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February 7, 1997

BY HAND DELIVERY

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

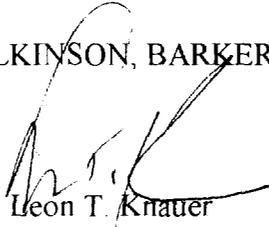
Dear Mr. Caton:

There is transmitted herewith an original and four copies of Comments of the Republic of Panama in Docket No. 96-261.

Should there be any questions concerning the enclosure, please contact undersigned counsel.

Sincerely,

WILKINSON, BARKER, KNAUER & QUINN

By: 
Leon T. Krauer

Enclosure
cc: All Commissioners

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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

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In the Matter of)
) IB Docket No. 96-261
International Settlement Rates)

COMMENTS OF THE REPUBLIC OF PANAMA

REPUBLIC OF PANAMA

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Its Attorneys

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SUMMARY OF COMMENTS

The Republic of Panama submits its comments largely to advise the Commission how its rulemaking proposals would negatively impact Panama's ability to complete implementation of its privatization, network expansion, and competition plans now underway.

For the past decade, the Commission had adopted a wide variety of measures to encourage the development of competitive markets in the provision of international services, and these policies have already enjoyed considerable success. For example, less than five years ago the Commission established guidelines, or "benchmarks," to help U.S. and foreign carriers establish their settlement rates. Since then U.S. accounting rates have fallen by 29%. Given the recent steps being taken by countries like Panama to privatize and to open their markets to competition, and given the new technological and market forces impacting the global telecommunications market, the trend of the last four years will only accelerate in the near future.

Despite this substantial success, the Commission now proposes to change course by adopting a regulatory solution instead of relying primarily growing market forces. Specifically, in its notice of proposed rulemaking, the Commission proposes to require that U.S. carriers change the accounting rates they pay to foreign carriers to terminate their international traffic. The new call termination rate would not be based on a rate negotiated with the foreign carrier; rather, it would be based on a rate set unilaterally by the Commission. In effect, the Commission, an agency of the U.S. Government,

proposes to establish the rate foreign carriers charge U.S. carriers to terminate U.S.-originated traffic in their country.

The Republic of Panama believes that the Commission's proposal raises considerable complications under both international and U.S. laws. But more fundamentally, the Republic of Panama is concerned about the wisdom of this proposal, especially when applied to developing countries like Panama.

Panama and the United States share the same goals in the telecommunications sector, but they begin their task at a very different point.

While the United States is in the process of extending competition, Panama is now in the process of introducing competitive forces. And while the challenge United States faces is to preserve universal service while extending these competitive forces, the challenge facing Panama is to introduce competition while simultaneously beginning to achieve a bare minimal level of universal service. There remain in Panama over 400 communities still without any telephone service.

In its *NPRM*, the Commission proposes to treat differently developing countries with an actual commitment to fostering entry and promoting competitive market environments. *Id.* at 28 ¶ 72. The Republic of Panama agrees wholeheartedly with this Commission proposal. As the Commission observes, such a policy "would recognize the challenges to developing countries posed by the introduction of cost-based rates and the consequent reduction or elimination of the revenue stream generated by the current system. At the same time . . . it would also encourage the development of competitive markets necessary to achieve cost-based settlement rates." *Id.* at 27 ¶ 70.

The Commission has a choice to make in achieving its objectives. It can pursue a near-sighted approach of new (and likely, continued) regulation of the international market — an approach which would almost certainly impact negatively the ability of countries like Panama to complete implementation of their reforms. Alternatively, the Commission can maintain its current approach of encouraging the introduction of competitive forces in all markets in all reaches of the world. Only the latter approach has any promise of true, fundamental reform, as only this approach will ensure that a developing country like Panama will have the resources available to implement and complete successfully its privatization, network buildout, and competition reforms.

BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

In the Matter of)
) IB Docket No. 96-261
International Settlement Rates)

COMMENTS OF THE REPUBLIC OF PANAMA

The Republic of Panama, by its attorneys, respectfully submits these comments in response to the Federal Communications Commission's (the "Commission") *Notice of Proposed Rulemaking*, FCC 96-484 (Dec. 19, 1996) ("*NPRM*").¹ In this *NPRM*, the Commission proposes to require that U.S. carriers change the settlement rates they pay to foreign carriers to terminate their international traffic. The new call termination rate would not be based on a rate negotiated with the foreign carrier. Rather, it would be based on a rate set unilaterally by the Commission. In effect, the Commission, an agency of the U.S. Government, proposes to establish the rate foreign carriers charge U.S. carriers to terminate U.S.-originated traffic in their country.

