, Wireless Telecommunications, Mass Media and International Bureaus, were initiated subsequent to a “broad, comprehensive internal review of all existing FCC regulations and informal input from industry and the public.” These initiatives were aimed at eliminating or modifying rules addressing such issues as the bundling of consumer premises equipment with telecommunications service, interlocking directorates between telecommunications carriers and the cross ownership restrictions on certain spectrum bands.

II. INTERNATIONAL TELECOMMUNICATIONS SERVICES LICENSING

In order to properly appreciate the impact of the Commission’s Licensing Reform Order, it is essential to analyze the obligations and restrictions placed on U.S. carriers that engage in the provision of international telecommunications service—particularly those that are foreign-owned or affiliated. While for a number of years the Commission has employed varying public interest tests to determine whether an international service license application is in the public interest, the

6. See id.
8. See id.
11. The other proceedings the FCC’s International Bu-
Market Entry Order\textsuperscript{23} is often considered the beginning of a new era and the pinnacle of regulation in this area. This order, which instituted a rigorous test for foreign carrier entry into the U.S. market for international telecommunications, initiated the Commission’s streamline of the application review process and entry criteria (with the exception of its benchmark settlement rate policy).

This streamlining was ultimately achieved through the Streamlining Order,\textsuperscript{24} the implementation of the WTO’s Fourth Protocol to the General Agreement on Trade in Services\textsuperscript{25} in the Commission’s Foreign Participation Order,\textsuperscript{26} and eventually with the biennial review’s Licensing Reform Order.\textsuperscript{27}

A. Licensing Prior to the Market Entry Order

The Commission is under a statutory obligation to ensure (1) that the grant of Section 214\textsuperscript{28} authority is consistent with the public convenience and necessity\textsuperscript{29} and (2) that the grant of a section 310(b)(4)\textsuperscript{30} application, a request to exceed the twenty-five percent indirect foreign ownership benchmark in radio licenses, is consistent with the public interest.

Prior to the Market Entry Order, the Commission “evaluated foreign ownership in U.S. telecommunications carriers and radio licenses on an ad hoc basis.”\textsuperscript{31} For carriers seeking authority to provide international telecommunications service on a facilities or resale basis, the Commission balanced its policy in favor of open market entry against the potential for discrimination against unaffiliated U.S. carriers by the foreign carrier’s parent.\textsuperscript{32}

Under section 310(b)(4), the Commission considered several factors for applicants wishing to exceed the twenty-five percent indirect foreign ownership benchmark.\textsuperscript{33} Some factors include national security issues, the extent of alien participation, the type of radio license sought and the extent to which the investment would further the Commission’s policies at the time.\textsuperscript{34} At the time, no clear entry criteria were available for foreign carriers to enter the market.

B. The Market Entry Order

On November 30, 1995, the Commission released its Market Entry Order, which set forth entry criteria as part of its overall public interest analysis under section 214 of the Act.\textsuperscript{35} The Commission believed the entry criteria were necessary to promote effective competition in the U.S. market for international telecommunications services.\textsuperscript{36} According to this order, the public interest demanded opportunities for all U.S. carriers to innovate in the provision of international services—including their entry into foreign markets—and limits on the ability of dominant foreign carriers to leverage their market power in the U.S. market.\textsuperscript{37} Further, this order examined applications by foreign-affiliated entities for licenses of common carrier radio facilities under section 310(b)(4) of the Act in a similar fashion.\textsuperscript{38}

At the heart of the Commission’s Market Entry Order was the establishment of the effective com-
petitive opportunities analysis ("ECO") to determine whether a foreign affiliated carrier’s entry into the U.S. market is in the public interest.\textsuperscript{39} ECO is a two-pronged test: The first prong addresses whether U.S. carriers have the legal ability to enter the destination market of the applicant (\textit{de jure} ability to enter).\textsuperscript{40} The second prong is comprised of three elements that examine whether U.S. carriers have the actual ability to enter the destination market of the applicant (\textit{de facto} ability to enter).\textsuperscript{41} Specifically, the first element focuses on the terms and conditions of interconnection with the incumbent’s network and whether any barriers to interconnection exist in the market.\textsuperscript{42} The second element focuses on competitive safeguards that have been put in place by the regulatory or competition authority in the destination market to ensure that the incumbent does not leverage its market power to disadvantage a U.S. carrier in this market.\textsuperscript{43} Under the third element, ECO examines the regulatory framework of the incumbent market to determine whether the regulator and the incumbent are jointly controlled or independent entities and whether the regulator has the power to enforce the first three elements of ECO.\textsuperscript{44} The ECO analysis balances all four elements with other public interest factors—such as cost-based accounting rates\textsuperscript{45} or evidence of existing competition—that are entered into the record to determine whether the application is in the public interest.\textsuperscript{46}

ECO did not apply to all situations in which a foreign carrier sought access to the U.S. international telecommunications market. The Commission applied the ECO analysis only if the applicant was affiliated with a foreign carrier with market power operating in the destination market.\textsuperscript{47} Further, it rejected a control standard for affiliation\textsuperscript{48} and determined that a U.S. carrier was affiliated with a foreign carrier if the foreign carrier had a twenty-five percent or greater equity interest in the U.S. carrier applying for the license, or a controlling interest at any level.\textsuperscript{49}

\textsuperscript{39} See id. at 3884-88, paras. 27-39.
\textsuperscript{40} See id. at 3890, para. 44. In its application of the \textit{de jure} prong of ECO, the Commission has examined such legal entry barriers as the existence of limitations on the number of licenses to be rewarded or foreign ownership restrictions on such licenses. See id; see also \textit{In re} Telecom New Zealand Limited ("TNZL"), \textit{Order, Authorization and Certificate}, 12 FCC Rcd. 19379, 19384, para. 11 (1996).
\textsuperscript{41} See Market Entry Order, 11 FCC Rcd. at 3890, para. 44.
\textsuperscript{42} See id. at 3892, para. 49.
\textsuperscript{43} See id. at 3892, para. 51. The safeguards considered in the Commission’s application of ECO have included “(1) the existence of cost-allocation rules to prevent cross-subsidization; (2) timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers’ facilities; and (3) protection of carrier and customer proprietary information.” See id; see also \textit{In re} Hong Kong Telecommunications (Pacific) Limited ("HKTP"), \textit{Order and Authorization}, 13 FCC Rcd. 20050, 20064, para. 33 (1998); \textit{In re} Hong Kong Telecommunications (Pacific) Limited ("HKTP"), \textit{Order on Reconsideration}, DA 99-1481 (July 28, 1999).
\textsuperscript{44} See Market Entry Order, 11 FCC Rcd. at 3894, para. 54.
\textsuperscript{45} See ISP Reform Order, 14 FCC Rcd. at 7965-66, para. 8 n.8 (defining the accounting rate as “the price a U.S. facilities-based carrier negotiates with a foreign carrier for handling one minute of international telephone service. Each carrier’s portion of the accounting rate is referred to as the settlement rate. In almost all cases, the settlement rate is equal to one-half the negotiated accounting rate.”).
\textsuperscript{46} See Market Entry Order, 11 FCC Rcd. at 3890, para. 44.
\textsuperscript{47} In determining “market power,” the Commission examined the following factors: (1) the market share of the applicant’s affiliate in the destination market, (2) the supply elasticity of the destination market, (3) the demand elasticity of the customer in the destination market and (4) the foreign carrier affiliate’s “cost structure, size and resources.” \textit{In re Application of KDD America, Order, Authorization and Certifi...
affiliation had to be with a foreign carrier providing telecommunications service, not simply any foreign interest, and this foreign carrier affiliate had to be operating in the applicant’s destination market. Finally, the affiliate had to have market power, which was defined as the ability of the carrier to act anticompetitively against unaffiliated U.S. carriers through the control of bottleneck services or facilities at the foreign end.

