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

In the Matter of	)	File No. EB-07-IH-5149
	)	
	)	
IDT Corporation	)	NAL/Acct. No. 200832080092
	)	
	)	
Apparent Liability for Forfeiture	)	FRN No. 0003-7900-37
	)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 9, 2008 **Released: July 10, 2008**

By the Commission:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("*NAL*"), we find that IDT Corporation ("IDT" or "the Company"), has apparently violated section 220 of the Communications Act of 1934, as amended (the "Act"),[1] and section 43.51 of the Commission's rules by willfully and repeatedly failing to file with the Commission, within thirty days of execution, a copy of an agreement with Telecommunications D'Haiti S.A.M. ("Teleco Haiti") and each of four amendments thereto governing, among other things, the exchange of services, routing of traffic, accounting rates, and division of tolls on the U.S.-Haiti route.[2] We further find that IDT has violated sections 43.51 and 64.1001 of the Commission's rules by failing to file a modification request for each of its four amendments to rate schedules under the terms of its agreement with Teleco Haiti,[3] and by failing to obtain Commission approval prior to implementing such amendments.[4] Based on our review of the facts and circumstances surrounding this matter, we find that IDT is apparently liable for a total forfeiture of $1.3 million.

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[1] 47 U.S.C. § 220(g). Section 220 of the Act gives the Commission discretion to "prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this Act," 47 U.S.C. § 220(a)(1), and provides that

> [a]fter the Commission has prescribed the forms and manner of keeping accounts, records, and memoranda to be kept by any person as herein provided, it shall be unlawful for such person to keep any other accounts, records or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other manner than that prescribed or approved by the Commission.

47 U.S.C. § 220(g).

[2] 47 C.F.R. § 43.51(a)(1) (2003).

[3] 47 C.F.R. §§ 43.51(e)(2), 64.1001(b) (2003). The amendment of a rate schedule established pursuant to the terms of a contract constitutes a contract amendment for which a party must file a modification request in accordance with section 64.1001 of the Commission's rules.

[4] 47 C.F.R. § 64.1001(e) (2003).

II. BACKGROUND

2. The Commission's International Settlements Policy ("ISP") is a longstanding regulatory framework that governs how U.S. carriers negotiate with foreign carriers for the exchange of international telecommunications traffic. The ISP is the structure by which the Commission has sought to respond to concerns that foreign carriers with market power are able to take advantage of the presence of multiple U.S. carriers serving a particular market.[5] The Commission established the ISP to prevent foreign carriers with market power from discriminating, or using threats of discrimination or other anticompetitive actions against competing U.S. carriers as a strategy to obtain pricing concessions regarding the exchange of international traffic, a practice known as "whipsawing."[6] The Commission thus adopted the ISP to ensure a competitive playing field among providers of international services due to the possibility that dominant carriers on the foreign end of a U.S.-international route could leverage their market power to the detriment of U.S. carriers and, ultimately, U.S. consumers.

3. The ISP establishes three conditions on the ability of U.S. carriers to execute agreements with foreign carriers for the exchange of international traffic: (1) all U.S. carriers must be offered the same effective accounting rate, and same effective date for the rate ("nondiscrimination");[7] (2) U.S. carriers must receive a proportionate share of U.S.-inbound, or return, traffic based upon their proportion of U.S.-outbound traffic ("proportionate return");[8] and (3) the accounting rate[9] must be divided evenly

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[5] *See International Settlements Policy Reform*, Notice of Proposed Rulemaking, 17 FCC Rcd 19954, 19956-60 (2002), ¶¶ 2-6 ("*ISP Reform NPRM*"). The ISP was formerly termed the Uniform Settlements Policy ("USP"). The USP initially applied to telegraph and telex services and evolved through Commission decisions and practices. The intent of the USP was to ensure that U.S. carriers were treated fairly and that U.S. customers received the benefits that result from the provision of international services on a competitive basis. Among other things, the policy required uniform accounting rates and uniform terms for sharing of tolls. *See, e.g., Mackay Radio and Telegraph Co.,* 2 F.C.C. 592 (Telegraph Committee 1936), *aff'd sub nom. Mackay Radio v. FCC,* 97 F.2d 641 (D.C. Cir. 1938) (In the 1936 decision, the Commission denied an application for section 214 authority to serve Norway because the settlement terms would have permitted the Norwegian carrier to "whipsaw," or engage in anticompetitive behavior against, U.S. carriers by manipulating traffic flows and retaining a greater percentage of the accounting rate); *Modifications of Licenses in the Fixed Public and Fixed Public Press Services*, 11 F.C.C. 1445 (1946); *Mackay Radio and Telegraph Co.,* 25 F.C.C. 690 (1951), *rev'd on other grounds sub nom. RCA Communications, Inc. v. FCC*, 210 F.2d 694 (D.C. Cir. 1952), *vacated and remanded,* 346 U.S. 86 (1953); *TRT Telecommunications Corp.,* 46 F.C.C. 2d 1042 (1974). In 1986, the Commission termed the USP the "ISP" and extended its application to International Message Telephone Service ("IMTS") in response to significantly greater reported instances of "whipsawing." The Commission also streamlined the filing of accounting rate modifications and chose not to apply the ISP to enhanced services. *See Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes,* Report and Order, 2 FCC Rcd 1118 (1987) ("*ISP Order*"), *modified in part on recon.,* Order on Reconsideration, 2 FCC Rcd 1118 (1987) ("*ISP Recon Order*"); Further Reconsideration, 3 FCC Rcd 1614 (1988) ("*ISP Further Recon*").