The Republic of Panama submits these comments because it is concerned about the wisdom of this proposal, especially when applied to developing countries like Panama. The Republic of Panama also believes that the Commission's proposal raises considerable

¹ Of course, neither this Commission nor the U.S. Government generally has jurisdiction over the Republic of Panama and in submitting these comments the Republic of Panama does not consent to the Commission's assertion of jurisdiction over it. The Republic of Panama submits these comments to advise the Commission of the consequences its proposals would have on foreign-based carriers and peoples, including the carriers serving and the citizens of the Republic of Panama.

complications under both international and U.S. laws. These comments are submitted on behalf of the Government of Panama by the Office of Privatization (ProPrivat), the division of the Ministry of the Treasury in charge of the privatization program in the Republic of Panama.

I. BACKGROUND: PANAMA AND ITS TELECOMMUNICATIONS

Adoption of the Commission's proposals would directly, and negatively, affect the provision of telecommunication services in other countries, including Panama. It is therefore imperative that the Commission understand Panama, its telecommunications infrastructure and its regulatory policies. It is also essential that the Commission appreciate the impact the adoption of its proposals would have on both the people of Panama and the ongoing efforts of the Republic of Panama to develop a fully competitive telecommunications environment.

A. Panama Generally

The Land. The Isthmus of Panama connects North and South America.² Panama is a small country, covering 29,157 square miles -- which is approximately 75% the size of the Commonwealth of Virginia. Over half of Panama's land consists of forests. The interior is mostly steep, rugged mountains and dissected upland plains; coastal areas largely consist of

² Panama was first sighted by Rodrigo de Bastida in 1501 and the next year was visited by Christopher Columbus on his last voyage to the Americas. Panama's capital, Panama City, was founded in 1519.

plains and rolling hills. Panama is bounded on the south by Colombia and on the north by Costa Rica.

Panamanian People. Panama is home to approximately 2.7 million people — about 80% less than half the population of Virginia. Panama's population is young, healthy, and literate. One-third of its citizens are 14 years of age or less; average life expectancy exceeds 75 years; and over 89% of all adults are literate. Forty percent of the population reside in Panama City or the Colon Free Zone, which are located at opposite ends of the Panama Canal. The area surrounding the Canal is controlled by the Panama Canal Commission and the U.S. Army.

Government. Panama is a constitutional republic recognized by the United Nations, and it is represented in almost all nations.³ Like the United States, the Panamanian government consists of three branches: executive, legislative, and judiciary. Members of the 72-member unicameral *Asamblea Legislativa* (Legislative Assembly) and the executive branch, headed by President Ernesto Pérez Balladares, who was educated in the United States, were elected in May 1994 and will serve until the next election in 1999.

Economy. Because of its key geographic location, Panama's economy is service-based, and heavily weighted toward banking, commerce, and tourism. Panama's gross national product (GNP) was \$6.6 billion in 1993, and in 1994 its GNP grew at a rate of 3.6%

³ Panama secured its independence from Spain in 1821 and its independence from Colombia in 1903.

— well below the 7.1% average of the early 1990s, but well above the 0.7% average annual decrease during the 1980s.

The Panamanian economy is closely tied to that of the United States. The Panamanian currency — the balboa — is traded at the fixed rate of one balboa per one U.S. dollar. The United States is also Panama's largest trading partner, with 40% of its imports and 45% of its exports associated with the United States.

Panama's economy was wrecked by the military regimes that ruled the country in the late 1970s and throughout the 1980s, and it is still attempting to recover from these regimes. In 1993, Panama's foreign debt was \$6.7 billion, about \$2,480 per citizen, of which \$3.7 billion was long-term public debt. This foreign debt does not allow re-investment of the net national product into the economy; most instead must go towards interest payments on the debt.⁴

Panama experienced a net trade deficit of almost \$1.7 billion in 1994, with exports of \$520 million and imports of \$2,205 million.⁵ With respect to the United States, Panama experienced a net trade deficit in 1994 of \$704 million.

