the power to issue cease and desist orders found lacking in *Carroll*,[96] but also the power to declare which "practices" and "charges" are "just" and "reasonable," the power to prescribe rates, and the power to conduct complaint proceedings leading to monetary damages.[97] Thus, the Court's interpretation of the Commission's limited power over broadcasting licensees simply has no application in this context.

In this regard, contrary to the implicit claims made by a number of Commenters, the Commission's NPRM does not assert authority to modify contracts between U.S. carriers and any third party. Instead, the Commission's proposals extend only to the modification of inter-carrier arrangements -- that is, over contracts required to be filed with the Commission under Section 211. Indeed, the remarkable fact that not a single Commenter denies that settlement arrangements between U.S. carriers and foreign correspondents must be filed with the Commission, and are thus subject to Section 211's requirements, constitutes a tacit admission that the Commission has regulatory authority to review, and if necessary modify, their terms.[98]

For all these reasons, as well as those stated in AT&T's initial comments, there can be no serious question that the Commission has ample authority to regulate U.S. carriers' settlement arrangements with foreign carriers.

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[96] *See* 47 U.S.C. § 205.

[97] *See* 47 U.S.C. §§ 201, 205, 207, 208.

[98] *See* AT&T at 50-51.

## V. THE COMMISSION SHOULD STOP SETTLEMENT SUBSIDIES UPON U.S. MARKET ENTRY TO PREVENT COMPETITIVE DISTORTION.

There is wide recognition that above-cost settlement rates not only impose higher costs on U.S. consumers and carriers, but also permit foreign carriers to cause competitive harm in the U.S. international services market. Besides many U.S. Commenters, Foreign Commenters from the more liberalized markets -- New Zealand, Sweden and the UK -- attest to the legitimacy of this concern. There is therefore broad support for the NPRM's proposal to use settlement rates to address competitive distortion. But as AT&T has described (pp. 34-46), settlement rates can provide effective safeguards against competitive distortion only if they are set at economic cost -- i.e., at TSLRIC -- rather than at benchmark levels as the NPRM (¶¶ 76, 82) proposes. Because benchmark +rates exceed economic cost by significant margins, they would not remove foreign carriers' incentives to engage in "one-way bypass" of the settlements process by sending their U.S.-bound traffic over international private lines. Nor would they remove the strategic pricing advantages foreign carriers would obtain by providing U.S.-outbound switched facilities-based and resale services on routes to affiliated markets.

As described below, no Commenter has shown that AT&T's concerns are misplaced. Indeed, no Commenter attempts to produce evidence that the benchmark conditions proposed by the NPRM would provide adequate protection against competitive harm, or that alternative safeguards would address subsequent competitive distortions on a timely basis without imposing unreasonable regulatory burdens. Thus, rather than the half-measures proposed by the NPRM, the Commission should remove the incentive for foreign carriers to exploit their above-cost settlement rates for anticompetitive purposes.

This requires Section 214 authorizations for U.S.-inbound switched services over international private lines and for U.S.-outbound switched facilities-based and resale services to affiliated markets to be contingent upon the existence of settlement rates at TSLRIC.

### 1. Cost-based Settlement Rates are Necessary to Prevent Carriers Providing U.S.-inbound Switched Services Over International Private Lines From Engaging in "One-Way By-pass."

AT&T has shown (pp. 34-39) that requiring settlement rates on the relevant route to be at benchmark levels before allowing the provision of switched services over international private lines would not provide a sufficient safeguard against "one-way bypass." The margin between benchmark rates and the cost-based termination rates available in the U.S. would still allow carriers to obtain significant profits by sending their U.S.-bound traffic over international private lines, while collecting benchmark settlement rates on U.S.-outbound traffic.[99] Yet, as the NPRM acknowledges (¶ 83), by requiring settlement rates to be at cost before allowing the provision of these services, "the Commission would eliminate the financial distortion from above-cost settlement rates that makes distortion possible." Cost-based rates, not the high end of the benchmark range, should therefore be the required standard.