The Market Entry Order also addressed a foreign-affiliated entry test for common carrier radio licenses under section 310(b)(4) of the Act. Section 310(b)(4) permits corporations with up to one-fourth foreign ownership of capital stock to control common carrier, aeronautical or broadcast licenses, but it instructs the Commission to make a public interest determination in granting licenses to corporations that are more than twenty-five percent foreign-controlled. In the Market Entry Order, the Commission determined that the public interest demanded that applicants for common carrier radio licenses be subject to an ECO test, where it identified a “home market” for each foreign investor, compared appropriate market segments and applied the de jure and de facto prongs to these segments. Although the Commission adopted the ECO test to determine whether foreign interests could control more than twenty-five percent of a common carrier radio licensee (e.g., a wireless telephony license), it refused to adopt the test for determining whether similar investments in broadcast and aeronautical licenses were in the public interest.

In establishing ECO, the FCC seemed to articulate a policy of open and fair trade in the telecommunications services market, but in fact it erected trade protection barriers for the largest of the U.S. carriers and provided itself with more regulatory obligations than it could satisfy. The support of the larger U.S. carriers, who provide a majority of the international facilities-based services from the U.S., was not exclusively due to a strong public policy belief that foreign markets must be opened. ECO provided an opportunity for them to delay the inevitable entry of foreign competition in the U.S. international telecommunications market. Until the implementation of the WTO Basic Telecom Agreement (at the opposition of the largest U.S. international carrier), U.S. carriers employed such ambiguous standards under ECO as the definition of “market power” and the evidentiary showings necessary under the ECO test to oppose these applications and delay the authorization of potential foreign-affiliated competitors. The ECO analysis resulted in delay because the Commission was required to release an order...
for each application filed by a foreign-affiliated carrier. These orders made determinations—and provided future applicants with Commission precedent—as to whether the foreign affiliate had market power and/or whether the scrutinized market met the ECO standard. Regardless of the FCC’s determinations, the applicants business plans suffered due to the inherent delays that accompanied these licensing criteria and procedures.

C. International 214 Streamlining Order

A few months after releasing the Market Entry Order, the Commission released its Streamlining Order, which provided the telecommunications community with guidance on the application process and streamlined many of the requirements for obtaining a license to provide international service. This order introduced the “Global 214,” an application U.S. carriers can submit for the provision of services to all international points as long as they are not affiliated with a foreign carrier in any destination markets that would require a market power or ECO demonstration. These applications are placed on streamlined review, that is, they are deemed granted if there are no objections from the Commission or another party within a certain number of days after the application is placed on public notice. Unaffiliated U.S. carriers received the most benefit from the Global 214. Foreign-affiliated U.S. carriers could apply for such licenses only as long as their applications excluded international points where there was an affiliation with a foreign carrier. For example, a U.S. carrier affiliated with the dominant carrier in a particular foreign country could receive global authority to provide service to all destinations but the country of affiliation. The carrier could subsequently attempt to garner authority on the affiliated route through a separate application subject to the ECO test.

The Streamlining Order made the Commission’s licensing regulations more efficient and partially addressed the resources problem with the ECO test. Non-affiliated carriers’ applications would be streamlined and approved, and the carriers permitted to operate within thirty-six days of the date of Public Notice. A separately written order was not necessary, thus saving Commission resources for those applications subject to the ECO analysis.

However, foreign-affiliated carriers remained subject to a different standard that handicapped their entry. Whereas an unaffiliated U.S. carrier could apply for and receive international authority in less than two months, a foreign-affiliated carrier’s application would have to include information meeting the ECO criteria. In addition, the foreign-affiliated carrier was more likely to be subject to the objections of competing U.S. carriers and require a written authorization by the Commission.

D. World Trade Organization Basic Telecommunications Agreement

On February 15, 1997, the WTO Basic Telecommunications Agreement was concluded. Sixty-nine nations, including the United States and most of its major trading partners—representing ninety percent of worldwide telecommunications service revenue—committed to opening their markets for basic telecommunications services. The WTO Basic Telecom Agreement is a separate agreement, rather it is incorporated into the WTO’s General Agreement on Trade in Services (“GATS”). In the agreement, signatories made varying degrees of commitments to open their markets for international telecommunica-

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63 See id. at 12889, para. 11.
64 See id. at 12891–92, para. 14.
65 WorldCom mentioned in its comments filed in the Streamlining proceeding, that under the proposed rules it would only have to file one global application and several specialized ones, rather than the more than 500 it had filed prior to the implementation of the Global 214. See id. at 12888, para. 9.
66 See id. at 12884, para. 12.
67 See id. at 12880, para. 12.
68 See generally Streamlining Order, 11 FCC Rcd. 12884.
69 See id. at 12891, para. 14.
70 See id.
71 See id.
72 In addition to its fifteen members, the European Union is also bound, raising the number of the contracting parties to the Basic Telecom Agreement to seventy. See Laura B. Sherman, "Wildly Enthusiastic" About the First Multilateral Agreement on Trade in Telecommunications Services, 51 Fed. Comm. L.J. 61, 62 n.3 (1998). Although China is not a member of the WTO, Hong Kong remains a member despite its July 1999 remission to China by virtue of its status as a separate customs territory of the People’s Republic of China. See id.
73 See Foreign Participation Order, 12 FCC Rcd. at 23893, para. 2.
74 See Sherman, supra note 72, at 62.
Fifty members agreed to adopt the Reference Paper, which sets out procompetitive regulatory principles. An additional ten members committed to adopting either part or all of these principles in the near future. The principles of the Reference Paper include interconnection provisions, competition safeguards, transparency of licensing criteria, universal service policies, independence of the regulator and allocation of scarce resources. These safeguards were created to prevent monopolies of basic telecommunication from exploiting "their dominant position to distort market forces and impede the ability of competitors to supply networks or services for which commitments would be made." The negotiators realized that a comprehensive approach to regulatory reform was needed because the telecommunications laws and regulations in most countries did not foster a competitive marketplace since most had been designed when telecommunications had been monopolized by the state.

The FCC subsequently implemented the commitments made by the United States in its Foreign Participation Order. The Commission divided the applicants between WTO member nations, which received significant regulatory relief, and non-WTO member nations, which remained subject to the ECO analysis in effect at the time of the implementation of the order. As a result, applicants for Section 214 authority from WTO member nations, seeking authority to exceed the section 310(b)(4) foreign ownership benchmark, and applicants seeking a cable landing license are no longer required to make an ECO showing. Instead, these applicants are subject to a rebuttable presumption that as WTO members, they do not pose concerns that would justify denial of an application on competitive grounds. Any anticompetitive concerns raised during the application process by the Commission would be addressed through license denial only if its dominant carrier safeguards and individualized license conditions could not prevent such activity.

Under the guise of the protections offered under the WTO Basic Telecom Agreement, the Foreign Participation Order addressed two of the major problems with ECO—trade protectionism and regulatory obligations. First, by fully embracing the WTO Basic Telecom Agreement and substantially deregulating foreign carrier entry from WTO member nations, regardless of the carrier's country commitments under the agreement, the Commission's policies reflected a move towards reliance upon competition rather than strict regulatory supervision. While ECO's primary goal was to protect U.S. carriers from the competitive pressures of foreign entry, the benefits of an open-entry policy were denied to consumers by precluding these competitive pressures. The rebuttable presumption offered to applicants from WTO member nations provided further streamlining in the application process by reducing the regulatory obligations the Commission made when it enacted ECO. The Commission would have to conduct an ECO analysis and draft an order.

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75 See WTO Basic Telecom Agreement, supra note 6, at 1169. Regardless of the commitments made by the individual countries under the Basic Telecom Agreement, Articles II (Most Favored Nation) and XVII (National Treatment) of GATS demand WTO members treat like services and service suppliers from other WTO members no less favorably than they treat their own services and service suppliers. See id.

76 See Foreign Participation Order, 12 FCC Rcd. at 23903, para. 27. The Reference Paper was never formally issued as a WTO document. See id. For a description of the Reference Paper, see Sherman, supra note 72, at 71–86.