[6] In general, "whipsawing" is the abuse of market power by a foreign carrier, or a combination of carriers, within a foreign market that is intended to play U.S. carriers in foreign markets against each other in order to gain unduly favorable terms in arrangements for the exchange of traffic. *ISP Reform NPRM,* 17 FCC Rcd at 19956-57, ¶ 2. This practice occurs where a foreign carrier has the ability, through pressure on multiple U.S. carriers, to extract higher termination rates from a U.S. carrier than the foreign carrier is required to pay to terminate traffic on the U.S. end. *Id.* Thus, the goal of the ISP is to address this asymmetry in market power. If "whipsawing" were to occur, U.S. carriers would be paid at or near cost for terminating U.S.-international traffic on the U.S. end, while paying above-cost settlement rates for termination of U.S.-international services on the foreign end, thereby forcing the U.S. carriers to recover those additional costs from U.S. ratepayers in the form of higher calling prices. *Id.*

[7] 47 C.F.R. § 64.1002(a)(1).

[8] 47 C.F.R. § 64.1002(a)(2).

(*i.e.*, 50-50) between U.S. and foreign carriers for U.S. inbound and outbound traffic ("symmetrical settlement rates").[10] Together, these components are intended to create a unified bargaining position among U.S. carriers in their negotiations with foreign carriers possessing market power.[11]

4. To detect instances in which U.S. and foreign carriers have entered into arrangements that violate the Commission's International Settlements Policy, the Commission adopted, among other safeguards, section 43.51 of its rules, which imposes on U.S. carriers specific filing obligations relating to contracts and other arrangements between U.S. and foreign carriers for the exchange of international telecommunications traffic.[12] In particular, the Commission required that certain U.S. carriers who execute agreements with foreign carriers concerning the exchange of services, routing of traffic, rate and other matters, timely file such agreements with the Commission,[13] and further directed that such carriers file a "modification request" prior to implementing any arrangement that offered terms different from those made available to any other carrier serving the same U.S.-international route.[14] In section 64.1001

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[9] The international accounting rate system evolved as part of a regulatory tradition in which international telecommunications services were supplied through a bilateral relationship between national monopoly carriers. An accounting rate is the price a U.S. facilities-based carrier negotiates with a foreign carrier for handling one minute of international telephone service. Each carrier's portion of the accounting rate is referred to as the settlement rate. *2000 Biennial Regulatory Review,* Report and Order, 16 FCC Rcd 10647, 10657 (2001), ¶ 15 n.44 ("*2000 Biennial Review"*).

[10] 47 C.F.R. § 64.1002(a)(3).

[11] *ISP Reform NPRM*, 17 FCC Rcd at 19957, ¶ 3.

[12] *See* 47 C.F.R. § 43.51; *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,* Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 24007 (1997), ¶ 259 ("[O]ur contract filing requirement in section 43.51 of the Commission's rules enables us to detect instances where carriers enter into arrangements that are inconsistent with our rules and policies.") ("*Foreign Participation Order*").

[13] Pursuant to the 2003 version of section 43.51(a) of the Commission's rules, certain common carriers generally must file with the Commission, within thirty days of execution:

> a copy of each contract, agreement, concession, license, authorization, operating agreement or other arrangement to which it is a party and amendments thereto with respect to the following: (i) the exchange of services; and, (ii) the interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances. . . .

47 C.F.R. § 43.51(a)(1) (2003). This version of section 43.51(a) applied to any carrier that was:

> engaged in foreign communications and enters into a contract, agreement, concession, license, authorization, operating agreement or other arrangement . . . with a foreign carrier that does not qualify for the presumption . . . that it lacks market power on the foreign end of one or more of the U.S.-international routes included in the contract.

47 C.F.R. § 43.51(b)(2) (2003).

[14] 47 C.F.R. § 43.51(e) (2003). The 2003 version of section 43.51(e) provided, in pertinent part:

> [I]f a carrier files an operating or other agreement with a foreign carrier pursuant to [section 43.51(a)] 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, 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

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of its rules, the Commission, among other things, barred subject carriers from implementing any such arrangement absent prior Commission approval, and further required that such carriers notify all other carriers providing service on the same international route of its modification request, concurrently with the filing of such request with the Commission.[15] Collectively, the obligations imposed by sections 43.51 and 64.1001 were intended to enable the Commission to identify potential instances of anticompetitive conduct and enforce compliance with the International Settlements Policy.[16]

5. As the U.S.-international market and foreign markets for telecommunications services have become more competitive, the Commission has increasingly relaxed its application of the ISP. Most recently, the Commission, in 2004, lifted the ISP and certain associated requirements for all U.S.-international routes where U.S. carriers had negotiated termination rates that fell below certain thresholds, or "benchmarks" previously established by the Commission in order to reduce international settlement rates by bringing them closer to cost.[17] The Commission determined that, in such cases, market forces were sufficiently competitive to justify removing the ISP as it applied to U.S. carriers. The Commission further found that removing the ISP requirements from benchmark-compliant routes would simplify the Commission's current regulatory regime and facilitate the expansion of opportunities for flexible, commercial arrangements on more routes, to the benefit of U.S. competition and U.S. consumers.[18] Pursuant to the procedures established in the *ISP Reform Order,* the Commission began to identify U.S.-

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> file with the International Bureau a modification request under section 64.1001 [of the Commission's rules].