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[99] Even greater profits would be garnered if, as WorldCom suggests (p. 19), switched services were authorized over international private lines on a showing that only 50 percent of the traffic on a route was settled within the benchmarks. To avoid providing such incentives to engage in bypass, the settlement rate requirement should rather apply to all traffic on each route. Similarly, the suggestion by Japan (p. 3) that settlement rate requirements should be carrier-specific, rather than applying to all traffic on the route, ignores the ability of resellers, which do not participate in the settlements process, to engage in one-way bypass. *See* NPRM at ¶ 82.

No Commenter makes any showing that benchmark rates would protect against inbound bypass, and other U.S. Commenters share AT&T's concern that this proposed safeguard would not prevent this activity.[100] Nor do Foreign Commenters offer any reassurance that inbound bypass would not occur. Indeed, the incumbent carriers from two more liberalized countries confirm the fears expressed by U.S. carriers concerning the incentives to bypass above-cost settlement rates. TNZL (p. 9) observes that "[switched traffic] will tend to migrate to [international private lines] if settlement rates are above the costs the international private line carrier incurs to terminate the traffic at the foreign end."[101] Telia (pp. 3) warns that carriers from non-liberalized markets are

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100 *See* WorldCom at 17 ("application of the benchmarks will decrease -- but not eliminate -- the incentive for carriers to engage in by-pass, absent true cost-based rates"); MCI at 11 ("[E]ven if the foreign operator were to agree to rate-based benchmark settlement rates, . . . [it] would have the incentive to send its traffic to an affiliate to avoid paying the equivalent above-cost settlement to a U.S. carrier. Thus, the foreign carrier would have both the motivation and the ability to distort the U.S. termination market on the route and reap excessive profits on the foreign termination, to the competitive disadavantage of U.S. carriers and, ultimately, the detriment of U.S. consumers."). *See also* Sprint at 10 ("The closer settlement rates are to their economic costs, the less the incentive to arbitrage between international switched services provided over resold private lines and similar (and substitutable) service provided under traditional correspondent relationships."); CSI at 5-6 ("The Commission accurately recognizes how above-cost rates can serve as an incentive, and provide carriers with the ability, to distort prices and abuse their market power. . . [T]he Commission should strive for foreign carriers market access based on certification of cost-based accounting rates.")

101 TNZL (pp. 9-11) objects to the use of benchmark settlement rate conditions for the provision of switched services over international private lines on the grounds that this would allow incumbent foreign carriers negotiating settlement rates to "block" ISR competition, but ignores that in most countries there is no such competition. Similarly, ACC (pp. 4-5) fails to explain how allowing the provision of these services could bring competitive pressure on foreign carriers in markets that would not allow any bypass of U.S.-outbound services. In fact, the only result of allowing the provision of these services to any country meeting benchmark requirements would be

(footnote continued on following page)

already engaging in one-way settlements bypass into Sweden, where they can "terminate international traffic in Telia's domestic network at a low national interconnection rate, rather than an accounting rate." Telia (p. 4) therefore advocates "the use of cost-based accounting rates, based on the cost of the national extension rates at both ends."[102]

The NPRM (¶ 83) would set settlement rates at cost after distortion had occurred, but neither the NPRM nor any Commenter explains how one-way bypass could be detected on a timely basis without imposing unreasonably burdensome reporting requirements. As AT&T has described (pp. 37-39), reliance upon the only existing Commission monitoring activities that would reveal shifts in inbound-outbound traffic (i.e., the annual Section 43.61 reporting process), would delay action for at least nine months after the end of the calendar year in which bypass occurred, while the introduction of more frequent reports would impose costly compliance burdens and could disclose competitively sensitive information. Existing Commission reporting requirements for carriers authorized to provide switched services over international private lines have also been widely ignored. *See* AT&T at 38, n.63.

The comments of WorldCom, the only other Commenter to address the questions raised by the NPRM (¶ 83) regarding the "mechanism or approach" to be used

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(footnote continued from previous page)

to allow incumbent carriers in such countries to derive additional profits from their still-above-cost settlement rates by engaging in one-way bypass into the U.S.

[102] The UK (p. 4) concurs that "some safeguard is necessary" for routes to monopoly markets.

to identify competitive distortion, underscore these concerns.[103] WorldCom (pp. 20-21) "strongly supports" the NPRM's proposal that settlement rates should be reduced to the bottom of the benchmark range "as soon as the Commission finds that there has been a competitive distortion." WorldCom recommends (p. 20) that the critical measure should be whether "the percentage of outbound traffic increases by more than 10% across two measurement periods." However, the relatively low tolerance for competitive distortion that WorldCom recommends is hardly compatible with the substantial delays in Commission enforcement that would be entailed by reliance upon the existing Section 43.61 reporting process.