77 See Foreign Participation Order, 12 FCC Rcd. at 23903, para. 27.

78 See Foreign Participation Order, 12 FCC Rcd. at 24039, para. 340.

79 Sherman, supra note 72, at 71.


81 See generally Foreign Participation Order, 12 FCC Rcd. 25891.

82 See id. at 23903, para. 2.

83 See id. at 25904, paras. 29–30.

84 The Commission's authority to grant licenses and operation of submarine cables is granted by the President pursuant to the Cable Landing License Act, not the Communications Act. See 47 U.S.C. §§ 34–39 (1994 & Supp. II 1997), Exec. Order No. 10530, reprinted as amended in 3 U.S.C. § 301 app. at 459–60 (1994). In the Foreign Participation Order, the Commission initiated an open entry policy, instead of the ECO analysis, with regard to applications from WTO member nations to land and operate submarine cables in the United States. See Foreign Participation Order, 12 FCC Rcd. at 25983, para. 93. However, submarine cable landing licenses still must obtain the approval of the State Department pursuant to E.O. 10,530, regardless of their WTO membership. See 3 U.S.C. § 301 app. at 459–60.

85 See Foreign Participation Order, 12 FCC Rcd. at 25913, para. 50.

86 See id. at 25913–15, paras. 51–54.

87 See id. at 25904, paras. 29–30.

88 See id. at 25907, para. 38.

89 See id. at 25906, para. 35.

90 See id. at 25906, para. 33.
der only for an applicant affiliated with a foreign carrier with market power in a non-WTO member nation. In less than three years, the Commission significantly reduced the workload in the licensing arena, providing it with the ability to focus its resources on actual cases of anticompetitive behavior, rather than the theoretical possibility in every application.

E. 1999 Licensing Reform Order

After a thorough review of its regulations in the Licensing Reform Order, the Commission further provided easier entry for new carriers and more flexibility for existing carriers. The broad application of the ECO test, which provided incumbent U.S. carriers with an popular regulatory tool to delay competition, and the obligation to release individual orders for each foreign-affiliated carrier now seem like a distant memory. The Licensing Reform Order is the culmination of the Commission's efforts to eliminate self-imposed trade barriers and to streamline its licensing process.

The Licensing Reform Order was released after the Commission conducted a public forum and many informal meetings with interested members of the community to examine ways to simplify and eliminate burdens on the industry and the Commission. The order further streamlined the section 214 licensing process by (1) reducing the streamlined time period from thirty-five to fourteen days, (2) expanding the class of applications subject to streamlining, and (3) no longer removing applications from streamlined review solely due to the filing of a petition to deny. By expanding the class of applications eligible for streamlined review to include those on affiliated routes where the carrier has only resale or mobile facilities, the Commission narrowed the scope of a possible ECO analysis and the need to issue individualized orders for a great number of applications. Further, the Commission’s refusal to automatically remove applications from streamlined review solely due to the submission of a petition to deny, regardless of the merits of such a petition, marked an important step in reducing the ability of U.S. carriers to delay competition on a particular route.

By summer 1999, the Commission’s entry policies shifted from protecting incumbent U.S. carriers from foreign entry into the U.S. market with its enactment of ECO, toward an open entry policy where all carriers, regardless of affiliation, can enter the market in a more efficient manner. Yet the Commission had not adopted a completely “open-entry” regulatory structure for all foreign carriers in all circumstances. Several issues precluding this competitive model should be addressed in the Commission’s Year 2000 biennial review.

III. SETTLEMENT RATES

The accounting rate system defines how international carriers settle accounts with each other for the exchange of international switched traffic. The Commission set out guidelines for setting accounting rates in the Benchmarks Order, which unilaterally imposed caps on the amount U.S. carriers can compensate foreign administrations for the termination of U.S. traffic.

The FCC heard the first accounting rate case in 1936. The case addressed “whipsawing,” an anticompetitive activity that harms U.S. telegraph carriers. In Mackay Radio & Telegraph Company, Inc., the FCC refused to grant Mackay Radio’s section 214 application because the proposed ra-

91 See Licensing Reform Order, 14 FCC Rcd. 4909, 4912–33, paras. 8–56 (streamlining section 214 authorizations and allowing forbearance for pro forma assignments and transfers of control).

92 See generally Licensing Reform Order, 14 FCC Rcd. 4909.

93 See id. at 4912, para. 9.

94 See id. at 4918, para. 20.

95 See id. at 4912–13, para. 9.

96 See supra note 45, defining accounting rates and settlements rates.


98 Whipsawing occurs when competitive U.S. carriers send traffic to a foreign country where communications services are controlled by a de facto or de jure monopolist, often referred to as a PTT. See In re Uniform Settlement Rates on Parallel International Communications Routes, Memorandum Opinion and Order, 84 F.C.C.2d. 121, 122, para. 4 (1980) [hereinafter Uniform Settlement Rates Order]. The PTT receives a certain amount of international traffic from each U.S. carrier but is under no obligation to send proportional return traffic or charge equal termination costs. See id. When the PTT favors one U.S. carrier over another with its return traffic, it exerts its monopoly power over these carriers, thus harming competition. See id.

dio circuit between the United States and Norway would not generate additional traffic but would merely shift the routing of existing traffic from cable to radio circuits.\footnote{See Mackay Radio, 2 F.C.C. at 600.} Mackay had agreed to offer Norway a higher accounting rate if it sent all U.S.-bound telegraph traffic through its radio circuit instead of the transatlantic cables used by other U.S. carriers for their Norway-bound traffic.\footnote{See id. at 596.} The FCC determined this arrangement would eliminate the U.S.-Norway cable traffic of another carrier and cause ruinous competition among U.S.-based international communications carriers.\footnote{See id.}

As a direct result of the Mackay case, the FCC created the Uniform Settlements Policy ("USP") in the 1930s.\footnote{See Charles H. Kennedy & M. Veronica Pastor, An Introduction to International Telecommunications Law 126 (1996).} Under this policy, U.S. international carriers offering identical services to the same foreign point had to do so under identical accounting rates, settlement rates and division of tolls.\footnote{See generally 47 C.F.R. §§ 43.51, 64.1001 (1996).} Also, the international record carriers were prohibited from negotiating exclusive rates or receiving a disproportionate amount of return traffic from the foreign correspondent.\footnote{See Stuart Z. Chiron and Lise A. Rehberg, Fostering Competition in International Telecommunications, 38 Fed. Comm. L.J. 1, 45. (1987). Foreign administrations may whipsaw U.S. carriers by indicating that unless certain terms or conditions in the operating agreement of another U.S. carrier, the filing carrier had to file a notification letter or waiver request with the International Bureau pursuant to section 64.1001.

The dramatic increase in settlement rate deficits and the asymmetry of accounting rates began in the 1980s and continued into the 1990s.\footnote{See 47 C.F.R. § 43.51 (1996).} During this period, U.S. regulators began to focus on the problem of disproportionate accounting rates and began to develop various remedies. In 1980, the FCC issued a policy statement reaffirming the need for the USP but stated that the public interest may warrant waivers of the policy in certain cases.\footnote{See In re Implementation and Scope of the Uniform Settlements Policy for Parallel Routes, Final Rule, 51 Fed. Reg. 4736 (Feb. 7, 1986).} In 1986, the FCC changed the name of the USP to the International Settlements Policy ("ISP") and simplified and streamlined the waiver process.\footnote{See infra Part III.C.}

## A. Modern-Day Accounting Rate Regulation

Until the ISP Reform Order was released in 1999, the ISP was codified in sections 43.51\footnote{47 C.F.R. § 43.51(a) (1996).} and 64.1001\footnote{47 C.F.R. § 64.1001 (1996).} of the Commission's rules. These sections regulated the operating agreements, which are basically private contracts between a U.S. international carrier and a foreign carrier. With the exception of the mandatory benchmark settlement rate ceilings imposed in 1997,\footnote{See infra Part III.C.} the FCC does not dictate prices the U.S. carrier may contract with a foreign carrier. However, it does demand that the carrier file the operating agreements with the FCC, and that these contracts adhere to proportional return and nonexclusivity regulations.