The new administration, inaugurated in September 1994, has launched an economic plan designed to reverse rising unemployment (12.9% in 1994), attract foreign investment,

⁴ Last year the Panamanian government successfully renegotiated and re-structured much of its foreign debt to reduce substantially the sizable interest payments it must make.

⁵ The Europa World Yearbook states that Panama's trade deficit was "only" \$853 million.

cut back the size of government, dismantle trade barriers and modernize the economy. Among other things, the Ministry of the Treasury has created a new Office of Privatization, known as ProPrivat, to implement a five-year privatization plan. Privatization projects include telecommunications, airports, the electric utility sector, sugar mills, the national ports authority and race track, and the administration of casinos.

The largest privatization now underway, as discussed more fully below, involves the government-owned telephone company, INTEL, S.A. To ensure the proper use of funds generated through privatizations, the Panamanian Legislature has specified that such funds must be placed in a trust fund known as the Trust Fund for Development (*Fondo Fiduciario para el Desarrollo*) used to finance public investment in development and social projects. The funds cannot be used for government operations or foreign debt payments.⁶ Any monies obtained from public auctions of privatized companies must also be deposited in the Trust Fund.

In a major step, Panama last fall joined the World Trade Organization ("WTO"), and it is now participating in negotiations with the WTO's Group on Basic Telecommunications. Any commitments that Panama may ultimately make in these negotiations would have to be extended to the United States and all other WTO members on a most favored nation (MFN) basis.

⁶ See Law No. 20 of 15 May 1995, Attachment A.

Panama's Special Ties to the United States. Throughout its history, Panama has had a special relationship with the United States. Indeed, its independence from Colombia in 1903 was largely due to the military and political intervention of the United States. About the same time, the United States began constructing the Panama Canal to connect the Pacific Ocean with the Atlantic Ocean through the Caribbean Sea.⁷ As a result of the September 1977 Canal Treaty signed by then-presidents Jimmy Carter and Omar Torrijos Herrera, ownership of the Canal will revert to the people of Panama at noon, December 31, 1999.⁸

Panama's close ties to the United States extend well beyond the Panama Canal. In addition to the economic ties discussed above, Panama often assists the United States in its implementation of foreign policy. To take two recent examples, at the request of the U.S. Government, Panama accepted Cuban refugees and offered asylum to Raoul Cedras, the former Haitian army chief. The U.S. military also intervened in Panama in 1964 to suppress a nationalistic movement, and again in 1989 to remove the dictator, Manuel Noriega.

⁷ The U.S. Marines landed in Panama on November 3, 1903. The Panama Canal Treaty was executed 15 days later --- notably *without* a Panamanian signature. Rather, Panama was "represented" by a former French Canal Company executive. Under the 1903 Treaty, the U.S. was granted ("in perpetuity") control of a strip of Panamanian territory, known as the Canal Zone, over the width of Panama (82 km) and extending for 8 km on either side of the Canal route. The Treaty also established Panama as a protectorate of the U.S., a status which ended in 1939. Colombia did not recognize the Republic of Panama until 1921.

⁸ With the execution of this Treaty, known as the Torrijos-Carter Agreement, administration of the Canal was transferred from the U.S. Defense Department to the Panama Canal Commission, a U.S. Government independent agency which now has a Panamanian chief administrator. There is a substantial question whether the Canal will be profitable. The United States claims that tolls have recovered only a fraction of the investment it has made in the Canal.

“Operation Just Cause.” although lasting only for several days, resulted in a \$2 billion loss to Panama and its citizens in damages and lost revenues.

B. Telecommunications In and With Panama

Radical changes are now underway in the provision of telecommunications services within Panama. As in the United States, telephone services in Panama in the recent past have been provided on a monopoly basis --- in this case, by the government-owned Instituto Nacional de Telecomunicaciones (“INTEL”). Recently, and largely as a result of the vision and efforts of the current administration, Panama is vigorously pursuing telecommunications privatization and pro-competition programs. As described more fully below, Panama believes that, by the beginning of the 21st century, its telecommunications infrastructure will be among the most modern, open, and robust of all telecommunications networks in the world.

