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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 1, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Market Entry and Regulation of International
Common Carriers with Foreign Carrier
Affiliations -- AT&T Petition for
Rulemaking: RM-8355

Dear Mr. Caton:

Enclosed herewith is the original and 4 copies of
the Statement of Telefonica Distancia de Puerto Rico, Inc. in
Opposition to AT&T Petition for Rulemaking.

Also enclosed is an additional copy of the Statement
and this transmittal which we ask you to date stamp and return.

Respectfully submitted,



James L. McHugh, Jr.

JLM/dlh
Enclosures

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Market Entry and Regulation
of International Common Carriers
With Foreign Carrier Affiliations

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RM-8355

**STATEMENT OF
TELEFONICA LARGA DISTANCIA DE PUERTO RICO, INC.
IN OPPOSITION TO AT&T PETITION FOR RULEMAKING**

Telefonica Larga Distancia de Puerto Rico, Inc. ("TLD")
submits this statement in opposition to the Petition for
Rulemaking of American Telephone & Telegraph Company.

SUMMARY

The AT&T Petition is of particular concern to TLD
because TLD is a facilities based U.S. international carrier with
a foreign carrier affiliation. TLD will describe in this
statement how the AT&T proposal would unfairly, unnecessarily and
illegally impact upon it.

Even beyond the specific effects on TLD, AT&T's
petition is based on faulty premisses. First, AT&T does not, and
cannot, demonstrate that the methods of regulation which the
Commission has adopted to date are ineffective in preventing
unfair competitive practices by foreign affiliated U.S. carriers.
Second, there is no showing that AT&T's proposed rules would lead
to the opening of the telecommunications markets of other
nations. In fact, such rules may have the opposite result,

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making it more difficult for many U.S. companies to penetrate foreign markets.

AT&T criticizes the approach of the Commission to issues of foreign affiliation as "patchwork." However, AT&T's analysis of the Commission's decisions in this area does not support this conclusion. The Commission has indeed approached differing situations presented by foreign affiliation in different ways. And since different situations frequently require different approaches or solutions, this is appropriate.^{1/} What AT&T offers as an alternative is a set of rigid, overly broad rules, the main beneficiary of which would be AT&T.

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^{1/} AT&T states that "Telefonica has suggested that it would be preferable if this ad hoc approach were replaced with a comprehensive set of rules that guide the actions and expectations of all parties." AT&T Petition, iii. AT&T is incorrect. TLD does not agree with AT&T that a "comprehensive set of rules" on this subject is appropriate or necessary. Rather, TLD has consistently maintained that it is not appropriate for the rules established at the time of TLD's entry in the U.S. market to be altered, without cause or factual basis, in the ways AT&T has urged in response to TLD facility applications.

I. IMPACT UPON TLD

A. Background

The history of TLD's creation and foreign affiliation is important background. In the early 1970's the Commonwealth of Puerto Rico acquired the Puerto Rico Telephone Company ("PRTC") from All Americas Cables & Radio ("AAC&R"). PRTC provided local exchange service to most of the Island of Puerto Rico. The Commonwealth made this investment with the hope of improving the quality of service provided by PRTC, increasing Puerto Rico's low telephone penetration and reducing the prohibitively high off-island rates that were then charged by the monopoly off-island carrier. At that time, rates for U.S. Mainland calls to and from Puerto Rico were approximately three times the rates for calls of similar distance and duration on the Mainland because Puerto Rico was essentially treated as an international point.^{2/}

With the aid of the FCC, the Puerto Rico rates were integrated into the Mainland structure. Eventually, PRTC was also permitted by the Commission to enter the off-island long distance market. TLD's predecessor was then created to provide these services as a separate PRTC subsidiary.

