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September 16, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

Re: CC Docket No. 96-146

Dear Mr. Caton:

On behalf of Atlantic Tele-Network, Inc. ("ATN"), we are submitting this letter as ATN's reply comments in the above-referenced rulemaking proceeding. The purpose of this letter is to underscore ATN's belief and understanding that the FCC, in its Notice of Proposed Rulemaking (FCC 96-289) ("Notice") on July 11, 1996, did not propose to adopt new rules or policies governing the provision of audiotext services through international direct-dial ("IDD") calling. For purposes of this letter, we define IDD audiotext services to involve a call placed by an end-user subscriber directly to an IDD (or "011") international audiotext number at the collection rate tariffed by an authorized U.S. international facilities-based common carrier for IDD calls to the destination point in question.[1]

THE LEGAL AND REGULATORY STATUS OF IDD AUDIOTEXT SERVICES

The Communications Act of 1934 and the FCC's rules in Part 64 do not govern or regulate IDD audiotext services as "pay-per-call" services. Section 228(i) defines a pay-per-call service as one "for which the caller pays a per-call or per-

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1 ATN is a U.S. corporation with a direct or indirect majority ownership interest in several entities providing telecommunications services and/or equipment. Among those entities is Guyana Telephone & Telegraph Ltd. ("GT&T"), the sole provider of telecommunications services in the developing country of Guyana. GT&T terminates IDD audiotext traffic from the United States and other countries.

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time-interval charge that is greater than, or in addition to, the charge for transmission of the call." 47 U.S.C. § 228(i). The FCC adopted that definition verbatim in Part 64. See 47 C.F.R. § 64.1501(a)(2). IDD audiotext services do not constitute pay-per-call services under that definition because, in the IDD audiotext configuration, the end-user subscriber does not pay any charge greater than, or in addition to, the U.S. carrier's IDD collection rate for transmission of the call.

In its letter ruling of September 1, 1995, the Common Carrier Bureau's Enforcement Division did not seek to bring IDD audiotext services inside the definition of pay-per-call services. See Letter from J. Muleta, FCC, to R. Marlowe, Counsel (Sept. 1, 1995), 10 FCC Rcd 10945 ("Muleta Letter"). The Enforcement Division held that when the U.S. common carrier who imposes charges upon end-user subscribers for information services also makes payments to the information services provider, the information service qualifies as a pay-per-call service under the statute and the FCC's regulations. The FCC reasoned that because payments from the U.S. carrier to the information services provider are reflected in the tariffed collection rate charged to the end-user subscriber, the "tariff is a sham" and the subscriber has indirectly paid a charge greater than the transmission charge for the call. 10 FCC Rcd at 10946. That letter ruling does not implicate IDD audiotext services, where it is the terminating foreign carrier, not the originating U.S. international common carrier, who makes payments directly or indirectly to the information services provider. Further, the collection rate charged by the U.S. carrier to the end-user subscriber is the same IDD collection rate that subscribers pay for non-audiotext calls to the foreign destination, thereby ensuring that the U.S. carrier's IDD collection rate is not a "sham."

While modifying Section 228, the Telecommunications Act of 1996 ("1996 Act") did not change the legal or regulatory status of IDD audiotext services in any manner whatsoever. Congress removed a prior exemption in Section 228 for tariffed services, but it did not alter the statutory requirement that pay-per-call services involve a charge greater than, or in addition to, the charge for the transmission of the call. Therefore, pursuant to Section 228 as modified by the 1996 Act, IDD audiotext services continue to fall outside the definition of pay-per-call services.