The Competitive Past. Panama was at the forefront in developing competitive policies for the telecommunications market, acting well before the United States. The Panamanian toll market (domestic and international) was competitive during the 1960s and 1970s, and Panamanians could choose among several toll carriers on either a presubscription or per-call basis.⁹ As a result, Panamanian consumers enjoyed some of the lowest

⁹ The three carriers providing competitive toll services in Panama were: All American Cable and Radio, Inc. (AACR), a subsidiary of International Telegraph and Telephone (ITT), which owned a half-interest in a submarine cable between Panama and the United States, connecting to AT&T on the (continued...)

international telephone prices in the world; indeed, citizens of neighboring countries would often travel to Panama to make cheap international calls. In 1970 in Decree No. 214 (see Attachment B), the Panamanian legislature, after determining that market conditions were such that regulation of prices was no longer necessary, deregulated the provision of international services. The competitive regime ended in the early 1980s, in part because some of the carriers either merged or exited the market, and in part because of pressures from some international carriers.¹⁰

The Present. Since 1981, all fixed telecommunications services in Panama — local, domestic toll, and international — have been provided by INTEL.¹¹ At the end of 1995, INTEL served 346,000 lines — over 30% more lines than five years earlier. Nevertheless, there remains a substantial, and growing, unmet demand for telephone service, and the

(...continued)

northern end; Intercontinental de Telecomunicaciones por Satélite (INTERCOMSA), a joint venture between COMSAT, which owned 40% of the shares, and its Panamanian partners; and TRT, a subsidiary of United Brands, a U.S.-based firm with significant interests in Panama. See, e.g., *Implementation of Section 505 of the International Maritime Satellite Telecommunications Act*, 74 F.C.C.2d 59 at ¶ 50 (1979); *Tropical Radio Telegraph*, 28 F.C.C.2d 95 at ¶ 5 (1971); *AMK Corp.*, 17 F.C.C.2d 933 at ¶ 8 (1969).

¹⁰ Some international carriers complained about handling multiple carriers from a single country, as their switches were not equipped to handle CIC codes. These carriers asserted that to route international calls originating from Panama, they had to operate as if three countries existed and that this arrangement was inefficient for a country of only two million. See, e.g., *All America Cables and Radio, Inc.*, 70 F.C.C.2d 824, p. 834 at n.10 (1979).

¹¹ INTEL does not provide telecommunications services within the U.S.-controlled Canal Zone. This will change once Panama regains control of the Canal Zone. The impacts of this change have not been fully investigated.

telephone service penetration rate approximates only 10% (as opposed to 93% in the United States).

INTEL, which currently has approximately 3,600 employees, has also been modernizing its network in recent years. Over 80% of its switches are now digital, and approximately 65% of its lines are served by digital switches — nearly a 50% increase over the last five years alone.

INTEL provides local residential service at the flat rate of US \$10 monthly — regardless of the geographic location of the customer. It provides local business service at the flat rate of US \$20 monthly. Facsimile lines are also provided at the flat rate of US \$20.

With respect to domestic toll service, the price for direct dialed calls ranges from a low of US \$0.10 to a high of US \$0.40 per minute, depending on the destination of the call within Panama. For example, a 300.6 km. toll call between Panama City and Bocas del Toro, near the border with Costa Rica, costs US \$0.40 per minute, while a 165.6 km. call from Colon to Los Santos costs US \$0.15 per minute. As in the United States, sizable discounts are available for toll calls made during the evenings.

The price for international calls varies widely depending upon the country being called. Direct-dialed calls to the United States (including Alaska and Hawaii) are priced at \$1.40 per minute, with discounts for calls made during the evening and even larger discounts

for calls made at night. These rates are substantially less than those charged for calls to most other countries.¹²

As in the United States today,¹³ INTEL has used toll services to subsidize the cost of providing local service. In the United States, most toll services involve domestic calls as opposed to international calls. For example, in 1994 international calls represented only 10.6% of all toll calls.

The situation is very different in Panama. Because of its small size, and its importance as the major trading and banking center in Central America, most toll service revenues in Panama are generated by international calling rather than domestic toll calls. In 1995 revenues from domestic toll generated 25% of INTEL's gross toll revenues, while revenues from international toll generated 75% of INTEL's gross toll revenues.

INTEL currently has operating agreements with three U.S. carriers: AT&T, MCI, and Sprint. INTEL's U.S. accounting rates were reduced from US \$1.30 to \$1.25 effective

¹² For example, the rate for the first three minutes of a call to Canada ranges from US \$6.00-\$7.50 with additional minutes billed at US \$2.00-\$2.50. The first three minutes of a call to France or the United Kingdom are US \$9.00 with additional minutes billed at US \$3.00.