Section 43.51 required all U.S. non-dominant carriers who entered into an operating agreement with another carrier to provide foreign communications to file a copy of the agreement with the Commission within thirty days of execution.\footnote{See In re Implementation and Scope of the Uniform Settlements Policy for Parallel Routes, Final Rule, 51 Fed. Reg. 4736 (Feb. 7, 1986).} Operating agreements include provisions concerning the division of tolls, the basis of settlement of traffic balances and the accounting rates. If the operating agreement or an amendment to an existing agreement included a division of tolls, accounting rates or other items not identical to the equivalent terms and conditions in the operating agreement of another U.S. carrier, the filing carrier had to file a notification letter or waiver request with the International Bureau pursuant to section 64.1001.\footnote{See 47 C.F.R. § 43.51(d) (1996).}

If the rate is simply lower and there are no

\textsuperscript{100} See Mackay Radio, 2 F.C.C. at 600.
\textsuperscript{101} See id. at 596.
\textsuperscript{102} See id.
\textsuperscript{104} See id.
\textsuperscript{105} See generally 47 C.F.R. §§ 43.51, 64.1001 (1996).
\textsuperscript{106} See Stuart Z. Chiron and Lise A. Rehberg, Fostering Competition in International Telecommunications, 38 Fed. Comm. L.J. 1, 45. (1987). Foreign administrations may whipsaw U.S. carriers by indicating that unless certain terms or conditions of their operating agreements are changed the inbound traffic to that particular operator will decrease. See id. This decrease in inbound traffic will adversely impact the revenue of the U.S. operator. See id.
\textsuperscript{107} The U.S. balance of payments deficit grew from $312 million in 1979 to $2.4 billion in 1989. See Kenneth B. Stanley, Balance of Payments, Deficits, and Subsidies in International Communications Services: A New Challenge to Regulation, 43 Admin. L. Rev. 411, 414. (1991). The cumulative deficit for the period was $12.5 billion, most of it accruing from 1985 to 1989. See id.
\textsuperscript{108} See Uniform Settlement Rates Order, 84 F.C.C.2d 121, para. 1.
\textsuperscript{110} 47 C.F.R. § 43.51 (1996).
\textsuperscript{111} 47 C.F.R. § 64.1001 (1996).
\textsuperscript{112} See infra Part III.C.
\textsuperscript{113} See 47 C.F.R. § 43.51(a) (1996).
\textsuperscript{114} See 47 C.F.R. § 43.51(d) (1996).
other modifications, such as an increase in return traffic, then the carrier had to file a notification letter under section 64.1001(c), stating the new rate and noting that there has been no other modification in the operating agreement.\textsuperscript{115} If the operating agreement included a difference that was not a simple rate reduction, the carrier had to file a waiver request under section 64.1001(f).\textsuperscript{116} This waiver request had to thoroughly explain the proposed modifications in the operating agreement with the foreign carrier.\textsuperscript{117} Both notification letters and waiver requests should have included statements that the filing carrier had not bargained for exclusive availability of the new accounting rate or bargained for more than its proportionate share of return traffic.\textsuperscript{118} The carrier also had to state that it had informed the foreign administration that U.S. policy required that competing U.S. carriers have access to accounting rates on a nondiscriminatory basis.\textsuperscript{119}

In 1996, the Commission authorized U.S. carriers to negotiate alternative settlement arrangements that deviated from the requirements of the ISP with any foreign correspondent carrier in a country that satisfied the ECO test.\textsuperscript{120} The Commission would consider other alternative settlement arrangements to countries that had not satisfied ECO if the applicant could demonstrate that such a deviation would promote market-oriented pricing and competition while precluding the abuse of market power by the foreign correspondent.\textsuperscript{121} These criteria were amended in the Foreign Participation Order\textsuperscript{122} when the Commission replaced ECO as the threshold standard for determining when to permit accounting rate flexibility with carriers from WTO member nations, with a rebuttable presumption that flexibility is permitted for carriers from WTO member nations.\textsuperscript{123}

No international organization has the authority to enforce or adjudicate accounting rates. The International Telegraph and Telephone Consultative Committee ("CCITT") of the International Telecommunications Union ("ITU")\textsuperscript{124} had established a set of recommendations for international service, providing the basis for dividing revenue from international communications service between countries.\textsuperscript{125} In 1992, the CCITT approved Recommendation D.140, which recommended that accounting rates reflect the cost of providing the service and that they are not discriminatory between operators.\textsuperscript{126} However, this recommendation is not binding because the ITU does not possess enforcement or dispute resolution authority. The FCC has since established mandatory settlement rate benchmarks for U.S. carriers.\textsuperscript{127}

B. Settlement Rate Deficit

The asymmetry between accounting and collection rates has reached a point where settlement payments are a substantial factor in the United States trade deficit. The decrease in settlement rates and telecommunications costs are reflected in lower collection rates, the rates customers pay. Settlement payments have steadily increased and recently leveled off even though accounting rates and telecommunications costs have decreased substantially.\textsuperscript{127} There is no single factor that is a catalyst to these disproportionate rates; instead, there is a multitude of factors. Some are artificially created by foreign operators and governments, such as taxation of telecommunications services, but many are unintentional results of market forces.\textsuperscript{128}

The international settlement payments deficit increases when accounting rates do not decrease

\textsuperscript{115} See 47 C.F.R. § 64.1001(c) (1996).
\textsuperscript{116} See 47 C.F.R. § 64.1001(f) (1996).
\textsuperscript{117} See id.
\textsuperscript{118} See id.
\textsuperscript{119} 47 C.F.R. § 64.1001(g) (1996).
\textsuperscript{120} See In re Regulation of International Accounting Rates, Phase II, Fourth Report and Order, 11 FCC Rcd. 20063, para. 2 (1996) [hereinafter Flexibility Order].
\textsuperscript{121} See id.
\textsuperscript{122} See Foreign Participation Order, 12 FCC Rcd. at 24026, para. 302.
\textsuperscript{123} The ITU is a specialized agency of the United Nations that was originally founded in the 19th Century to universalize telegraph service among nations. See KENNEDY & PASTOR, supra note 103, at 30–31. Today, the ITU provides oversight to international matters concerning telecommunications standards, radio matters, and international development. See id. at 32. The CCITT represents the telecommunications standardization sector of the ITU and is now referred to as the "ITU-T." See id.
\textsuperscript{124} See Stanley, supra note 107, at 414–15.
\textsuperscript{125} See KENNEDY & PASTOR, supra note 104, at 131–32.
\textsuperscript{126} See generally Benchmarks Order, 12 FCC Rcd. 19806; Benchmarks Reconsideration Order, 14 FCC Rcd. 9256.
proportionally with the cost of international switched services. The FCC reported that between 1985 and 1994, U.S. carriers paid a total of $26 billion in settlement payments to foreign carriers; nearly half of these payments were thought to have exceeded the actual costs of terminating calls.\textsuperscript{129} Since 1985, the net settlement outpayment has quadrupled, reaching over $5.45 billion in 1997.\textsuperscript{130} In 1988, it was estimated that three out of every four dollars that U.S. carriers collected for international calls were owed to the foreign carrier for terminating the calls.\textsuperscript{131} The ITU has estimated that, of the $55 billion spent on international phone calls by each country in 1995, only $30 billion was needed to cover costs.\textsuperscript{132}

Foreign PTTs and governments directly cause some of the disparity in accounting rates and traffic. The primary institutional structure aggravating the U.S. deficit in this area is the subsidy some PTTs have built into the cost of terminating calls from the United States. These payments often subsidize local telephone service, postal operations, and even such programs as currency solvency that are ancillary to international telecommunications.\textsuperscript{133}