47 C.F.R. § 43.51(e) (2003). The 2003 version of section 64.1001 similarly stated that:

> [i]f the international settlement arrangement in the operating agreement or amendment referred to in [section 43.51(e)] differs from the arrangement in effect in the operating agreement of another carrier providing service to or from the same foreign point, the carrier must file a modification request under this section unless the international route is exempt from the international settlements policy under [section 43.51(e)].

47 C.F.R. § 64.1001(b) (2003). Section 43.51(e)(2) of the Commission's rules similarly required carriers to file a modification request where such carriers amended an existing operating agreement with a foreign carrier. *See* 47 C.F.R. § 43.51(e)(2) (2003).

[15] 47 C.F.R. § 64.1001(e), (f) (2003). In particular, section 64.1001(e) of the Commission's rules provided that "[a]n operating agreement or amendment filed under a modification request cannot become effective until the modification request has been granted. . . ." 47 C.F.R. § 64.1001(e) (2003).

[16] Section 64.1002 of the Commission's rules, which codifies the International Settlements Policy, directs that carriers subject to the ISP "must . . . duly comply with the requirements in § 43.51 and § 64.1001 [of the Commission's rules]." 47 C.F.R. § 64.1002.

[17] *International Settlements Policy Reform,* First Report and Order, 19 FCC Rcd 5709, 5723 (2004), ¶ 27 ("*ISP Reform Order*"). As early as 1992, the Commission adopted benchmarks for international settlement rates that were applicable to specific U.S.-international routes. *See 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 (1992). These benchmark settlement rates served as guidelines for what constituted the maximum just and reasonable amount that U.S. carriers should pay foreign carriers for the termination of U.S.-international traffic.

[18] *ISP Reform Order,* 19 FCC Rcd at 5723, ¶ 27.

international routes that were considered exempt from the ISP.[19] On November 4, 2004, the Commission lifted the ISP as it applied to the route between the United States and Haiti, among others.[20]

6. IDT is a publicly-traded, New Jersey-based company that provides a range of telecommunications services domestically and internationally, including local, long distance, wireless, a range of voice over Internet protocol services, and pre-paid calling cards.[21] IDT offers services to retail and wholesale markets in more than 230 countries and territories worldwide.[22] In 2007, IDT's telecommunications division generated revenues of approximately $1.73 billion.[23]

7. On October 22, 2003, IDT entered into a Carrier Service Agreement ("agreement") with Teleco Haiti that established the terms and conditions for the provision and purchase of wholesale telecommunications services on the U.S.-Haiti route, including the rates for such services.[24] During the time period beginning February 5, 2004, until November 4, 2004, when the ISP was lifted from the U.S.-Haiti route, IDT and Teleco Haiti ("the parties") amended the agreement by establishing or amending four times the rates that would apply to Teleco Haiti's termination of U.S.-originated traffic.[25] The four rates became effective on February 5, February 23, May 12, and August 1, 2004.[26] On March 1, 2007, IDT filed its Carrier Service Agreement with the Commission at the request of Commission staff,[27] and, on May 23, 2007, IDT identified the rates established under the agreement, again at the request of Commission staff.[28]

III. DISCUSSION

8. Pursuant to section 220 of the Act, the Commission may "prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to [the Act],"[29] and "may classify [such] carriers and prescribe different requirements . . . for different classes of carriers," including international telecommunications carriers.[30] In addition, section 220 makes it unlawful for subject

[19] *Id.*, 19 FCC Rcd at 5771, Appendix D; *Additional U.S.-International Routes Exempted from the International Settlements Policy*, Public Notice, 19 FCC Rcd 22032 (2004).

[20] *Additional U.S.-International Routes Exempted from the International Settlements Policy*, Public Notice, 19 FCC Rcd 22032, 22035 (2004).

[21] http://idt.net (as of June 17, 2008).

[22] http://idt.net (as of June 17, 2008).

[23] http://idt.net (as of June 17, 2008).

[24] Letter from Troy F. Tanner, Bingham McCutchen, Counsel for IDT Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, dated March 1, 2007 (attaching Carrier Service Agreement between IDT and Telecommunications D'Haiti S.A.M., October 22, 2003) ("Tanner March 1 Letter").

[25] Letter from Troy F. Tanner, Bingham McCutchen, Counsel for IDT Corp., to Helen Domenici, Chief, International Bureau, Federal Communications Commission, dated May 23, 2007, at 2 ("Domenici May 23 Letter").

[26] *Id.* at 2.

[27] Tanner March 1 Letter, Attachment.

[28] Domenici May 23 Letter, at 2.