¹³ See, e.g., *Access Reform Rulemaking*, CC Docket No. 96-262, FCC 96-488 (Dec. 24, 1996), where the FCC notes that current interstate (and international) access charges include a contribution to help subsidize local service.

October 1, 1996 and will be reduced again effective April 1, 1997 to US \$1.20.¹⁴ These rates are within the settlement rate benchmarks the Commission established in 1992.¹⁵

The INTEL Privatization. The Panamanian telecommunications sector is in the process of returning to competition. After the ouster of General Manuel Noriega in 1989 and the restoration of democracy in Panama, the government became fully committed to privatizing key sectors of the economy in order to modernize infrastructure, reduce debt burden, lessen government involvement and strengthen and deepen capital markets. Telecommunications is at the forefront of those privatization efforts.

The telecommunications sector is regulated by Law No. 31 of 9 January 1996 ("Law No. 31"), which provides for the liberalization of the telecommunications sector and the introduction of competition. Article 21 of Law No. 31 specifically authorizes foreign ownership of telecommunications companies in Panama, regardless of whether or not they utilize radio spectrum. At the same time, Law No. 31 prohibits companies controlled by foreign governments from controlling the operations of Panamanian telecommunications concessionaires.

¹⁴ While these reduced rates are available to all U.S. carriers, at the present only AT&T is taking advantage of them. The settlement rate of US \$1.20 will be effective through September 30, 1997, at which time the rate will be re-negotiated.

¹⁵ See *Regulation of International Accounting Rates*, CC Docket No. 90-337 (Phase II), Second Report and Order and Second Further NPRM, 7 FCC Rcd 8040 (1992).

INTEL is scheduled to be privatized in the first quarter of this year. Law No. 5 of 9 February 1995 ("Law No. 5") ordered the conversion of INTEL from a branch of the Panamanian Government into a corporation organized under a private law (or *Sociedad Anónima*, "S.A."), with the Panamanian Government as the temporary holder of 100% of the shares. Under Law No. 5, forty-nine percent (49%) of the shares, designated as Class B shares, will be sold to a strategic partner with substantial experience in the telecommunications field through a wholly-transparent public auction process. Acquisition of the Class B shares will give the strategic partner operating control of INTEL, S.A., as they convey the right to elect five of the members of the nine-person Board of Directors of INTEL, S.A. Two percent (2%), of the shares, designated as Class C shares, will be placed in a trust fund for the benefit of existing and future INTEL, S.A. employees. The remaining 49% of the shares, known as Class A shares, will remain in the hands of the Government until the full privatization of the company in the future.

Law No. 5 established a prequalification process for companies interested in purchasing the Class B shares. In May, 1996, three companies, GTE, Southwestern Bell and *Telefónica Internacional, S.A.* ("TISA"), submitted the necessary documents to participate in the prequalification process. TISA was disqualified under Article 21 of Law No. 31, which, as stated, authorizes foreign investment and control in telecommunications concessionaires, so long as the concessionaires are not majority owned or otherwise

controlled by foreign governments. Southwestern Bell withdrew in July 1996. ProPrivat proceeded to announce a second tender, and to reopen the prequalification process. Negotiations with two potential bidders, GTE and Cable & Wireless, are currently at a very advanced stage. The final bidding process is scheduled to be completed next month.

The investor purchasing INTEL's Class B stock will have numerous obligations, including quality of service and expansion requirements. INTEL, S.A. will be required to more than double its lines by 2002, and to bring telephone service to approximately 400 areas currently unserved. In return for this obligation, consistent with current practices in all privatizing countries in Latin America and beyond, INTEL, S.A. will be granted a limited period of exclusivity for fixed local service, for all international voice service and for certain domestic long distance voice services. The exclusivity period will be utilized to rebalance INTEL, S.A.'s rates so as to eliminate existing cross-subsidies, and to bring calling prices into alignment with cost. The length of the exclusivity period is currently the subject of negotiations with the potential bidders, but it is clear that only certain limited voice services will be provided on an exclusive basis, and only for a limited period of time. Law No. 31 establishes a two-tier system to obtain operating licenses (or "concessions") in Panama. Article 20, which provides that, as a general rule, concessions will be granted under a fully competitive regime, is subject to one exception. Competition can be limited for specified