In the early 1990's, with the encouragement of U.S. Government officials, the Commonwealth of Puerto Rico undertook to privatize PRTC and TLD's predecessor. This effort, however,

^{2/} After the Commonwealth's acquisition of PRTC, AAC&R continued to provide the off-island long distance services in conjunction with AT&T, its "mainland correspondent." AT&T later purchased AAC&R's Puerto Rico long distance operations and combined it with its existing long lines services. As a result, AT&T is now TLD's major competitor in Puerto Rico/Virgin Islands services.

was successful only as to TLD. In December 1992, the FCC approved the acquisition of the assets of TLD by a subsidiary of Telefonica de Espana, the Spanish telephone company. Telefonica Larga Distancia de Puerto Rico, et al., 8 FCC Rcd. 106 (1992), ("TLD Order"). TLD is owned 79 percent by Telefonica and 19 percent by the Puerto Rico Telephone Authority ("PRTA," an authority of the Government of Puerto Rico).^{3/} The remaining 2 percent is owned by the employees of TLD through an employee stock ownership plan.

B. The TLD Order Proceedings

AT&T participated extensively in the proceedings which authorized the TLD acquisition. AT&T asked the Commission to impose numerous conditions and safeguards upon TLD in order to protect other U.S. carriers from the risk of TLD taking advantage of its foreign affiliation to engage in anticompetitive conduct. Additionally, AT&T urged the Commission to withhold action on the TLD acquisition "until a comprehensive policy framework" was established. AT&T argued that substantial market entry concerns were raised by the TLD acquisition and that these concerns should not be addressed in the context of individual applications, but rather, should be the subject of a policy making proceeding of

^{3/} The radio licenses of TLD's predecessor were conveyed to Telecomunicaciones Ultramarinas de Puerto Rico ("TUPR"). TUPR is a Puerto Rico corporation owned 85.1 percent by PRTA and 14.9 percent by the subsidiary of Telefonica de Espana. This ownership complies with Section 310(a) and (b) of the Communications Act.

the same nature as AT&T is now proposing. TLD Order, 108.^{4/}

The Commission agreed with AT&T that conditions and safeguards were appropriate to insure competitive integrity. However, it rejected AT&T's urging to defer consideration of the TLD acquisition until policy/rule making proceedings were conducted. The Commission determined that the question of TLD's market entry could be determined in the context of the Section 214 applications. The Commission acknowledged that the closed nature of foreign markets was a "serious problem."^{5/} The specific nature of that "serious problem" was described by the Commission as the risk that foreign affiliation could lead to discrimination favoring TLD over other U.S. carriers terminating traffic in Spain. TLD Order, 108. However, the Commission concluded that this discrimination potential did not require that TLD be denied facilities-based entry. Rather, it concluded that

^{4/} The FCC described the issues identified by AT&T as including: "potential leveraging of foreign market power to impact adversely the competitive U.S. marketplace; perpetuation of high, non-cost-based accounting rates; U.S. trade policy implications of permitting foreign access to U.S. telecommunications markets while markets abroad remain closed; and damage to U.S. carriers' ability to compete in a global market with carriers who have full access to customers in their home country." TLD Order, note 13.

^{5/} In Spain there is now competition in value added, paging and data services. Mobile services are to be opened in 1994. While Telefonica de Espana has a 30 year concession agreement, the agreement provides that the terms regarding services for which Telefonica now has a monopoly will be modified from time to time as required to comply with evolving European Community standards or Spanish law. Telefonica is a private corporation, in which the Kingdom of Spain has an investment of approximately 34.9 percent. Telefonica stock is traded on the New York Stock Exchange and on the exchanges of several other countries. It is estimated that 20-25 percent of the shares are held by U.S. citizens. AT&T operates a manufacturing facility in Spain and has been a supplier of Telefonica.

the problem could be dealt with by crafting "nondiscrimination safeguards" sufficient to protect U.S. carriers in their provision of U.S. international service from discrimination that might occur as a result of such entry. TLD Order, 109.^{9/} Thus the Commission considered and rejected AT&T's position that the terms of TLD's market entry should be determined in a proceeding designed to adopt "comprehensive rules and regulations" for U.S. market entry by foreign carrier affiliates. TLD Order, 109.

