

transition towards their new benchmarks within 30 days" after the FCC adopts rules,⁴⁵ and it urges adopting a complaint procedure in which "the foreign carrier should always carry the burden of proving the nature and magnitude of its costs."⁴⁶ These and other statements in AT&T's comments show that AT&T fully understands that the intent and effect of the FCC's proposed policies would be to impose requirements directly upon foreign carriers subject to enforcement actions by the FCC for non-compliance.

AT&T incorrectly relies upon RCA Communications, Inc. v. FCC, 43 F. Supp. 851 (S.D.N.Y. 1942), as supporting the FCC's jurisdiction to prescribe settlement rates for foreign carriers.⁴⁷ That case involved a decision by the FCC to establish new collection rates for U.S. customers of radiotelegraph services. The FCC did not seek to change the amount that the U.S. carriers would remit to their foreign correspondents for their role in carrying such traffic. Indeed, the Court expressly recognized that the U.S. carriers would have to modify their existing agreements with foreign carriers or, if they could not, "bear the loss on outgoing messages."⁴⁸ The Court did not state or imply that the FCC has authority to force foreign administrations to accept a lesser amount of compensation. To the contrary, the Court recognized that any changes to operating agreements, including rates, would require the consent of the foreign carrier "subject to the regulations of its government."⁴⁹ However, the FCC's enforcement proposals would require foreign carriers

⁴⁵ AT&T Comments at 2 (Summ.).

⁴⁶ AT&T Comments at 24.

⁴⁷ AT&T Comments at 53-54.

⁴⁸ 43 F. Supp. at 855.

⁴⁹ 43 F. Supp. at 853.

to accept FCC-prescribed settlement rates against their consent and without regard to the regulations of their Government authorities.

KDD does not dispute that the FCC has authority to regulate the settlement practices of U.S. carriers through its International Settlements Policy. Nor does KDD dispute that the FCC has authority to direct U.S. carriers to terminate relations on a route where the FCC finds it necessary to promote the U.S. public interest.⁵⁰ However, KDD strongly disputes that the FCC has authority to prescribe the settlement rates that foreign carriers can charge for terminating U.S.-billed traffic over their own facilities in their own countries. In particular, KDD objects to the FCC's proposed enforcement measures by which U.S. carriers would make settlement payments at FCC-prescribed rates in derogation of the carriers' contractual obligations.⁵¹ As KDD stated in its comments, each country has the authority to regulate the rates charged by carriers operating under its jurisdiction for the termination of traffic billed in other countries in a globally acceptable manner.⁵² KDD's position is fully consistent with the National Telecommunications and Information Administration's view that "foreign governments maintain independent sovereign authority

⁵⁰ Should the FCC ever determine to exercise that authority, it should require U.S. carriers to terminate relations according to the terms of their operating agreements with foreign carriers. There is no legal or factual basis for requiring U.S. carriers to terminate relations on a route without complying with applicable contractual termination provisions, particularly since the FCC had a prior opportunity to review the rates, terms and conditions of such agreements pursuant to the regulations requiring U.S. carriers to file copies of such agreements within 30 days of their execution. 47 C.F.R. § 43.51.

⁵¹ Through its proposed rules, the FCC would improperly transfer to the foreign country the burden of deciding whether to terminate relations on a route. KDD submits that the FCC properly bears that burden should it object to the settlement rates charged by the foreign carrier, subject to the regulations imposed by its Government, for terminating U.S.-billed traffic.

⁵² KDD Comments at 3-4.

over the foreign end of a call" and that the FCC lacks the authority to "compel foreign entities to accept accounting rates prescribed by the [FCC] for U.S. carriers."⁵³

The FCC's proposals would lead to irreconcilable conflicts with Government authorities in other countries. What would happen when the FCC and the regulators in a foreign country disagree as to an appropriate settlement rate? What would happen on a route where the FCC prescribed a benchmark settlement rate and the foreign Government required its carriers to accept nothing less than a higher settlement rate? The FCC's theory of jurisdiction simply does not work because it does not allow other countries to exercise the same degree of regulatory authority over settlement rates as the FCC proposes to exercise. As Congress did not authorize the FCC to usurp the regulatory powers of foreign countries, the FCC's benchmark proposals are beyond its statutory jurisdiction under the Communications Act of 1934.