time periods (“exclusivity periods”) when justified for economic or technical reasons.¹⁶ Concessions granted under a regime of exclusivity or numeric limitation are known as Type A concessions, while the vast majority of concessions, granted under a regime of full competition, are known as Type B concessions. Law No. 31 establishes that Type A concessions must be granted as a result of a fully transparent public auction. Only cellular telephony is currently classified as a Type A service on a permanent basis. However, two concessionaires will operate in the Panamanian market in full competition with each other. BellSouth already holds a cellular concession and is authorized to operate throughout the Republic of Panama. It is currently offering service in the cities of Panama and Colon, and is developing its network to provide nationwide coverage. INTEL, S.A. will receive a cellular concession upon the sale of the Class B shares to the strategic partner. There are twelve mobile telephone concessionaires, who will continue to operate under a regime of full competition and will compete with BellSouth’s and INTEL, S.A.’s cellular service.

As part of its effort to attract foreign investors and promote the development of full and fair competition, the Pérez Balladares administration has created a new independent regulatory commission to oversee the telecommunications sector, the *Ente Regulador de los*

¹⁶ *Ley No. 31 de 9 de enero de 1996, Artículo 20. Gaceta Oficial, viernes 9 de febrero de 1996, p. 7*
See Attachment C.

Servicios Públicos (“Ente”).¹⁷ The Ente is responsible for regulating the telecommunications, electric, water and sewage sectors. Three Commissioners were named in 1996, and the Ente now has a staff of over 90 employees. The Commissioners were selected on the basis of their recognized integrity and knowledge of the industries the Ente regulates.

The Ente submits all major decisions in the telecommunications sector to free and open public consultation. The public at large was invited to submit comments on the draft general telecommunications regulations. In carrying out its regulatory functions, the Ente prepared and submitted to public consultation a general classification of telecommunications services specifying which services will be considered as Type A and Type B. When the classification was adopted, all but seven services were classified as Type B and opened to free and immediate competition. The only services not to be classified as Type B were pay phones, fixed local telephony, domestic toll service and International Message Telephone Service (“IMTS”) -- all the subject of INTEL, S.A.’s temporary exclusivity —and cellular telephony.¹⁸ On the same day it adopted the regulatory classification, the Ente ordered INTEL, S.A. to interconnect with a mobile service provider on nondiscriminatory terms, noting “[t]he policy of the Government in telecommunications matters indicates that all concessionaires must provide telecommunications services in accordance with the principles

¹⁷ Law 26 of 29 January, 1996, Attachment D.

¹⁸ See *Resolución del Ente Regulador de los Servicios Públicos No. JD-025 of 12 December 1996* (see Attachment E).

of equal treatment between users in similar situations ... from this legal principle, we may conclude that companies that provide telecommunications services must treat in an equal and nondiscriminatory manner all users who request and receive a particular kind of service.”¹⁹

The Ente issues concessions for all Type B services. To ensure that effective competition may begin as soon as INTEL, S.A.’s exclusivity period is over, the Ente plans to begin issuing Type B concessions to competing carriers two years before the termination of the exclusivity period. The Ente’s regulatory process has been designed to attract investment through its simplicity, clarity and lack of bureaucracy. International norms are being applied to assure investor confidence. Like the FCC, the Ente is an independent government agency committed to promoting competition in order to bring to consumers better services at lower prices. It is thus clear that in a short period of time the Government of Panama has swiftly and constructively implemented major portions of its program to privatize and to create a truly competitive telecommunications marketplace.

¹⁹ See *Resolución del Ente Regulador de los Servicios Públicos No. JD-027 12 December 1996* (see Attachment F).

II. THIS COMMISSION DOES NOT HAVE THE JURISDICTION TO MODIFY THE ACCOUNTING RATES FOREIGN CARRIERS CHARGE TO TERMINATE INBOUND TRAFFIC IN THEIR COUNTRY

In this proceeding, the Commission proposes to “require” that settlement rates for U.S. carriers with foreign countries be set “at or below” the levels it establishes.²⁰ As a practical matter, a Commission order to this effect would often require U.S. carriers to breach the terms of their lawful and effective operating agreements with foreign correspondents by paying instead an accounting rate specified by this Commission.²¹ The Commission seeks comment on whether it has the legal authority to take this step — that is, change the accounting rate charged by a foreign carrier to terminate inbound traffic in its country. *See NPRM* at 9 ¶ 19.