Moreover, the identification of such relatively small traffic shifts on the numerous routes on which carriers would wish to provide services over international private lines if they were not subject to the equivalency test would require a greatly expanded and overly burdensome reporting and review process. WorldCom also fails to explain how such small traffic shifts resulting from one-way bypass could be distinguished from those resulting from call-back, refile, or other pro-competitive market changes. *See* AT&T at 38-39.

Yet, if the Commission requires a cost-based settlement rate before switched services may be provided over international private lines, there would be no

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[103] Although the UK (pp. 2, 5) does not explain the safeguards it uses against one-way by-pass, these entail carrier-specific and overly burdensome quarterly reporting requirements that carriers would have difficulty in meeting without the extensive use of adjustments or estimates. *See* AT&T at 39, n.64. Such a reporting requirement would require substantial administrative resources to administer and would be overly reliant upon accurate reporting by each individual carrier. *Id.*

possibility of competitive distortion because there would be no incentive to engage in one-way settlements bypass. As MCI (p. 11) observes, "belt-tightened but nonetheless bloated" benchmark rates would still threaten competition. In contrast, achieving cost-based settlement rates directly, through an express Commission requirement as a condition of providing these services, would protect competition even more effectively than the equivalency test.

### 2. Cost-based Settlement Rates Are Also Required to Prevent Competitive Price Distortion Where U.S.-Outbound Switched Facilities-based and Resale Services are Provided to Affiliated Markets.

As WorldCom (pp. 16-17) properly emphasizes, carriers may engage in one-way bypass by routing their U.S.-bound traffic to a U.S. facilities-based affiliate as easily as through resold international private lines. *See also* AT&T at 40, n.65. For this reason alone, the Commission should condition facilities-based authorizations on the establishment of cost-based (i.e., TSLRIC) settlement rates by the affiliated foreign carrier. As explained above, benchmark rates would not be sufficient to remove the incentive for misbehavior.

But as AT&T has also described (pp. 39-46), all Section 214 authorizations for the provision of switched facilities-based and resold U.S.-outbound services should be subject to a carrier-specific requirement for cost-based settlement rates on routes to affiliated markets because of an additional and critical concern -- to redress the strategic pricing advantages that the foreign-affiliated carrier would otherwise enjoy. Foreign carriers have strong incentives to enter the U.S. market to provide U.S.-outbound services because they can then earn profits at both ends of the international route.

All foreign carriers already earn profits on the above-cost settlement rates they charge for terminating U.S.-outbound services -- which would continue, albeit to a lesser extent, under benchmark rates. Contrary to the NPRM (¶ 80) and GTE (p. 26, n.48), by establishing U.S. affiliates, foreign carriers would earn additional profits by selling U.S.-outbound services in the U.S. market at U.S. collection rates and by using their U.S. affiliates to stimulate additional U.S.-outbound traffic (and additional settlements revenue) by lowering U.S. collection rates. *See* AT&T at 41.[104]

Most importantly, in lowering U.S. price to stimulate additional outbound traffic, a foreign-affiliated carrier would not be constrained by the same cost considerations as unaffiliated U.S. carriers, as it could treat the settlement payment as an internal transfer. Above-cost settlements would thus provide the foreign-affiliated carrier with an unbeatable pricing advantage on the affiliated route, and belie the claim by GTE (p. 26) that it would be "irrational" of the foreign carrier to seek to increase its profits in this way.[105] The International Bureau recently concluded that even a foreign-affiliated U.S. reseller may be motivated to price its resold U.S.-outbound services below cost in

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[104] *See also* ESI at 8-9 (lost settlements payments could be largely offset by the U.S. business that would be gained, by additional traffic and sales of additional services, and by the advantage of obtaining a business presence in the U.S. market).