Thus, the TLD Order determined that TLD could be prevented from combining with its parent to engage in anticompetitive acts damaging other U.S. carriers by the imposition of specific conditions or safeguards to the grant of TLD's authorities. These safeguards supplement the protective rules governing foreign dominant carriers that were revised by the Commission only two and one-half months prior to the TLD Order. International Services, 7 FCC Rcd. 7331 (1992).^{1/}

^{9/} In addition, the Commission was persuaded that "the balance of public interest considerations weigh in favor of granting the applications." TLD Order, 109. The other public interest considerations to which the Commission referred were the desire to encourage the privatization of a government owned interexchange company and the fact that proceeds of the sale would be used to benefit education in Puerto Rico. TLD Order, 113 and 116.

There is no discrimination by TLD's affiliate against any U.S. carrier. All U.S. carriers, including TLD, are treated equally by Telefonica.

^{1/} The safeguards are described in paragraphs 24 through 31 of the TLD Order. TLD Order, 111-113. The Commission found it unnecessary to adopt other conditions proposed by AT&T. For example, the Commission declined to require accounting rate reductions as a condition of 214 authorizations (para. 27-28); declined to require customer proprietary network information and
(continued...)

The Commission also determined that when TLD filed applications for future facility authorizations, it would evaluate such applications on the basis of whether they posed competitive threats which were not adequately protected against by these safeguards. If the safeguards were not adequate, the Commission indicated that it would make such adjustments or additions to the safeguards as necessary.^{2/} Further, the Commission said it would review the safeguards in three years to

^{2/} (...continued)

disclosure rules (para. 29); declined to impose restrictions on transmission and switching equipment ownership (para. 28, note 43). In all of these instances, the Commission concluded that AT&T had presented no evidence supporting the need for protections or that the protections were unnecessary or were adequately provided for by the other conditions which the Commission adopted.

^{3/} The Commission stated that it would "monitor closely the addition of any circuits to countries where [TLD] is affiliated with a foreign carrier...." TLD Order, 109. Further, the Commission stated that while the conditions imposed in the TLD Order were adequate to protect U.S. competitors from unfair competition, it would evaluate the adequacy of those safeguards when TLD sought to expand its services or facilities:

In addition, we are satisfied that the requirements and limitations we are imposing as a condition of authorizing this transaction are sufficient at this time to safeguard competitors. Given the limits imposed on our authorization to [TLD], we will have the opportunity to attach additional conditions, where warranted, should [TLD] seek to expand its U.S. international service offerings or capabilities. We also reserve the right to impose additional conditions on [TLD's] authorized operations if, after due notice and comment, such conditions are warranted. We commit to review at the end of three years the effectiveness of the nondiscrimination safeguards we have imposed.

TLD Order, 116. The Commission also determined that the full Commission would review future facilities applications by foreign affiliated carriers. TLD Order, 113.

reevaluate their effectiveness in protecting U.S. carriers from anticompetitive actions by TLD.^{9/}

C. AT&T's Proposed Rules Are Inconsistent With The TLD Order

The Commission thus defined how it would regulate TLD in the future and the standard by which it would evaluate TLD's future Section 214 applications. Moreover, it declined to prohibit TLD from entering the U.S. market on the basis of the market entry situation in Spain and declined to defer TLD's entry pending the policy/rule making proceedings urged by AT&T.