[29] 47 U.S.C. § 220(a)(1).

[30] 47 U.S.C. § 220(h). By establishing certain filing and notification requirements to implement the ISP, the Commission has deemed certain international carriers to be a "class of carriers" necessitating "different requirements" to satisfy the main purpose of section 220 of the Act.

carriers "to keep the accounts in any other manner than that prescribed or approved by the Commission."[31] In cases where a carrier fails to keep its accounts and records as required, or "to submit such accounts, records, memoranda, documents, papers, and correspondence . . . to the inspection of the Commission," section 220 imposes a forfeiture of "$6,000 for each day of the continuance of each such offense."[32] To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such penalty should be imposed.[33] The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has violated the Act or a Commission rule.[34] As set forth in greater detail below, we conclude under this standard that IDT is apparently liable for forfeiture for its apparent violations of section 220 of the Act, and sections 43.51 and 64.1001 of the Commission's rules.[35]

9. The fundamental issues in this case are whether IDT apparently violated the Act and the Commission's rules by: (1) failing to file, within thirty days of execution, a copy of its Carrier Service Agreement with Teleco Haiti, and four subsequent amendments to the agreement; (2) failing to file a "modification request" for Commission authorization for each of four rate amendments to the agreement that established terms and conditions different from equivalent terms provided to another carrier serving the same U.S.-international route; and (3) failing to obtain Commission authorization prior to implementing such rate amendments. We answer these questions affirmatively. Based on a preponderance of the evidence, therefore, we conclude that IDT is apparently liable for a forfeiture of $1.3 million for apparently violating section 220 of the Act,[36] and sections 43.51 and 64.1001 of the Commission's rules.[37]

10. Specifically, we propose the following forfeitures for IDT's apparent violations: (1) a total of $500,000 for IDT's failure to file, within thirty days of execution, a copy of its Carrier Service Agreement with Teleco Haiti, and four subsequent amendments to the agreement; (2) a total of $400,000 for IDT's four failures to file a modification request with the Commission prior to establishing, or amending, contractual termination rates for Haiti-bound traffic; and (3) a total of $400,000 for IDT's implementation of rate terms on four occasions that varied from equivalent rates provided to another carrier serving the same U.S.-international route, prior to receiving Commission approval.

A. Filing of Agreements

11. Based on a preponderance of the evidence, we conclude that IDT has apparently violated section 220 of the Act, and section 43.51(a) of the Commission's rules by failing to file with the Commission a copy of its Carrier Service Agreement with Teleco Haiti, as well as four amendments to

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[31] 47 U.S.C. § 220(g).

[32] 47 U.S.C. § 220(d). The inflation-adjusted forfeiture that was effective in 2003 for violations of section 220 was $7,600 per day. 47 C.F.R. § 1.80(b)(4), Note, Section III (2003).

[33] 47 C.F.R. § 1.80(f).

[34] *See, e.g., SBC Communications, Inc.*, *Apparent Liability for Forfeiture,* Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

[35] 47 U.S.C. § 220; 47 C.F.R. §§ 43.51, 64.1001 (2003).

[36] 47 U.S.C. § 220.

[37] 47 C.F.R. §§ 43.51, 64.1001.

such agreement,[38] from November 22, 2003[39] to November 4, 2004, when the Commission lifted the ISP and its implementing rules from the U.S.-Haiti route.[40] IDT's failure to satisfy its obligations under section 43.51(a) constitutes a clear violation of a vital Commission requirement. As noted above, the 2003 version of section 43.51(a) unambiguously required that all subject carriers file with the Commission, within thirty days of execution, "a copy of each contract, agreement . . . or other arrangement to which it is a party and amendments thereto with respect to . . . the exchange of services and the interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, or the settlement of traffic balances."[41] With certain exceptions, section 43.51(a) applied, by its terms, to all carriers "engaged in foreign communications [that enter] into a contract, agreement . . . or other arrangement and amendments thereto with a foreign carrier that does not qualify for the presumption . . . that it lacks market power on the foreign end of one or more of the international routes included in the contract."[42]

12. At the time that IDT and Teleco Haiti executed their agreement, and for a period when the Agreement was effective, Teleco Haiti was a telecommunications provider presumed to possess market power on a route that was subject to the ISP.[43] Although section 43.51(a) thus obligated IDT to file its Carrier Service Agreement with the Commission by November 22, 2003 -- thirty days after its execution -- IDT failed to do so.[44] In addition, IDT only apprised the Commission of its four contractual amendments relating to termination rates for the first time on May 23, 2007, in response to a Commission staff request.[45]

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[38] It is unclear, based upon the record, whether IDT and Teleco Haiti amended their Carrier Service Agreement through oral or written agreement. Even if the parties had amended their agreement orally, however, IDT still would have been obligated to file a "certified statement covering all the details of the arrangement," in accordance with section 43.51(a)(2) of the Commission's rules. 47 C.F.R. § 43.51(a)(2).

[39] Section 43.51(a) of the Commission's rules required that IDT file its agreement with the Commission by November 22, 2003, thirty days after the agreement was executed. *See* 47 C.F.R. § 43.51(a) (2003).