There are other institutional pressures that increase U.S. settlement rates. These factors include (1) the FCC's regulations to prevent whipsawing by decreasing incentives to lower accounting rates,\textsuperscript{134} (2) the fact that prices are set in U.S. dollars whereas accounting rates are calculated in monetary units other than U.S. dollars,\textsuperscript{135} (3) the effects of taxation of telephone service in foreign countries\textsuperscript{136} and (4) the discriminatory practice of some countries that charge higher settlement rates to terminate U.S. traffic than traffic from other countries.\textsuperscript{137}

Increased U.S. settlement payments, however, are mainly the result of several different market forces. First, outbound traffic greatly exceeds inbound traffic.\textsuperscript{138} The reasons for the increased outbound traffic include the large number of wealthy immigrants in the U.S. calling abroad,\textsuperscript{139} the lack of direct dial and high PTT originating costs that retard demand and usage in their respective countries and the competitive market in the U.S. that lowers cost and increases demand and usage in this country. Second, new services have added a third player into the international settlements process. International 800 and third-party billing arrangements, such as credit cards, have created a situation where the country responsible for the billing and the settlement payments may not have originated the phone call. For example, in a country beyond call,\textsuperscript{140} the billing country may not be either the originating or terminating country, yet it must pay a settlement rate to the terminating country and the originat-

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Year & Settlement Receipts & Settlement Payments & Deficit \\
\hline
1993 & 2,938 & 6,645 & 3,707 \\
1994 & 3,003 & 7,294 & 4,291 \\
1995 & 3,073 & 8,016 & 4,943 \\
1996 & 2,829 & 8,484 & 5,655 \\
1997 & 2,865 & 8,315 & 5,450 \\
\hline
\end{tabular}
\caption{Settlement data for the past five years, in millions of U.S. dollars.}
\end{table}

\textsuperscript{131} See Frieden, supra note 128, at 115 n.11.
\textsuperscript{133} See Stanley, supra note 107, at 431.
\textsuperscript{134} See Frieden, supra note 128, at 114.
\textsuperscript{135} Accounting rates are often set in Special Drawing Rights ("SDR"), which is an international currency unit that is determined by the International Monetary Fund and based on the average of a basket of currencies. See Trade in Telecommunications: A Glossary of Technical Terms (visited Oct. 4, 1999) <www.itu.int>. As of Sept. 24, 1999, each SDR was worth approximately $1.723. See id.
\textsuperscript{136} See Stanley, supra note 107, at 419.
\textsuperscript{137} See id. at 433.
\textsuperscript{138} Home country beyond enables a caller in one country to access directly a home country direct service provider of a second country for the purpose of placing a call terminating outside the second country. ITU Database (visited Feb. 14, 2000) <www.itu.int/sancho.html>. Home country beyond involves a two-stage international call and will require the home country direct service provider to have bilateral agreements in place with both the service access provider and the service delivery provider which will permit calls between the origin and destination countries involved. See id. For example, a U.S. carrier subscriber making a call from Brazil to France would call the access number in the United States, receive dial tone from the U.S., then call on to France. The Brazilian operator recognizes this as a Brazil-to-U.S. call and the French operator recognizes this as a U.S.-to-France call. When the two legs are less expensive than a direct dial, home country direct becomes a viable option.
\textsuperscript{139} Home country beyond enables a caller in one country to access directly a home country direct service provider of a second country for the purpose of placing a call terminating outside the second country. ITU Database (visited Feb. 14, 2000) <www.itu.int/sancho.html>. Home country beyond involves a two-stage international call and will require the home country direct service provider to have bilateral agreements in place with both the service access provider and the service delivery provider which will permit calls between the origin and destination countries involved. See id. For example, a U.S. carrier subscriber making a call from Brazil to France would call the access number in the United States, receive dial tone from the U.S., then call on to France. The Brazilian operator recognizes this as a Brazil-to-U.S. call and the French operator recognizes this as a U.S.-to-France call. When the two legs are less expensive than a direct dial, home country direct becomes a viable option.
ing country, thus aggravating the settlements balance of that country. Third, uncollectable payments and calling fraud adversely affect the U.S. based carrier since it does not collect the charge but must pay the foreign carrier for terminating the call. Fourth, U.S. carriers did not have a substantial incentive to lower accounting rates, until the deregulation included in the ISP Reform Order, because ISP regulations bound them to equal accounting rates and proportional return.

C. Benchmark Settlement Rate Order

The U.S. government attempted for years to address the settlement rate deficit and achieve cost-based settlement rates by means of discussion and negotiation bilaterally and multilaterally at the ITU, the Organization for Economic Cooperation and Development ("OECD") and other international organizations. In 1997, the Commission imposed caps on the amount a U.S. carrier can pay a foreign carrier for its settlement of U.S. traffic. The Benchmark Order noted that these benchmark settlement rates were necessary because, under the international accounting rate system at that time, the settlement rates U.S. carriers paid to foreign carriers to terminate U.S.-originated traffic are in most cases substantially above the cost foreign carriers incur to terminate that traffic. The Commission expressed a belief that above-cost settlement rates not only harmed U.S. consumers through higher than necessary international calling rates, but also provided funding necessary for foreign carriers to finance strategies that create competitive distortions in the market for U.S. international services. The settlement rate deficit, which was partially the result of high settlement rates, reached a total of $5.4 billion in 1996, double what it was in 1990.

The benchmark rates adopted in the order are based on a Tariff Component Price ("TCP"), an average of a foreign carriers' publicly available tariff rates and other information made available to or estimated by the Commission. Most country routes were assigned according to their economic development, as defined by a World Bank and ITU classification scheme. The three benchmarks adopted are fifteen cents per minute for upper income countries; nineteen cents per minute for upper middle income and lower middle income countries; and twenty-three cents per minute for lower income countries. The Commission would rely on petitions by interested parties and the international telecommunications could not force all facilities based-carriers to exit the market or prevent subsequent entry. See id. at 19898, para. 199. Also, such activity would easily be detectable by the Commission or the underlying facilities carrier because a significant portion of its costs, and the wholesale rate at which it takes service from the underlying facilities-based carrier, is known or easily attainable. See id. at 19900, para. 204.

See generally Benchmarks Order, 12 FCC Rcd. 19806.
See id. at 19807, para. 2.
See id. The settlement rate benchmark condition adopted in the Benchmark Order is intended to reduce the ability of U.S.-licensed carriers to engage in a predatory price squeeze. See id. A price squeeze refers to a strategy of prediction that would resolve the foreign carrier setting high (above-cost) international settlement rates while its U.S. affiliate offers "low" prices for domestic IMTS services in competition with the other carriers. See id. Because the foreign carrier's international termination services are a necessary input for providing IMTS services, the foreign carrier can create a situation where the relationship between "high" international settlement rates and its U.S. affiliate's "low" prices for IMTS services forces competing carriers to lose money or customers, even if they are more efficient than the affiliate at providing international service. See id. at 19901, para. 208.

A proposal was made by the larger domestic carriers in the Foreign Participation Proceeding to extend this condition to the licenses of all foreign-affiliated U.S. carriers, whether resale or facilities-based authority. See Foreign Participation Order, 12 FCC Rcd. at 23979, para. 198. If implemented, arguably such a condition would have precluded all means of the carrier to provide traffic on any route in which it had an affiliate offering a settlement rate above benchmark. The Commission declined to apply the settlement rate benchmark condition to switched resale providers because the switched reseller has substantially less incentive to engage in a predatory price squeeze than a facilities-based carrier. See id. Due to the switched resellers' lack of control of essential facilities, it

141 See generally Benchmarks Order, 12 FCC Rcd. 19806.
142 See id. at 19807, para. 2.
143 See id. The settlement rate benchmark condition adopted in the Benchmark Order is intended to reduce the ability of U.S.-licensed carriers to engage in a predatory price squeeze. See id. A price squeeze refers to a strategy of prediction that would resolve the foreign carrier setting high (above-cost) international settlement rates while its U.S. affiliate offers "low" prices for domestic IMTS services in competition with the other carriers. See id. Because the foreign carrier's international termination services are a necessary input for providing IMTS services, the foreign carrier can create a situation where the relationship between "high" international settlement rates and its U.S. affiliate's "low" prices for IMTS services forces competing carriers to lose money or customers, even if they are more efficient than the affiliate at providing international service. See id. at 19901, para. 208.