AT&T did not appeal or seek reconsideration of the TLD Order. However, it now asks the FCC to adopt rules which, if applied to TLD, would amount to a virtual reversal of that Order. AT&T's rules would prohibit TLD from acquiring or operating any new facilities until such time as "comparable competition opportunities" exist for U.S. carriers in Spain. Thus, without any change of facts from those existing at the adoption of the TLD Order, AT&T urges the imposition of rules which, unless changes are made in the Spanish telecommunications market, would

^{9/} TLD Order, 109 and 116. The TLD Order did not resolve certain issues under the Cable Landing License Act. Because the issue was not presented by the facts, the Commission said that it, and the Department of State, would decide in the future whether the reciprocity provisions of the Act should be used to prevent TLD from being licensed to own cable circuits connecting with Spain or other affiliated carriers. The issue remains undecided. The State Department has approved the grant of a license to TLD in the COLUMBUS II/AMERICAS-1 cable systems for all circuits to all countries except those connecting to Spain. However, contrary to the State Department approval, the Common Carrier Bureau has deferred consideration of TLD's participation in these cables in their entirety pending further Commission proceedings. I-T-C-93-029 and 030; SCL-91-001 and 002.

effectively bar TLD from upgrading its facilities, acquiring new facilities or providing new services. This is absolutely contrary to the intentions of the Commission in the TLD Order. The TLD Order explicitly recognizes that TLD would file future Section 214 applications and describes how those applications would be processed and the standards by which they would be considered.

If the approach which AT&T now advocates had been adopted by the Commission in the TLD Order, the TLD transaction would not have taken place. The provision of successful competitive telecommunications services requires the ability to respond to market conditions and to provide efficient, cost effective services benefiting the public. As the Commission knows, no buyer would purchase a company which would be barred from such free competition and locked in a 1992 "facility time capsule." It is equally unlikely that the Commonwealth of Puerto Rico would have been willing to sell its valuable asset under such terms, since to do so would have been contrary to its goal of improving off-island telecommunications services. Sale to a company which could not effectively compete would not benefit the people of Puerto Rico. Only AT&T, TLD's major competitor in the Puerto Rico/Virgin Island market, would benefit from such an arrangement.

While the Commission reserved its right to adjust the TLD operating conditions as necessary to prevent TLD from acting anticompetitively, it did not reserve the right to regulate TLD in a way that would confiscate its business. AT&T has offered no

showing which would justify the Commission in changing the rules by which TLD is regulated in this dramatic manner.^{10/}

The time for AT&T to challenge the basic rules under which TLD was permitted to enter the U.S. market has passed. AT&T did not seek review of the TLD Order and is now bound by its terms. Absent a dramatic factual change justifying rescission of the terms of TLD's market entry, the adoption of rules such as AT&T proposes would raise fundamental issues of due process.^{11/}

II. AT&T'S ALLEGATIONS OF UNFAIR COMPETITION

Just over one year ago, in International Services, the Commission rejected another AT&T request that general rules be adopted to govern the facilities based operations of foreign affiliated U.S. international carriers. The Commission then concluded that such issues were better addressed in the context of specific Section 214 applications when affiliated carriers sought authority to provide end-to-end services with their affiliates. Id. at 7337.

^{10/} AT&T has filed petitions to deny all but one of the Section 214 applications which TLD now has pending before the Commission. AT&T has opposed TLD's applications for authority to provide switched voice service to the Bahamas over 6 circuits, I-T-C-92-242; to the Netherlands over 6 circuits, I-T-C-93-033; non-interconnected private line service to the Dominican Republic, I-T-C-93-091; and the COLUMBUS II/AMERICAS-1 applications referenced infra, note 8. In each of those petitions AT&T has argued for action similar to that which it urges here. However, in none has it presented evidence which would justify such action. The only TLD application AT&T has not opposed is an application for a modification in the facilities which TLD is authorized to utilize for service to Venezuela. That application contemplates that TLD and its correspondent would lease cable facilities from AT&T.

^{11/} E.g., see, Ruckelshaus v. Mansanto Co., 467 U.S. 986, 1004-5 (1984).