VI. THE FCC'S PROPOSALS WOULD VIOLATE INTERNATIONAL LAW

With the singular exception of the U.S. carriers, there is virtual consensus on the record that the FCC's proposal to prescribe settlement rate benchmarks unilaterally contravenes the letter and spirit of applicable international telecommunications regulations.⁵⁴ AT&T's argument that foreign carriers have previously consented to any settlement rates that the FCC might prescribe⁵⁵ is contrived. To the best of KDD's knowledge, no foreign

⁵³ See Comments of National Telecommunications and Information Administration, CC Docket No. 90-337, filed Oct. 12, 1990, at 17.

⁵⁴ E.g., KDD Comments at 21-22; China Telecom Comments at 1-2; Telefonica Comments at 16-21, 36-37; CANTO Comments at 2; Telintar Comments at 12; GTE Comments at 9-13; Jabatan Telekom Malaysia Comments at 2.

⁵⁵ AT&T Comments at 57 n.104.

carrier has agreed to permit U.S. regulatory authorities to modify the applicable settlement rate at will. Presumably, AT&T would dispute that foreign regulatory authorities have the unilateral right to increase settlement rates under the very contractual provisions AT&T cites.

The FCC's proposed enforcement measures -- including forcing foreign carriers to accept an FCC-prescribed settlement rate over their opposition and without regard to foreign laws and regulations -- are plainly contrary to the ITU provisions requiring "mutual consent" and "mutual agreement" in the establishment of settlement rates.⁵⁶ In addition, ITR Article 2.8 defines the term "accounting rate" to be "the rate agreed between administrations in a given relation that is used for the establishment of international accounts." Further, the provisions in ITR Appendix 1.1 regarding the application of accounting rates provide that they should be established by "mutual agreement." Lastly, Article 37 of the ITU Convention requires international carriers to "come to an agreement with regard to the amount of their debits and credits" when implementing the settlements process. Plainly, the FCC's enforcement proposals would violate those binding provisions by imposing a settlement rate that has not been agreed to by the foreign administration.

KDD urges the FCC to work with like-minded foreign administrations and carriers to achieve lower, more cost-oriented settlement rates on a global basis. As SBC Communications noted:

"This sort of government intervention leading to unilateral behavior would undoubtedly be disruptive to any orderly attempts to reduce settlement rates. By directing U.S. carriers to take certain actions -- some of which are likely to appear hostile from the foreign carriers' perspectives -- the Commission would

⁵⁶ KDD Comments at 21-22.

potentially undermine the ability of U.S. carriers to continue negotiations and to develop creative, potentially beneficial solutions to any international accounting [rate] disputes."⁵⁷

It is inconsistent for the FCC to rely upon ITU regulations calling for cost-oriented settlement rates, while proposing to bypass the appropriate ITU forum (Study Group 3) tasked with reforming the global accounting rate system. As KDD previously stated, it stands ready to participate fully in any appropriately constituted multilateral effort to address the issues raised by the FCC in this proceeding.⁵⁸

VII. THE FCC'S PROPOSALS WOULD CONSTITUTE AN UNLAWFUL PRESCRIPTION

The FCC's proposed rules would constitute an unlawful prescription of rates without adequate cost data in violation of Section 205 of the Communications Act of 1934.⁵⁹ Conceding that the proposed benchmarks are unlawful, Sprint urges the FCC to modify its proposals by establishing a presumptive benchmark and giving foreign carriers an opportunity to justify a higher rate.⁶⁰ However, Sprint's suggestion contains no cure. As Sprint notes, the FCC cannot prescribe a rate because it lacks the necessary data. If a foreign carrier declines the FCC's invitation to submit cost data to rebut the presumptive benchmark,⁶¹ the

⁵⁷ SBC Communications Comments at 6.

⁵⁸ KDD Comments at 22-23.

⁵⁹ E.g., Telintar Comments at 28-29; Cable & Wireless Comments at 15-17.

⁶⁰ Sprint Comments at 19.

⁶¹ Unlike the Permian Basin Area Rate Cases, where the federal agency had the
(continued...)

FCC still would lack adequate data upon which to prescribe a rate. Sprint's reliance upon the Permian Basin Area Rate Cases, 390 U.S. 747, 761 (1968), is misplaced. The agency in that case lawfully prescribed rates based upon "composite cost data," while the FCC here lacks any data, composite or otherwise, on the costs incurred by foreign carriers to terminate international switched traffic in their own countries.