[40] Although we exercise our prosecutorial discretion and limit our finding of liability to the period of time from November 22, 2003 to November 4, 2004, we note that IDT arguably is also subject to liability for failing to file its agreement and amendments until March 1, 2007, over three years after Commission rules required it to do so. In our view, the fact that section 43.51(a) no longer applied to carriers serving the U.S.-Haiti route as of November 4, 2004 arguably does not excuse the company from discharging an obligation that attached prior to that date.

[41] 47 C.F.R. § 43.51(a)(1)(i), (ii) (2003).

[42] 47 C.F.R. § 43.51(b)(2) (2003).

[43] *See the International Bureau Revises and Reissues the Commission's List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, Public Notice, 18 FCC Rcd 2438 (2003).

[44] As noted above, IDT ultimately filed its agreement with the Commission on March 1, 2007. The Commission has repeatedly stated, however, that subsequent corrective measures to address a violation do not eliminate a licensee's responsibility for the period during which the violation occurred. IDT's untimely filing thus neither excuses nor mitigates in any way its apparent violation of section 43.51(a). *SBC Communications, Inc.*, Order of Forfeiture, 16 FCC Rcd 5535, 5542, ¶ 18 (2001); *see also Coleman Enters., Inc. d/b/a Local Long Distance, Inc.*, Order of Forfeiture, 15 FCC Rcd 24385, 24388, ¶ 8 (2000); *American's Tele-Network Corp.*, Order of Forfeiture, 16 FCC Rcd 22350, 22355-56, ¶ 15 (2001).

[45] Domenici May 23 Letter, at 2. Based upon the record, it is unclear precisely when IDT and Teleco Haiti executed the four rate amendments at issue. Irrespective of when they were executed, however, IDT was required by section 43.51(a) to apprise the Commission of such amendments in 2004, long before IDT saw fit to do so.

13. IDT contends that it did not file its Carrier Service Agreement with Teleco Haiti in accordance with section 43.51(a) because it "believed [the agreement] fell under the Commission's policy of not requiring the filing of interim agreements under the International Settlements Policy."[46] To buttress its assertion, IDT points to a 2004 *Order on Review* in which the Commission stated that it "does not require carriers to file interim agreements under the ISP."[47] We reject IDT's claim that its agreement with Teleco Haiti constituted an "interim agreement" not subject to the requirements of section 43.51(a). First, IDT puts forth no evidence to support its assertion that the Carrier Service Agreement was interim in nature.[48] Indeed, the agreement on its face strongly suggests otherwise,[49] and nowhere purports to establish terms, including rates, that were intended by the parties to be merely interim.[50] We find that the establishment of sequential, short-term rates that IDT has now provided to the Commission does not constitute an interim arrangement, particularly where, as here, such rates were established pursuant to the terms of an agreement that was clearly intended to be final, and there is no evidence to the contrary.[51] We also find disingenuous IDT's reliance on the Commission's statement that it "does not require carriers to file interim agreements under the ISP" in justifying its failure to file, given that IDT and Teleco Haiti executed the agreement prior to the Commission's June 2004 *Order on Review.*

14. We view IDT's failure to file its Carrier Service Agreement with Teleco Haiti, and four subsequent amendments, as a serious dereliction of IDT's obligations under the Act and our rules. As the Commission has noted, "[t]he primary purpose for requiring the filing of contracts between carriers is to assist the Commission in monitoring whether carriers are following the Commission's rules or are otherwise acting in an anti-competitive manner."[52] The Commission adopted section 43.51(a) in recognition that foreign carriers who possess market power on the foreign end of a route can adversely affect competition in the U.S. market by entering into exclusive arrangements, "whipsawing," or engaging in other such practices. The obligations imposed by section 43.51(a) thus were designed to reduce or eliminate the potential for such competitive harm by "enabl[ing] the Commission to enforce the International Settlements Policy and maintain regulatory oversight of accounting rate agreements. . . ."[53]

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[46] *See* Tanner March 1 Letter, at 1; Tanner May 23 Letter, at 1-2.

[47] *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief,* Order on Review, 19 FCC Rcd 9993, 9995 (2004), ¶ 2 n.9.

[48] *See* Tanner March 1 Letter.

[49] *See* Carrier Service Agreement between IDT and Telecommunications D'Haiti S.A.M., October 22, 2003, ¶¶ 1, 3.1, 7.12, Annex A ¶ 1.2 ("Carrier Service Agreement"); Domenici May 23 Letter, ¶ 3. The Commission's practice regarding interim agreements is limited and intended largely to keep U.S.-international circuits open when a U.S. carrier and its foreign correspondent are renegotiating expired rate agreements. Once service is disrupted due to inconclusive or failed negotiations, it becomes increasingly difficult for the parties involved to reach agreement, particularly where there is an ongoing dispute concerning amounts owed. The Commission's practice regarding interim agreements allows parties to continue negotiations while exchanging traffic at an agreed-upon interim rate, often the rate that has just expired. Once final agreement is reached, the parties typically "true-up" any difference between the interim and final rate. In light of these industry practices, requiring that interim terms be publicly filed with the Commission is unnecessary, and could hamper negotiations for the exchange of telecommunications traffic. IDT has offered no evidence of ongoing negotiations with Teleco Haiti that support its characterization of the Carrier Service Agreement as "interim."