AT&T bases much of its current petition on the assertion that the Commission's decisions to date fail to protect U.S. carriers from the risks of anticompetitive activity by U.S. carriers with foreign affiliation. AT&T maintains that the foreign dominant carrier rules and the specific safeguards adopted by the Commission in specific instances are not adequate. However, just as AT&T has no evidence which would support its desire to have the terms of entry changed for TLD, it likewise has no evidence supporting its assertion that the Commission's existing actions have been inadequate.

For example, AT&T argues that there is an incentive for a U.S. carrier and its foreign affiliate to make artificial arrangements regarding accounting rates because they are a "'transfer payment' within the same corporate enterprise." AT&T Petition, 29. Other than to assert that there is an incentive for this to occur, AT&T does not allege that it has actually happened or is permitted by the conditions the Commission has imposed or by its rules. AT&T made this same argument in the TLD Order proceeding and it was rejected by the Commission:

AT&T has also argued that settlement payments, when made between affiliated entities, are "transfer payments" that enable an affiliated U.S. carrier to price its U.S. services without regard to cost. While we recognize AT&T's concern that the above-cost component of accounting rates may be used by a foreign carrier to subsidize its affiliated U.S. carrier's competitive operations in the U.S. telecommunications market, this concern is addressed by our dominant carrier policies, which require that [TLD] provide us with cost support for its tariffed international services. We also note that [TLD] will be operating as a separate corporate entity from Telefonica and other affiliated foreign carriers, with separate books of account which are subject to audit by this Commission. We conclude that such safeguards effectively guard

against cross-subsidization abuse, and we therefore find no compelling reason to impose additional conditions to address the cross-subsidy concern raised by AT&T.

TLD Order, 112.

Similarly, AT&T urges that a foreign affiliate might violate the proportionate traffic condition by allocating more favorable categories of traffic to its affiliate, or by discriminating in the routes by which it routes return traffic. AT&T Petition, 28. Again, AT&T does not suggest that this actually has occurred, either in regards to TLD or any other carrier. Moreover, it would appear that such arrangements would violate the conditions regarding proportionate return and special concessions.^{12/} And AT&T does not suggest that, were this to occur, the complaint procedures of the Communications Act would be insufficient to provide relief.

The other examples of potential abuse offered by AT&T are effectively protected against by the no special concession conditions. AT&T Petition, 30-32. TLD does not suggest that there are no circumstances under which additional safeguards might be appropriate and justified. However, AT&T has not made the case for its proposals. Further, many of these abuses could equally be engaged in by non-affiliated U.S. carriers, particularly one as dominant and powerful as AT&T.^{13/} As AT&T

^{12/} The Commission specifically noted that its safeguards were designed to ensure that TLD does not "manipulate traffic streams." TLD Order, 112.

^{13/} The Commission recognized in the TLD Order that even non-affiliated U.S. carriers might "benefit" from their relationships with foreign carriers:

(continued...)

increasingly undertakes various joint ventures and service arrangements with carriers in other countries, and as it becomes an even stronger supplier of facilities in those markets, the chances of AT&T abusing its uniquely strong market position, and the incentives for foreign carriers to participate, are likewise increased. The dangers to fair competition in the U.S. international market posed by TLD, a carrier with less than one percent of AT&T's revenue, are significantly less than the dangers posed by AT&T's size and increasing diversity.

III. COMPETITION IN FOREIGN MARKETS

There is no demonstration in the AT&T Petition of how the rules which it proposes would further a U.S. goal of achieving more open foreign markets. Relatively few of the world's nations have carriers that would desire to enter the U.S. market. And those that do may not universally regard entry of

^{13/} (...continued)

AT&T appears to be concerned that a foreign carrier could obtain from an unaffiliated U.S. carrier proprietary technical information and provide such information to its affiliated U.S. carrier. It also appears concerned that foreign carriers are using customer information obtained from U.S. carriers to design global custom services. See AT&T Comments in CC Docket No. 91-560 at 5, 15-17. AT&T does not, however, provide any specific examples of the type of information it fears might be transferred, or how that information might be used to gain a competitive advantage. We note, moreover, that U.S. carriers would presumably have similar opportunities to obtain proprietary technical and customer information from their foreign correspondents.