THE FCC'S RULEMAKING IN CC DOCKET NO. 96-146

In its Notice, the FCC proposed new rules and policies to implement Congress' modifications to Section 228 in the 1996 Act. The purpose of this letter is to underscore ATN's belief and understanding that the Notice does not implicate the legal and regulatory status of IDD audiotext services. ATN would note that the FCC's proposed rules continue to define the term pay-per-call service, as does Section 228(i), to apply only to services "for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call." As noted above, under that definition, IDD audiotext services do not constitute pay-per-call services. Also, the Notice (at para. 48) proposes to codify the ruling in the Muleta Letter regarding situations where a U.S. common carrier who imposes charges upon an end-user subscriber also makes payments or undertakes reciprocal arrangements involving the information services provider. However, for the reasons stated above, IDD audiotext services are not within the ambit of that policy. As a result, the Notice does not propose, and could not reasonably be construed to propose, any change to the legal or regulatory status of IDD audiotext services.[2] Relying upon the Notice to specify the FCC's proposed rules and policies, ATN did not file comments on the record regarding IDD audiotext services.

It is well-established that the FCC cannot adopt rules and policies outside the scope of the underlying Notice of Proposed Rulemaking. E.g., MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1140-43 (D.C. Cir. 1995). Section 4(b) of the Administrative Procedure Act requires federal agencies to publish a "[g]eneral notice of proposed rule making" and to include in the notice "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). Section 4(c) requires the agency to give all interested persons an opportunity to participate through written comments. 5 U.S.C. § 553(c). Further, the parties to this rulemaking have not developed evidence on the

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2 See Comments of the Interactive Services Ass'n, CC Docket No. 96-146, filed Aug. 26, 1996, at 5 n.7 (noting that FCC's proposals do not encompass IDD audiotext services).

record to support adopting rules or policies other than those proposed by the FCC in the Notice.[3] See 5 U.S.C. § 706(2)(E); Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (1994). Therefore, the FCC cannot adopt new rules or policies regarding IDD audiotext traffic at this time in this proceeding.

NEW RULES ARE NOT NECESSARY FOR IDD AUDIOTEXT SERVICES

Although the FCC did not propose to adopt new rules and policies regarding IDD audiotext services in this rulemaking, ATN notes that one party submitted comments criticizing IDD audiotext services. The Alliance of Young Families claims (at pp. 4-6) that there are no controls in place today to prevent the misuse of IDD audiotext services. Without meaning to challenge the Alliance's objectives, ATN strongly disagrees with the Alliance's position on that issue. Last summer, representatives of GT&T met informally with officials in the FCC's International Bureau. As a result of those discussions, GT&T adopted a voluntary code of conduct designed to prevent the misuse of IDD audiotext services terminating in Guyana. In an open meeting on August 3, 1995, the Chief of the International Bureau supported GT&T's actions and formally reported to the Commission on the Bureau's discussions with GT&T.

Through voluntary commitments by U.S. and foreign carriers, ATN believes that the IDD audiotext industry has made progress in eliminating abusive practices. In that regard, ATN

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3 The large majority of commenting parties did not address IDD audiotext services at all. While a few parties commented on the use of "international numbers," it is not clear from the comments that they had IDD audiotext services in mind. See Comments of the National Ass'n of Attorneys General Telecommunications Subcommittee, CC Docket No. 96-146, filed Aug. 26, 1996, at 2-3. AT&T's comments, while urging the FCC to apply the policy in the Muleta Letter to situations where the U.S. carrier makes payments to information services providers in connection with international as well as domestic calls, did not address IDD audiotext issues. See AT&T Comments, CC Docket No. 96-146, filed Aug. 26, 1996, at 9.

would note the letter submitted on the record by Congressman Bart Gordon, a principal author of the Section 228 modifications in the 1996 Act. Congressman Gordon states that most complaints today do not involve IDD audiotext services; further, he states that, in his view, Congress did not find it necessary to impose restrictions upon IDD audiotext services and that it would not be "prudent or practical" for the FCC to do so. In light of these circumstances, ATN believes there is no empirical basis for the Commission to seek to propose new rules or policies governing IDD audiotext services.

Respectfully submitted,

Robert J. Aamoth
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Counsel for Atlantic Tele-Network, Inc.

cc: Counsel of Record