[50] *See* Carrier Service Agreement.

[51] *Id.*, Section III, ¶ 7.12.

[52] *2000 Biennial Review,* 16 FCC Rcd at 10678, ¶ 68.

[53] *Id.*

15. A carrier's compliance with section 43.51(a) is critical to enforcement of the ISP and related policies because it enables the Commission to monitor the existence of arrangements that could undermine competition in the market for telecommunications services on a particular international route, in this case, the U.S.-Haiti route. By failing to file its Carrier Service Agreement with Teleco Haiti in accordance with section 43.51(a), IDT fundamentally undermined the Commission's implementation of the ISP on the U.S.-Haiti route. In particular, IDT's failure deprived the Commission of any opportunity to review the agreement and possibly seek clarifications about its terms and conditions. More significantly, IDT's failure prevented the Commission from judging the agreement's overall compliance with the ISP and taking any steps needed to ensure the agreement was consistent with the Commission's pro-competitive rules and policies.

B. Accounting Rate Modifications

16. Based on a preponderance of the evidence, we further conclude that IDT apparently has violated section 220 of the Act and sections 43.51(e) and 64.1001(b) of the Commission's rules by failing to file a modification request for Commission approval for four separate amendments to its Carrier Service Agreement that established terms and conditions different from equivalent terms provided to another carrier serving the same U.S.-international route.[54]

17. Although the parties amended their agreement four times after its execution to establish different termination rates, IDT failed to file with the Commission the requisite modification requests seeking approval for such amendments, in accordance with sections 43.51(e) and 64.1001(b). As noted above, section 43.51(e) of the Commission's rules required the filing of a modification request where a carrier has executed an agreement, or amendment, with a foreign carrier establishing terms different from "the equivalent terms and conditions in the operating agreement of another carrier providing . . . similar service between the U.S. and the same foreign point."[55] At the time that IDT entered into its agreement with Teleco Haiti, another carrier, AT&T, was providing service on the U.S.-Haiti route pursuant to an agreement with Teleco Haiti that established an accounting rate different from the rate negotiated between IDT and Teleco Haiti. Because AT&T had filed a modification request with the Commission on April 22, 2003 disclosing its new accounting rates for the exchange of traffic with Teleco Haiti, IDT was, or should have been, aware that AT&T's rate was different from – indeed, higher than – the rate that IDT had negotiated with Teleco Haiti, and thus triggered IDT's obligation to file its own modification request, pursuant to sections 43.51(e) and 64.1001(b) of the Commission's rules.[56]

18. We view IDT's failure to file a modification request for each of the four rate amendments to its Carrier Service Agreement with Teleco Haiti as a serious offense. As the Commission has noted,

[54] 47 U.S.C. § 220; 47 C.F.R. §§ 43.51(e), 64.1001(b) (2003). Although we find IDT apparently liable for its failure to file a modification request for each of the four amendments to its agreement with Teleco Haiti, we note that IDT arguably is also liable for failing to file its agreement and amendments until March 1, 2007, over three years after Commission rules required it to do so. As we stated above, that sections 43.51 and 64.1001 no longer applied to carriers serving the U.S.-Haiti route as of November 4, 2004 arguably does not excuse the company from discharging an obligation that attached prior to that date.

[55] 47 C.F.R. § 43.51(e) (2003); *see also* 47 C.F.R. § 64.1001(b) (2003). While the applicability of section 43.51(e) appears limited to carriers who have "file[d] an operating or other agreement with a foreign carrier," we interpret the section more broadly to apply to any carrier who is required to file an operating agreement pursuant to section 43.51(a). We find that a more restrictive interpretation would thwart detection of anticompetitive practices by U.S. and foreign carriers, and undermine enforcement of the ISP.

[56] *See* Application for Accounting Rate Change, filed by AT&T Corp., dated April 22, 2003 (reporting a change in the accounting rate for the exchange of traffic with Teleco Haiti from \$.60 to \$.46).

"[t]he requirement for filing accounting rate modification requests . . . is intended to prevent harm to U.S. consumers resulting from the exercise of market power by foreign carriers. . . . [and] assists the Commission in ensuring compliance with the ISP and the Commission's benchmarks . . . [policy]."[57] As we noted above, one of the underlying purposes of the ISP is to protect against discriminatory treatment by assuring U.S. carriers access to the same rate with the foreign carrier considered to have market power on the U.S.-international route.[58] To that end, modification requests filed pursuant to section 64.1001 serve as a means by which to alert other U.S. carriers of rate changes and other arrangements on the U.S.-international route to which they are entitled access under the ISP, and thus are critical to enforcement of the ISP.[59]

19. The failure of a carrier such as IDT to abide by its filing obligation under section 64.1001 undermines enforcement of the ISP by allowing the carrier, among other things, to enter into an exclusive or anticompetitive arrangement absent any scrutiny or oversight by its competitors or the Commission. Moreover, the Commission and competitors are denied any opportunity to raise objections or concerns relating to the new arrangements, as contemplated by section 64.1001.[60] The harm resulting from such failure ultimately falls on U.S. consumers because competing U.S. carriers are deprived access to the newly negotiated arrangement. In this case, IDT failed to file a modification request for each of four

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[57] *2004 Biennial Regulatory Review*, Staff Report, 20 FCC Rcd 343, 379 (2005), Appendix VII. As noted above, the Commission has established benchmarks that govern the international settlement rates that U.S. carriers may pay foreign carriers to terminate international traffic originating in the United States. *See International Settlement Rates,* IB Docket No. 96-261, Report and Order, 12 FCC Rcd 19806 (1997), *aff'd sub nom. Cable and Wireless P.L.C. v. FCC,* 166 F.3d 1224 (D.C. Cir. 1999), Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999).