VIII. THE FCC SHOULD NOT ADOPT A COMPLAINT PROCEDURE

AT&T recommends that the FCC adopt an expedited procedure for U.S. carriers to file complaints against foreign carriers who do not comply with the FCC's benchmarks.⁶² The FCC lacks the authority to adopt such a procedure. Complaints are governed by Section 208 of the Communications Act of 1934, which applies solely to the acts or omissions of "any common carrier subject to this Act."⁶³ A foreign carrier does not qualify as a "common carrier subject to this Act" and, therefore, it cannot be subject to a formal or informal Section 208 complaint.

Nor does the FCC have authority to adopt procedures outside the ambit of Section 208 whereby U.S. carriers can file complaints against foreign carriers. Foreign carriers are not subject to the Communications Act of 1934 or the FCC's jurisdiction thereunder. The FCC cannot cure its lack of jurisdiction to adopt the proposed benchmark

⁶¹(...continued)
authority to compel regulated entities to produce any necessary cost data, the FCC, as Sprint concedes, lacks jurisdiction to compel foreign carriers to produce cost data for use in deriving a benchmark settlement rate. Sprint Comments at 14-15; see also KDD Comments at 4.

⁶² AT&T Comments at 33.

⁶³ 47 U.S.C. § 208. Pursuant to Section 1.711 of the FCC's rules, Section 208 governs both formal and informal complaints. 47 C.F.R. § 1.711.

policies, or its lack of data to prescribe benchmark rates, by establishing a procedure whereby foreign carriers must submit to the FCC's jurisdiction to prevent the FCC from directing U.S. carriers to pay reduced settlements in contravention of their contractual obligations. As KDD previously noted, the FCC should not establish any policies or procedures that depend upon or contemplate foreign carriers appearing before the FCC and submitting cost data or other information to support non-benchmark settlement rates.

IX. THE FCC SHOULD NOT ADOPT TRANSITIONAL SETTLEMENT RATE BENCHMARKS

Several U.S. carriers have asked the FCC to establish a "glide-path" whereby foreign carriers would be required to make unspecified settlement rate reductions during the transition period prior to the effective date of the permanent settlement rate benchmarks.⁶⁴ Of course, the same reasons why the FCC cannot adopt permanent benchmarks apply equally to the "glide-path" approach. Beyond those reasons, it is difficult for parties to comment because neither the FCC nor the U.S. carriers have made a full-fledged proposal regarding the number of reductions, the size of those reductions, the period over which they should be made, the extent to which the "glide-path" should vary among country categories, and other relevant issues. If for no other reason, the FCC should reject this approach because it would be inherently arbitrary as well as a nightmare for the FCC and carriers to monitor and administer.

⁶⁴ E.g., Sprint Comments at 2; WorldCom Comments at 10-13.

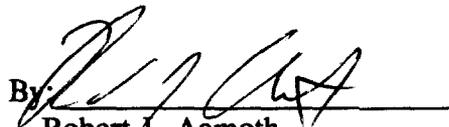
**X. THE FCC SHOULD REQUIRE U.S. CARRIERS TO ESTABLISH MORE
EQUITABLE IPL ARRANGEMENTS FOR INTERNET TRAFFIC**

KDD shares Telstra's concerns that U.S. international carriers have established arrangements for the exchange of Internet traffic which discriminate unreasonably against foreign carriers.⁶⁵ In particular, certain U.S. carriers have insisted that foreign carriers pay for both the U.S. and foreign IPL half-circuits for the transmission of U.S.-inbound and outbound Internet traffic. Foreign carriers who refuse to accept such discriminatory arrangements are denied the right to exchange Internet traffic. By forcing foreign carriers to purchase the full IPL circuit for Internet traffic, U.S. carriers and their Internet affiliates obtain a direct subsidy from foreign carriers and their rate-payers. KDD requests that the Commission turn its attention immediately to rectifying this abuse of market power by U.S. carriers.

CONCLUSION

For the foregoing reasons, KDD submits that the FCC should not adopt its settlement rate benchmark proposals.

Respectfully submitted,

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⁶⁵ Telstra Comments at 2-4.

CERTIFICATE OF SERVICE

I, Rebekah J. Kinnett, hereby certify that I have served a copy of the foregoing
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