[105] As the Supreme Court explained in the case cited by GTE, "Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market." *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993). Here, the above-cost settlements obtained by the foreign carrier from its control of the foreign bottleneck would provide its U.S. affiliate with both an incentive to maximize those profits and a pricing advantage on the affiliated U.S.-outbound route that no U.S. competitor could match.

order to generate additional settlements payments to its foreign affiliate.[106] As GTE itself has previously recognized,

> "Control of both ends, whether by facilities or through resale, provides the opportunity to leverage advantages created by self-correspondence which could be significant. . . . When a foreign carrier owns a U.S. reseller, it has the ability to engage in predatory tactics by manipulating the prices of its services."[107]

In fact, because of the ample above-cost cushion that benchmark rates would still provide, the foreign-affiliated carrier could impose a price squeeze on unaffiliated U.S. carriers without pricing below its own economic cost.

As AT&T has explained (pp. 43-46), the ability of carriers to harm competition on affiliated routes in this way can be addressed effectively through the settlements process only by requiring settlement rates to be at TSLRIC as a condition of market entry.[108] Cost-based settlement rates would remove foreign-affiliated carriers' incentive to generate increased profits from their foreign bottlenecks by engaging in unfair competition in the U.S. market and would thus eradicate the root cause of competitive price distortion.

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[106] *GTE Telecom, Inc.*, ITC-95-443, Order, Authorization and Certificate, (released Sept. 16, 1996), at ¶ 45.

[107] *See Market Entry and Regulation of Foreign-affiliated Entities*, IB Docket No. 95-22, Comments of GTE (filed Apr. 4, 1995), at 6.

[108] *See also* ESI at 2.

### 3. Cost-based Settlement Rate Conditions Would be Consistent With GATS Obligations.

There is also no substance to the claims by foreign carriers that the use of such conditions by the Commission would be precluded under the GATS.[109] Nothing in that agreement prevents the U.S. from imposing conditions on licenses to protect the conditions of competition in its market. The requirement for settlement rates to be established at benchmark levels -- or, as AT&T recommends, at cost -- as a condition of Section 214 authorizations for the provision of switched services over international private lines and U.S.-outbound switched facilities-based and resale services would apply uniformly to carriers from all countries, including the U.S. *See* NPRM, ¶ 79. Such requirements would be perfectly consistent with the MFN and national treatment obligations of Articles II and XVII of the GATS.

In fact, effective safeguards to promote competition in open markets are necessary to further the global market-opening objectives of the World Trade Organization ("WTO"). As emphasized by CHC (pp. 6-7), if carriers from closed markets are able to use above-cost settlement rates in conjunction with the MFN principle to subsidize their anticompetitive activities in open markets, the many WTO member countries that have not made GATS commitments to open their international services markets thus far will have no incentive to change their policies in the future. Consequently, as CHC warns (*id.*), cost-based settlement rates -- or, as AT&T believes is necessary, a Section 214 requirement for cost-based settlement rates where services are

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[109] *See* GTE at 30, 32; Japan at 2, 4; KDD at 24, 25.

provided on affiliated routes-- would prevent the inclusion of basic telecommunications under the GATS from having "the unintended consequence of solidifying the status quo of closed markets."

## CONCLUSION

For the reasons explained above and in AT&T's initial comments, the Commission should establish new, mandatory benchmark settlement rates, it should require annual reductions toward benchmark rates during the transition period and it should prescribe such rates in response to carrier complaint. The Commission should also require cost-based settlement rates as conditions of all Section 214 authorizations for the provision of switched services over international private lines and of switched facilities-based and resale services to affiliated markets.