[58] *See ISP Reform Order*, 19 FCC Rcd at 5725, ¶ 30 ("As the ISP provides that foreign carriers offer the same rates to all U.S. carriers, a showing that one U.S. carrier has negotiated a benchmark-compliant rate with the foreign carrier with market power triggers the ability for all other U.S. carriers to take the same rate. Once the foreign carrier with market power is under an obligation to provide services at benchmark rates to all U.S. carriers, we find it reasonable to conclude that the concerns underlying our use of the ISP on that route have been sufficiently alleviated to lift the ISP.").

[59] *See Foreign Participation Order*, 12 FCC Rcd at 24030, ¶ 313 ("parties that might have concerns with the reductions*, i.e.*, those with operating agreements with the same carrier, are given notice of the filing directly by the applicant. Therefore, a public notice would only prove to delay a procedure for approving modifications that is designed to allow expeditious grants in most cases while giving those parties potentially affected a chance to respond.").

[60] The 2003 version of section 64.1001(g) provided, in pertinent part, that:

> All modification requests will be subject to a twenty-one (21) day pleading period for objections and 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 (22^{nd}) 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 . . . . Modification requests that are formally opposed must await formal staff action by the International Bureau before the proposed modification can be implemented.

47 C.F.R. § 64.1001(g) (2003).

amendments to its agreement with Teleco Haiti that established rates different from those in effect between Teleco Haiti and AT&T.

C. Implementation of Rate Amendments Absent Commission Approval

20. Based on a preponderance of the evidence, we further conclude that IDT apparently has violated section 220 of the Act, and section 64.1001(e) of the Commission's rules by implementing four amendments to its Carrier Service Agreement with Teleco Haiti absent prior Commission approval. Despite section 64.1001(e)'s clear prohibition,[61] IDT and Teleco Haiti, on February 5, February 23, May 12 and August 1, 2004, effectuated amendments to their operating agreement that established rates for Teleco Haiti's termination of U.S.-Haiti traffic.[62]

21. Section 64.1001 of the Commission's rules sets out a detailed and comprehensive framework for notification and approval of arrangements between a U.S. and foreign carrier that are different from those the foreign carrier has brokered with competing U.S. carriers.[63] That framework establishes a specific time period for deliberation and comment on modification requests by competitors and the Commission, and provides a vehicle for possible objections to, or denial of, such requests.[64] Where, as here, a carrier implements an agreement with a foreign correspondent prior to requesting, and receiving, the requisite approval, it circumvents the Commission's process for ensuring that arrangements between U.S. and foreign carriers are consistent with the ISP and otherwise serve the public interest. Moreover, it deprives competing carriers an opportunity to raise competitive concerns or to opt in to more favorable arrangements, as contemplated by section 64.1001.

D. Proposed Forfeiture Amount

22. In light of IDT's apparent violations of section 220 of the Act, and sections 43.51 and 64.1001 of the Commission's rules, we find that a proposed forfeiture is warranted pursuant to section 220(d). The rules that IDT apparently violated in this case -- sections 43.51 and 64.1001 -- prescribe the manner in which certain carriers, including IDT, must maintain their records, and direct that such carriers submit specified documents to the inspection of the Commission and other interested parties.[65] Indeed, the Commission expressly relied upon section 220, among other provisions, as a statutory basis for its

[61] While the applicability of section 64.1001 as it existed in 2003 appears limited to an operating agreement or amendment "filed under a modification request," we interpret the provision more broadly to apply to any agreement or amendment for which a modification request must be filed, *e.g.*, an agreement or amendment whose terms and conditions 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. We find that a more restrictive interpretation would thwart detection of anticompetitive conduct by foreign carriers and undermine Commission enforcement of the ISP and related policies. Consistent with our interpretation, the Commission in 2004 revised section 64.1001 to state that "[a]ny operating agreement or amendment *for which a modification request is required to be filed* cannot become effective until the modification request has been granted. . . ." 47 C.F.R. § 64.1001(a) (2004) (emphasis added).

[62] Domenici May 23 Letter, at 2.

[63] *See* 47 C.F.R. § 64.1001 (2003).

[64] *See* 47 C.F.R. § 64.1001(g) (2003).

[65] *See* 47 C.F.R. §§ 43.51, 64.1001 (2003).

adoption of sections 43.51 and 64.1001 of the rules.[66] Accordingly, we find that IDT is apparently liable for forfeiture, pursuant to section 220(d) of the Act, for violating these provisions.