TLD Order, 112, note 45 (emphasis added).

the U.S. market as a sufficiently high priority as to provide an incentive to alter their existing internal operations.

AT&T asserts that the approach of the Commission to date has been a "patchwork" that does not address the issues of the present day. AT&T's analysis of the Commission's decisions falls far short of supporting its conclusion that the rules it proposes are a preferable alternative. AT&T Petition, 13-26. The Commission has been and will continue to be presented with very different foreign carrier issues. MCI and BT present vastly different issues than TLD, or Cable and Wireless or Optel or DOMTEL. It is appropriate for the Commission to approach these differing situations in different ways. Attempts to fix one, all-encompassing approach for such diverse situations would be a mistake.^{14/}

AT&T's proposal is not a well thought out, rational strategy for encouraging the desired developments in foreign markets.^{15/} Rather, in many respects it is a punitive action.

^{14/} Some of the differences to which AT&T points exist not because of inconsistency by the Commission but because the Congress has given the Commission different statutes with different standards. Section 214 of the Communications Act is based on a traditional public convenience and necessity standard. Section 310 is based on the Congressional determination to restrict certain non-U.S. radio license ownership. The Submarine Cable statute was designed to provide the President of the United States with discretion in dealing with certain cable landing issues.

AT&T also cites the private line resale equivalency requirement as an inconsistency. The problems to which that policy is addressed, however, do not grow out of foreign affiliation relationships, but rather out of practices in which any U.S. carrier might participate.

^{15/} The fact that AT&T's heavy approach exceeds reasoned action is evidence by the concurrence of both the Commission and the
(continued...)

When applied after the fact to a carrier like TLD that has already been permitted to enter the U.S. market, the punitive nature of the proposal is apparent. The wisdom of imposing these destructive rules upon an existing U.S. foreign affiliated carrier in a world market where the United States is seeking to positively influence a broad range of trade developments is questionable.

U.S. companies are making investments in foreign lands as those nations privatize their existing operations and as they introduce the concept of competition into formerly closed sectors. Many of these U.S. companies do not have the market power of AT&T. It is not in the interest of these companies for the U.S. to take action at this time which could invite retaliation or encourage discrimination against them. Indeed, the nature of AT&T's proposed action is such that elements of it go beyond the basic powers of the Commission to enact. The Commission certainly has an interest in the competitiveness of the world's telecommunications markets. However, the Executive Branch of the U.S. Government has a far broader view and greater expertise in these issues.

^{15/} (...continued)

Executive Branch agencies in TLD's market entry. The rules proposed by AT&T would have denied that entry. If the foreign market issues were best addressed in the manner AT&T proposed, the Executive Branch agencies would not have consented to TLD's entry into the U.S. market. Further, these Executive Branch agencies would probably not have assented to TLD's acquisition of circuits in the COLUMBUS II/AMERICAS-1 cables (to all countries except Spain) if to deny such acquisition was viewed as an important step in securing the opening of foreign telecommunications markets.

ACCORDINGLY, TLD requests that the Commission reject
AT&T's Petition for Rule Making.

Respectfully submitted

TELEFONICA LARGA DISTANCIA de
PUERTO RICO, INC.

By: 

James L. McHugh, Jr.
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1330 Connecticut Ave. N.W.
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November 1, 1993

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CERTIFICATE OF SERVICE

I, Mark H. Cobb, do hereby certify that a copy of the foregoing Statement of Telefonica Larga Distancia de Puerto Rico, Inc., dated November 1, 1993, has been sent by first class United States mail, postage prepaid, or hand-delivered to the following:

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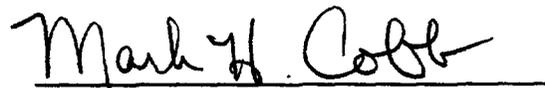
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