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Dated: March 31, 1997

Attachment 1

# LIST OF COMMENTERS

## INTERNATIONAL SETTLEMENT RATES

## File No. IB 96-261

ABS-CBN Telecom, North America, Inc. ("ABS-CBN")
ACC Corp. ("ACC")
Americatel Corporation ("AmericaTel")
Antelecom
Government of Antigua and Barbuda ("Antigua and Barbuda")
Government of Australia ("Australia")
CARICOM
The Cooperation Council for the Arab States of the Gulf ("Cooperation Council")
Telecomunicacione Internacionales De Argentina Telintar S.A. ("Telintar")
Superintendency Telecommunicaciones - Bolivia
Cable & Wireless, Inc. ("C&W")
Carribean Association of National Telecommunication Organizations ("CANTO")
Regional Technical Commission on Telecommunications of Central America ("COMTELCA")
Directorate General of Telecommunications, P&T, China ("DGT-China")
Chunghwa Telecom ("Chunghwa")
Compania Telefonos De Chile ("CTC Mundo")
Coalition for Hemispheric Competitiveness ("CHC")
Coalition of Services Industries ("CSI")
Deutsche Telekom ("DT")
Directorate General of Telecommunications, Taiwan, Republic of China ("DGT-Taiwan")
Economic Strategy Institute ("ESI")
Empresa Estatal De Telecommunicaciones - ("EMETEL")
Empressa Nacional de Telecomunicaciones S.A. ("ENTEL-Chile")
European Union
France Telecom ("FT")
Frontier Corporation ("Frontier")
Granada Ministry of Works, Communications and Public Utilities
GTE Service Corp. ("GTE")
Hispanic American Association of Research Centers and Telecommunications Companies ("AHCIET")
HongKong Telecom International ("HKTI")
INDOSAT
Instituto Das Comunicacoes De Portugal ("ICP")
International Digital Communications ("IDC")
Government of Japan ("Japan")
Colombia Telecom Regulatory Commission
Telecom - Colombia

Embassy of Antigua & Barbuda
Government of Jamaica ("Jamaica")
Jabatan Telekom Malaysia ("JTM")
International Telecom Japan ("ITJ")
Justice Technology Corporation ("Justice Technology")
Kokusai Denshin Denwa Company Ltd. ("KDD")
RPOAs of the Republic of Korea ("RPOAs")
Lattelekom SIA ("Lattelekom")
Department of Communications of Ministry of Transport of The Republic of Latvia
MCI Telecommunications Corporation ("MCI")
Nepal Telecommunications Corporation ("NTC")
New T&T Hong Kong Limited ("New T&T")
Telecom New Zealand Limited ("TNZL")
Pacific Bell Communications ("PBCom")
Pacific Islands Telecommunications Association ("PITA")
Regulatory Authority of Pakistan
Republic of Panama ("Panama")
Phillipines National Telecommunications Commission ("PNTC")
Portugal Telecom International ("Portugal Telecom")
Post and Telegraph Department of Thailand ("Thailand P&T")
Primus Telecommunications Group, Inc. ("Primus")
Kingdom of Saudi Arabia Ministry of P.T.T.
Syrain Arab Republic
SBC Communications Inc. ("SBC")
Telecommunication Authority of Singapore ("TAS")
Singapore Telecommunications Limited ("Singapore Tel")
Sprint Communications Limited ("Sprint")
Solomon Islands Government ("Solomon Islands")
Sri Lanka Telecom Limited
Government of St. Vincent and the Grenadines ("St Vincent")
Republic of Surinam ("Surinam")
Telecommunications of Jamaica Limited ("Jamaica Telecom")
Telecommunications Resellers Association ("TRA")
Telecom Italia ("Telecom Italia")
Telecom Vanuatu Limited ("Telecom Vanuatu")
Telefonica Del Peru ("Telefonica Del Peru)
Telefonica Internacional De Espana S.A. ("Telefonica De Espana")
Telefonos de Mexico S.A. de C.V. ("Telmex")
Telekom Malaysia ("Telecom Malaysia")
Republic of Poland, Ministry of Communications ("TPSA")
Telia AB ("Telia")
Telstra Corporation Limited ("Telstra")
The Communications Authority of Thailand ("CAT")
Tricom S.A. ("TRICOM")
Telecommunication Services of Trinidad and Tobago Limited ("TSTT")

United Kingdom Government ("UK ")
Office of the U.S. Trade Representative, Department of Commerce and Department of State ("USTR, Commerce, State")
U.S.House of Representatives, Committee on Commerce ("Leadership of the House Commerce Committee")
Videsh Sanchar Nigam Limited ("VSNL")
Worldcom, Inc. ("WorldCom")
Zephyr Capital Group ("Zephyr")

## CERTIFICATE OF SERVICE

I, Helen Elia, do hereby certify that on this 31st day of March, 1997 a copy of the foregoing "Reply Comments of AT&T " was mailed by U.S. first class mail, postage prepaid, upon the parties on the attached service list.

Helen Elia

Helen Elia

*No address was provided by these Commenters. Service has therefore been made on the relevant country's embassy in the U.S.

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