144 See Benchmarks Order, 12 FCC Rcd. at 19812, para. 13.
145 See id. at 19829, para. 49. The Tariff Component Price ("TCP") methodology uses three network components to calculate each country basket: (1) the "international facility component" consisting of "international transmission facilities, both cable and satellite, including the link to international switching facilities"; (2) the "international gateway component" consisting of "international switching centers and associated transmission and signaling equipment"; and (3) "national extension component," consisting of "national exchanges, national transmission, and the local loop facilities used to distribute international service within a country." Id.; see also Lawrence J. Spiwak, From International Competitive Carrier to the WTO: A Survey of the FCC's International Telecommunications Policy Initiatives 1985-1998, 51 FED. COMM. L.J. 111, 227 n.323 (1998).

146 The Benchmarks Order assigned benchmark settlement rates for most, but not all, countries on its International Points List. See Benchmarks Order, 12 FCC Rcd. at 19815, para. 19.
147 See id.
148 See id.
service agreement filing obligations of U.S. carriers for disclosure of these rates to determine compliance.\footnote{See 47 C.F.R. § 43.51 (1998).} The order adopted five transition periods for U.S. carriers to negotiate settlement rates at or below the benchmarks: one year for carriers from upper income countries (Jan. 1, 1999); two years for carriers from upper middle income countries (Jan. 1, 2000); three years for carriers from lower middle income countries (Jan. 1, 2001); four years for carriers in lower income countries (Jan. 1, 2002); and five years for countries with telephone penetration rates that are less than one in one-hundred (Jan. 1, 2003).\footnote{See Benchmarks Order, 12 FCC Rcd. at 19816, para. 22.}

The Commission also conditioned section 214 authorizations to provide facilities-based international services to countries where the licensee had an affiliate to offer settlement rates at or below the relevant benchmark on the affiliated route.\footnote{See id. at 9910, para. 228.} The benchmark was applied regardless of the affiliate’s market power or ability to control settlement rates in its market.\footnote{This condition was subsequently amended in the Benchmarks Reconsideration Order, 14 FCC Rcd. at 9269-72, paras. 39-46. In that order, the Commission reasoned that the condition for facilities-based service to affiliated markets should apply solely to U.S. carriers that are providing service on a route where they have an affiliate with market power. Market power is defined as controlling more than 50 percent of the market. See id. at 9270, para. 40. A predation strategy would make sense for a U.S. carrier only if its foreign affiliate had sufficient terminating facilities in the foreign market to terminate all the traffic generated by the U.S. carriers. See id. Because a carrier that lacks market power would most likely lack these facilities, there is not a sufficient danger of anticompetitive behavior. See id. at 9270-71, para. 41.}

This condition prohibited a U.S. carrier from using its facilities-based authority to provide switched service on a route unless the foreign affiliate offered settlement rates at or below the relevant benchmark.\footnote{See id. This is distinct from transit traffic, which is part of the traditional settlement systems and would disclose the originating country to the terminating operator. See id.} The Commission’s concern was that foreign-affiliated international services licensees operating in the United States could engage in anticompetitive behavior through a price squeeze. This would harm unaffiliated U.S. carriers and would eventually result in a decrease in competition on the particular route.\footnote{See id.} The condition affected foreign affiliated licensees because they would have to cease service on the affiliated route unless its foreign affiliate offered U.S. carriers benchmark settlement rates by April 1, 1998.\footnote{The Commission recognized that routing and bypass arrangements such as refile,\footnote{See Foreign Participation Order, 12 FCC Rcd. at 23924, para. 72. International Simple Resale ("ISR") refers to the provisioning of switched basic service via international private lines interconnected to the public switched telephone network at one or both ends. See id. ISR allows a carrier to provide international switched traffic outside the accounting rate system, thus placing downward pressure on accounting rates. See In re Regulation of International Accounting Rates (Phase II), First Report and Order, 7 FCC Rcd. 559, 560, para. 12 (1991). The Commission permitted ISR on select routes that it determined offered "equivalent" resale opportunities to U.S. carriers, a test that is similar, but not the same as ECO. See Market Entry Order, 11 FCC Rcd. at 3926, para. 138. At this time, the Commission will permit ISR on a WTO member nation route if the market is proved to be "equivalent" or at least 50 percent of the settled U.S.-billed traffic on the route or routes in question are at or below the relevant benchmark settlement rate. See Foreign Participation Order, 12 FCC Rcd. at 23927, para. 79. For non-WTO member country routes, the market must satisfy both the equivalency test and the 50-percent settlement test.} The Commission initially conditioned section 214 facilities-based authorization on a route where they have an affiliate with market power.

The Commission lifted the stay on this condition, but imposed a modified condition where only U.S. carriers with foreign affiliates with market power would have their facilities licenses conditioned.\footnote{See Benchmarks Reconsideration Order, 14 FCC Rcd. at 9269-72, paras. 39-46.} See id. Refile is selected in order to minimize the originating operator’s cost for terminating internal calls. See id. The terminating operator sees this traffic as originating in the middle country, not the originating country, and therefore will charge the accounting rate agreed to between these carriers. See id. This is distinct from transit traffic, which is part of the traditional settlement systems and would disclose the originating country to the terminating operator. See id.

\footnote{See id.}
of dominant, incumbent local exchange carriers. Unlike rate-of-return or price-cap methodology, the Commission based its settlement rates on information gathered from interested parties and unreliable sources, such as tariffs that included uncollectables, universal service and other irrelevant costs, and averaged all of these costs together rather than assigning rates on an individual country basis.

The *Benchmarks Order* was extremely beneficial to U.S. carriers and strongly disadvantaged foreign carriers, foreign-affiliated U.S. carriers and ultimately U.S. consumers. Unlike the mandated reduction in similar domestic scenarios, no U.S. facilities-based carrier was obliged to flow through any of the cost savings associated with the lower settlement rates in the form of lower collection rates to U.S. consumers. The FCC and state regulatory authorities often require domestic long-distance providers to demonstrate access charge reductions through tariff filings and flow-through plans. In the case of international traffic, the Commission concluded the marketplace would pass these rate reductions on to consumers.

The order was unclear on how the conditions in the *Benchmarks Order* were to be enforced. Clearly, facilities-based section 214 licenses were conditioned on affiliated routes and new requirements were imposed for ISR routes, but the Commission did not elaborate how it would enforce the benchmark rates on unaffiliated routes. If a country's international carriers are not offering benchmark rates by the dates indicated in the order, the Commission stated that it would work with the appropriate government authorities to lower the settlement rates by emphasizing cooperation and the decisions of the ITU in Recommendation D.140. Ironically, this unilaterally imposed rate cap relied on bilateral and multilateral mechanisms for enforcement. U.S. carriers may request Commission action in such circumstances by filing a petition that (1) demonstrates that they have been unable to negotiate a settlement rate with its foreign correspondent in compliance with the order and (2) requests enforcement measures to be initiated to ensure that no U.S. carrier pays the foreign correspondent an amount exceeding the lawful settlement rate benchmark.

Enforcement of the *Benchmarks Order* began in June 1999, when the Commission's International Bureau, pursuant to petitions filed by AT&T, MCI WorldCom and Sprint, ordered all U.S. carriers to pay the benchmark settlement rate of fifteen cents per minute on the U.S.-Cyprus and U.S.-Kuwait routes. In Cyprus, the petitioners had unsuccessfully attempted to negotiate with the Cyprus Telecommunications Authority to lower its settlement rate to fifteen cents from their rate of thirty-seven cents per minute. Likewise, the Commission released a similar order based on the petitioners' claim that the negotiations had been fruitless to lower the settlement rate of Kuwait from seventy-eight cents per minute to the benchmark rate.

While both of these disputes are ongoing and the *Benchmarks Order* failed to specify particular enforcement actions, there is Commission precedent in international accounting rate disputes.

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159 See *Benchmarks Order*, 12 FCC Rcd. at 19855, para. 102. The Commission admitted that the use of tariff data to calculate settlement rate benchmarks is that any inefficiencies in foreign carriers' tariffed prices will be noted in the TCP. See *id.*

160 See *id.* Cost information submitted by domestic carriers was not made readily available on the record for foreign interests to question. See Cable & Wireless PLC v. FCC, 166 F.3d 1224, 1233 (D.C. Cir. 1999).

161 See *Benchmarks Order*, 12 FCC Rcd. at 19930, para. 270. The Commission held that the combination of new entrants into the market, the WTO Basic Telecom Agreement, and its settlement rate policy would lower costs and increase competition, thus not necessitating a pass-through requirement. See *id.*


163 In the *Benchmarks Order*, the Commission required carriers to satisfy the "equivalency" test for ISR and demonstrate at least 50 percent of the settled, U.S-billed traffic on the route is at or below the appropriate settlement rate benchmark. See *Benchmarks Order*, 12 FCC Rcd. at 19917, para. 245. This condition was subsequently amended in the *Foreign Participation Order* by exempting the equivalency test on WTO member nation routes. See *id.* at 19922–23, para. 259.

164 See *id.* at 19895, para. 185.


166 See *Cyprus Order*, 14 FCC Rcd. at 8874, para. 15.

167 See *Kuwait Order*, 14 FCC Rcd. at 8868, para. 15.
1996, the Commission ordered all U.S. carriers to cease providing settlements payments to Telintar, the monopoly provider of international switched service in Argentina, due to anticompetitive actions taken during a contract dispute with AT&T.168 Eventually, Telintar made the most economical choice under the circumstances and ceased these practices; traffic eventually resumed.

D. Response and Appeal

A number of foreign carriers and administrations took issue with the Commission's unilateral imposition of settlement rate restrictions. Most of the ninety commentors to the Commission's notice opposed the Commission's unilateral approach to high settlement rates and questioned the Commission's reliance on the TCP and the lack of information on how these rates were determined.169 These opponents requested that the Commission rely instead on market forces and multilateral negotiations to make settlement rates cost-based.170 On the other hand, domestic interests applauded the implementation of the order and requested that the Commission provide even more downward pressure on these rates.171

Several adversely affected parties challenged the Commission's order in the U.S. Court of Appeals.172 Petitioners, including various parties representing over 100 foreign governments, regulators, and telecommunications companies, challenged the Benchmarks Order on several grounds. First and foremost, they claimed that the FCC, by limiting the settlement rates foreign carriers may charge U.S. carriers, had asserted extra-territorial jurisdiction over foreign carriers and foreign telecommunications services, thereby exceeding its authority under the Communications Act and the International Telecommunications Union Treaty.173 Second, even if the Benchmarks Order did not regulate foreign carriers, it unlawfully regulated domestic carriers by restricting the prices they may pay to non-FCC-regulated entities.174 Third, the benchmark settlement rates set by the Commission were arbitrary, capricious and unsupported by substantial evidence on the record, and the Commission's conditioning of the section 214 licenses held by foreign-affiliated carriers was unlawfully discriminatory and inadequately justified.175

The Court held in favor of the Commission on each of these grounds. First, the Court held that the Benchmarks Order does not regulate foreign carriers or foreign telecommunications services and therefore does not violate the Communications Act.176 The benchmark rates apply only to what U.S. carriers, subject to the Commission's jurisdiction, may pay for termination of U.S.-originated traffic.177 Although the effect of this regulation may impact foreign carriers, that alone does not result in the FCC exceeding its jurisdiction. Second, the court rejected the petitioner's arguments that the Communications Act only permits the Commission to regulate the terms by which U.S. carriers offer telecommunications services to the public, not the prices U.S. carriers pay to non-FCC-regulated entities for goods and services.178 The D.C. Circuit cited several sections of the Communications Act, including section 201 (ratemaking authority), section 205 (authority to declare a practice unlawful) and section 211 (authority to mandate amendments to contracts filed with the Commission), as well as the Mobile-Sierra doctrine,182 which provides the Commis-

168 See In re AT&T Corp. Proposed Extension of Accounting Rate Agreement for Switched Voice with Argentina, Order, 11 FCC Rcd. 18014 (1996); see also Spiwak, supra note 145, at 164.
169 See generally Benchmarks Order, 12 FCC Rcd. 19806.
170 See id. at 19814-15, at para. 18.
171 See id. at 19854.
173 See id. at 1229.
174 See id.
175 See id.
176 See id. at 1230.
177 See id. at 1230.
178 See id. at 1229.
179 See Cable & Wireless, 166 F.3d at 1230.
180 See id. at 1231.
181 See id. at 1231-32.
182 See generally FCC v. Sierra Pacific Power Co., 350 U.S. 348 (1956); United Gas Co. v. Mobile Gas Corp., 350 U.S. 332 (1956) (referred to as the "Mobile-Sierra Doctrine"). Under this doctrine, "the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful ... and to modify other provisions of private contracts when necessary to serve the public interest." Western Union Telegraph Co. v. FCC, 815 F.2d 1495, 1501 n.2 (D.C. Cir. 1987).

Although the legal standard for changing contract rates, (they must be 'unlawful') differs from the standard for changing other contract provisions (they must disserve 'the public interest'), in fact the two standards are not very different. Before changing rates, the Commission must make a finding that they are 'unlawful' according to the terms of the governing statute, which typically re-
sion with the authority to prescribe maximum settlement rates.\textsuperscript{183} Third, the court rejected the argument that the \textit{Benchmarks Order} violated the Administrative Procedure Act by calculating rates that undercompensate foreign carriers or by drawing conclusions on data not included on the record.\textsuperscript{184} It held that the reliance on the TCP methodology was justifiable because foreign carriers did not produce cost information on the record that would enable the Commission to rely on more accurate information.\textsuperscript{185} The decision was not appealed.

E. ISP Reform Order

The Commission’s International Settlements Policy was addressed in the 1998 biennial review.\textsuperscript{186} Pursuant to its section 11(a)(2) biennial review criteria, the Commission held that in most circumstances the ISP is no longer necessary or in the public interest as the result of meaningful economic competition in the international telecommunications market.\textsuperscript{187} The Commission found that in most circumstances the ISP reduced incentives for U.S. carriers to negotiate low settlement rates, because the rate provided to one carrier is available to all carriers.\textsuperscript{188} It also found that “the proportionate return requirement of the ISP can distort competition in the U.S. market,” and impede the entrance of new competitors\textsuperscript{189} and that the uniform settlement rates and public disclosure requirements inhibit competition at the retail level.\textsuperscript{190}

The Commission removed its ISP requirements—but not the benchmark settlement rates—for settlement agreements with foreign carriers lacking market power.\textsuperscript{191} The Commission originally proposed removing the ISP for arrangements with non-dominant carriers in WTO member nations.\textsuperscript{192} However, the order included all such arrangements, concluding that a carrier without market power will be unable to adversely affect competition in the U.S. regardless of its home country’s membership in the WTO.\textsuperscript{193} Further, on certain select routes where the U.S. in-bound traffic is settled at twenty-five percent or more below the prescribed benchmark rate, the ISP was entirely eliminated even for arrangements with the dominant carrier.\textsuperscript{194} Arrangements with the dominant carrier still have to be filed with the Commission, but these filings are no longer publicly available.\textsuperscript{195} This filing is required to ensure that U.S. carriers do not enter into arrangements that would allow the foreign carrier to exercise its market power to the detriment of U.S. consumers.\textsuperscript{196} However, the order recognized that public disclosure could have a chilling effect on pro-competitive termination arrangements.\textsuperscript{197}

The \textit{ISP Reform Order} correctly recognized that a regulatory system originally implemented to govern telegraph traffic between monopoly providers is no longer applicable in this age of multiple operators, least of all cost routing and internet telephony.\textsuperscript{198} The Commission stopped short of abandoning the ISP altogether, clearly recognizing that, under most circumstances, regulatory oversight and mandated disclosure of costs are unnecessary and potentially harmful in the international telecommunications market.\textsuperscript{199} Nevertheless, the Commission still maintains its benchmarks—although one of its primary means of monitoring such costs has been eliminated—and it has not demonstrated any willingness to abandon them in place of market pressures.

IV. POST-REVIEW

During 1999, the Commission enforcement of

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{183}] See Cable & Wireless, 166 F.3d at 1232.
\item[\textsuperscript{184}] See id. at 1232–34.
\item[\textsuperscript{185}] See id. at 1233.
\item[\textsuperscript{186}] See generally ISP Reform Order, 14 FCC Rcd. 7963.
\item[\textsuperscript{187}] See id. at 7964, para. 2.
\item[\textsuperscript{188}] See id. at 7972, para. 24.
\item[\textsuperscript{189}] See id. at 7972, para. 25.
\item[\textsuperscript{190}] See ISP Reform Order 14 FCC Rcd. at 7973, para. 27.
\item[\textsuperscript{191}] See id. at 7973, para. 29.
\item[\textsuperscript{193}] See \textit{ISP Reform Order}, 14 FCC Rcd. at 7971, para. 20.
\item[\textsuperscript{194}] See id. at 7982, para. 52. At the time the order was released, these routes included Canada, the United Kingdom, Sweden, Germany, France, Hong Kong, the Netherlands, Denmark, and Norway. See Commission Releases List of International Routes that Satisfy Criteria for Relief from the International Settlements Policy and Associated Filing Requirements, \textit{Public Notice}, 14 FCC Rcd. 12158 (1999).
\item[\textsuperscript{195}] See ISP Reform Order, 14 FCC Rcd. at 7989, para 67.
\item[\textsuperscript{196}] See id. at 7989, para. 69.
\item[\textsuperscript{197}] See id.
\item[\textsuperscript{198}] See id. at 7964, para. 2.
\item[\textsuperscript{199}] See id. at 7965, para. 6.
\end{itemize}
\end{footnotesize}
the “public interest,” the statutory standard by which it regulates international telecommunications and the entry of foreign carriers, can be concluded to be a mix of pro-U.S. consumer regulation and U.S. carrier protectionism. These are neither mutually exclusive nor fundamentally consistent objectives. The Market Entry Order, with its evidentiary standard obligations on foreign-affiliated carriers, and the Benchmarks Order, with its mandatory cost reductions and absent flow-through obligations, had the effect of protecting U.S. carriers and raising barriers to foreign carrier entry. Lack of entry and maintenance of the status quo for the larger U.S. international carriers effectively delayed the benefits of competition for U.S. consumers. On the other hand, the Commission did embrace competition in the entry standards created in the Foreign Participation Order and the deregulation of the international settlements policy. Cost disclosures and increased entry into the market by providers with less regulatory oversight increase the competitiveness of all carriers in the market, resulting in increased choices and lower prices for the U.S. consumer.

The Commission has also moved to a more reasonable regulatory position in considering its limited resources. The need to release multiple orders for carriers with few, if any, affiliates in foreign countries delayed the effect of this competitive pressure on the incumbent domestic carriers. Global 214 licenses increased applications on streamlined review and the refusal to automatically remove an application from streamline review exclusively due to an objection by a competing carrier further reduced the time of obtaining authorization for foreign-affiliated carriers.

In its Year 2000 biennial review, the Commission can do more to embrace the pro-U.S. consumer model of open competition in the international telecommunications market. The domestic interexchange and CMRS markets are examples of low barriers to entry and vigorous competition benefiting the U.S. consumer. The following issues, examined under the criteria established in section 11(a)(2) of the 1996 Act, should be considered in the upcoming 2000 review.

A. Abandon the Effective Competitive Opportunities Test for all International Services Applications.

ECO no longer necessarily serves the public interest because the international services market has become competitive, even on non-WTO member nation routes. The Commission should extend the open-entry criteria it currently provides applicants from WTO member nations to applicants from all nations. The rebuttable presumption that entry will benefit the market, can be conditioned or—in very unusual circumstances—denied if the licensee engages in conduct that violates the Commission’s rules. Rather than erecting barriers to entry and competition, the Commission should adopt the role of marketplace protector, similar to that of the telecommunications authorities in Australia and New Zealand. Internet telephony, refile, reorigination of traffic and other non-traditional means of exchanging international traffic have changed the marketplace and the necessary regulatory protections. Open-entry will allow more carriers into the U.S. market, compounding the competitive effect of these alternative routing arrangements. Foreign market entry for U.S. carriers will be achieved more rapidly through the exercise of multilateral and bilateral negotiating power, such as the WTO, rather than through erection of regulatory barriers in this country.

B. Amend the Commission’s Affiliation Standard.

The Commission’s rules contain several different definitions of “affiliate” or “affiliation.” For their telecommunications markets. See id. This replaces prophylactic regulations with a competitiveness system that will not interfere with the marketplace to the same extent. See id.

For example, the Commission sets the affiliate standard at control for purposes of protecting consumer information from being used in violation of its CPNI rules. See generally In re Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061 (1998). In its attempt to prevent affiliates of Foreign Signatories from using their rights as signatories in
international regulatory purposes, affiliation is a twenty-five percent equity interest or a controlling interest at any level. This affiliation standard is no longer necessary to serve the public interest. The competitive pressures preclude any foreseeable attempt to engage in the anticompetitive behavior the Commission seeks to prevent. Instead, the Commission should rely on a fifty-percent control standard, which may include a plurality ownership level in the carrier.

To effectuate a price squeeze or other anticompetitive behavior, the U.S. carrier and foreign-affiliated carriers would have to engage in an illegal, high-risk operation of providing service below cost for an extended period of time until other market participants exit the market. It is purely theoretical and highly unlikely that a non-controlling minority interest could convince the controlling interest to engage in such activity and succeed to the point where it would effectuate the harm the Commission is seeking to prevent. The Commission should recognize the improbability of such behavior in this market and apply ECO or its dominant carrier safeguards only when the applicant is controlling or is controlled by the foreign carrier in the destination market.

Further, the Commission should recognize the inability of a U.S. carrier to force a change in the affiliate's settlement rates unless it has de facto control over the foreign carrier. U.S. carriers that are "affiliated" with a foreign carrier under the Commission's current rules, but do not have a level of interest in the foreign carrier to exercise control of its operations, have their own facilities authorizations conditioned on the foreign carrier's compliance with the benchmark settlement rates. This condition could unfairly preclude the U.S. carrier from the facilities market on this route due to the actions of a foreign carrier that the U.S. carrier potentially could not influence or direct due to its non-controlling interest.

C. Modify the Benchmark Settlement Rates to Recognize Calling Party Pays.

In many foreign nations, mobile traffic costs are the responsibility of the party that originated the call, not always the mobile user as in the United States. Many believe this system stimulates growth and the use of wireless services, and the Commission commenced a proceeding to determine if it would be appropriate in the United States.205 Calling Party Pays ("CPP") is currently impacting the settlement arrangements of U.S. international carriers that are complying with the Benchmarks Order. Because CPP costs are the responsibility of the caller in the originating country, they result in a hidden surcharge on settlement rates paid for international service. These surcharges are added to the present settlement rates and can result in some cases in rates that exceed the applicable benchmark. This is a particular concern for U.S. carriers that are affiliated on the route and providing service on a facilities basis.

D. Eliminate Any Remaining Cost Disclosures.

All remaining requirements to disclose costs or make cost information publicly available are no longer in the public interest as the result of meaningful competition between service providers. In the ISP Reform Order, the Commission correctly recognized that the disclosure of cost information by regulatory mandate can harm competition. The Commission should extend this conclusion to other carrier-to-carrier contracts the Commission currently requires to be filed and made available to interested parties.206

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