The Republic of Panama believes that this Commission does not have such legal authority — for the same reason Panamanian regulators do not have the authority to modify the accounting rates which Panamanian carriers pay to U.S. carriers to terminate inbound

²⁰ *NPRM* at 25 ¶ 63. Panama cannot agree with the FCC’s characterizations of these levels as “benchmarks.” Webster’s New Collegiate Dictionary defines the word, benchmark, as “a point of reference from which measurements may be made.” The benchmarks the FCC adopted in 1992 were, indeed, benchmarks: “By setting this benchmark, we do not intend to prescribe accounting rates for any country or region; rather this benchmark range represents a *guideline* for the amount which the Commission believes U.S. carriers should be paying foreign correspondents to terminate calls from the U.S.” *Regulation of International Accounting Rates*, CC Docket No. 90-337 (Phase II), Second Report and Order and Second Further NPRM, 7 FCC Rcd 8040, 8141 ¶ 8 (1992) (emphasis added). In contrast, the benchmarks the Commission has proposed to adopt in this proceeding are not “guidelines” but rather prescriptive rates.

²¹ The Commission proposes this step because “[i]n the long term, . . . we are convinced that these reform efforts will benefit . . . foreign consumers and carriers.” *NPRM* at 11 ¶ 25.

international traffic in the United States. Indeed, it would appear that the Commission has already addressed this issue, for only 14 months ago it recognized that “[w]e do not have jurisdiction over the foreign carrier.”²²

The Communications Act of 1934, as amended, gives this Commission limited powers over international telecommunications. Specifically, while Section 2(a) of this Act gives this Commission jurisdiction over “foreign communication by wire or radio . . . which originates and/or is received within the United States,” that jurisdiction extends only to the U.S. end of an international call. In this regard, Section 2(b)(2) expressly states that “nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . any carrier engaged in . . . foreign communication solely through physical connection with the facilities of any other carrier not directly or indirectly controlling or controlled by . . . such carrier.”²³

As the executive branch of the U.S. Government has previously acknowledged, “Foreign governments . . . maintain independent sovereign authority over the foreign end of a call. .

²² *Market Entry and Regulation of Foreign-affiliated Entities*, Report and Order, IB Docket No. 95-22, 11 FCC Rcd 3873, 3813 ¶ 105 (Nov. 30, 1995). If this Commission does not have jurisdiction over foreign carriers, it necessarily follows that it does not have jurisdiction over the rates charged by these carriers.

²³ Indeed, the U.S. Congress even chose not to give the FCC jurisdiction over telecommunications within the Panama Canal Zone although this Zone remains U.S. territory until 1999. See Section 2(a), providing that “[t]he provisions of this Act . . . shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communications or transmission wholly within the Canal Zone.”

.. [T]he Commission cannot compel foreign entities to accept accounting rates prescribed by the Commission for U.S. carriers."²⁴

U.S. judicial precedent is consistent with this position. At issue in *RCA Communications v. United States*, 43 F. Supp. 851 (S.D.N.Y. 1942), were the rates RCA could charge its customers for telegrams originated in the United States but destined to foreign countries. RCA had followed the international norm of charging for "urgent" telegrams twice the rate it charged for ordinary telegrams, but this Commission then directed RCA to lower its retail rate for urgent telegrams to only 50% higher than that for normal telegrams.

On appeal, a three-judge court affirmed this prescription order, holding that the order "falls directly within the terms of the" U.S. Communications Act because the Commission was regulating the rates paid by consumers within the United States.²⁵ However, the court expressly recognized that the Commission lacks jurisdiction to regulate the rates paid by U.S. carriers to their foreign correspondents to complete U.S.-originated traffic. The court noted that, to modify such interconnection rates, it would be "necessary to secure the consent of the company or administration which operates the other end of the jointly operated circuit,

²⁴ Comments of the National Telecommunications and Information Administration, CC Docket No. 90-337, at 17 (Oct. 12, 1990).

²⁵ 43 F.Supp. at 854. The double rate for urgent messages was adopted at an International Telecommunications Conference. As the court noted, because neither the U.S. government nor U.S. carriers were a signatory to these international regulations, the FCC was under no obligation to honor them. *Id.* at 855. Importantly, the United States is now a signatory of the International Telecommunication Union (ITU) regulations.