23. Based on our review of the facts and circumstances of this case, we find that IDT is apparently liable for a forfeiture of $1.3 million. We find IDT apparently liable for a total of thirteen discrete offenses, including five violations of section 43.51(a),[67] four violations of sections 43.51(e) and 64.1001(b),[68] and four violations of section 64.1001(e).[69] As noted above, apparent violations of section 220 of the Act, such as those at issue here, carry a statutorily-prescribed per day penalty pursuant to section 220(d). Such penalties are then subject to mitigation or remission in accordance with section 504 of the Act.[70] Section 220 violations thus stand in contrast to other infractions for which the Act establishes no specific forfeiture amount.[71] The inflation-adjusted statutory forfeiture that was effective for violations of section 220(d) in 2003 was $7,600 for each day in which a violation continued, and $8,600 per day in 2004.[72]

24. Our review of the record indicates that IDT's thirteen violations, which varied in duration, continued for a minimum of approximately two weeks, to almost one year. If we were to apply strictly the per day forfeiture dictated by section 220(d) to each of IDT's apparent violations, our calculation would yield an amount that we find excessive under the circumstances. Given the totality of the circumstances, including IDT's overall history of compliance and ability to pay, we find IDT liable for a penalty of $100,000 per violation. We believe this amount reasonably reflects our commitment to ensure compliance with the Commission's International Settlements Policy and its implementing rules, yet is not unduly burdensome to a large and highly profitable company such as IDT. Given the central importance

[66] Section 1.80 of the Commission's rules, which governs forfeiture proceedings, provides that, "[i]n the case of a forfeiture imposed against a carrier under sections 202(c), 203(e) and 220(d), no forfeiture will be imposed if the violation occurred more than 5 years prior to the issuance of a notice of apparent liability." 47 C.F.R. § 1.80(c)(2). Each of the thirteen apparent violations in this case occurred within the five-year statute of limitations because they occurred in 2003 and 2004.

[67] IDT's apparent violations of section 43.51(a) include its failures to file with the Commission its Carrier Service Agreement with Teleco Haiti by November 22, 2003, and four subsequent rate amendments that became effective on February 5, February 23, May 12 and August 1, 2004.

[68] IDT's apparent violations of sections 43.51(e) and 64.1001(b) include its failures to file with the Commission a modification request for each of the four rate amendments to its Carrier Service Agreement with Teleco Haiti.

[69] IDT's apparent violations of section 64.1001(e) include its failures to obtain Commission approval prior to implementing each of the four rate amendments to its Carrier Service Agreement with Teleco Haiti.

[70] 47 C.F.R. § 1.80(b)(4), Note, Section III. Pursuant to section 504, "[t]he forfeitures imposed by title II . . . shall be subject remission or mitigation by the Commission, under such regulations and methods of ascertaining the facts as may seem to it advisable. . . ." 47 U.S.C. § 504(b). For convenience, the Commission treats such forfeitures as prescribed base amounts that are subject to downward adjustment, using the downward adjustment criteria applicable to section 503 forfeitures in section II of the note to section 1.80(b)(4). 47 C.F.R. § 1.80(b)(4), Note, Section III.

[71] In cases where there is no prescribed penalty, forfeiture determinations are governed by section 503 of the Act, which, among other things, establishes maximum forfeiture amounts that are subject further adjustment based upon the circumstances.

[72] 47 C.F.R. § 1.80(b)(5) (2003). The statutory maximum amount of a forfeiture penalty assessed under section 1.80 of the Commission's rules is subject to inflation-based adjustments at least once every four years. 47 C.F.R. § 1.80(b)(5). We note that some of IDT's apparent violations continued into 2004, when the applicable forfeiture penalty for section 220(d) violations increased to $8,600 per day. Nevertheless, for simplicity, we will use the $7,600 amount effective in 2003 to calculate IDT's apparent liability.

of sections 43.51 and 64.1001 in the Commission's pro-competitive regulatory framework governing international telecommunications services, we find that this amount represents an appropriate balance. Our proposed per violation forfeiture of $100,000, multiplied by IDT's thirteen apparent continuing violations, results in a total proposed penalty of $1.3 million.

IV. ORDERING CLAUSES

25. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 220(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 220(d), and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that IDT is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of $1.3 million for willfully and repeatedly violating the Act and the Commission's rules.

26. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's Rules,[73] within thirty days of the release date of this NOTICE OF APPARENT LIABILITY, IDT SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

27. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 9116229.

28. The response, if any, to this NOTICE OF APPARENT LIABILITY must be mailed to Hillary DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington, D.C. 20554 and must include the NAL/Acct. No. referenced above.

29. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

30. Requests for payment of the full amount of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE under an installment plan should be sent to Deputy Chief Financial Officer, Federal Communications Commission, Room 1-A637, 445 12th Street, S.W., Washington, D.C. 20554.[74]

[73] *See* 47 C.F.R. § 1.80.

[74] *See* 47 C.F.R. § 1.1914.

31. IT IS FURTHER ORDERED that a copy of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE shall be sent by certified mail, return receipt requested, to Troy F. Tanner, Counsel for IDT, Bingham McCutchen, LLP, 2020 K St., N.W., Washington, DC 20006-1806.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary