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JUL 29 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 29, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: IB Docket 96-261 - International Accounting Rates

Dear Mr. Caton:

Attached hereto is a document to be incorporated in the above captioned docket.

Accordingly, an original and two copies of this letter are being submitted to the Secretary of the Federal Communications Commission.

Sincerely,

Judy Simonson

Attachment

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List ABCDE

July 29, 1997

Re: *FCC Authority to Establish the Lower End of a Benchmark Range of Reasonable Settlement Rates Using Domestic Carriers' Average Network Termination Costs as a Cost Surrogate*

AT&T has proposed that the Commission base the lower end of a benchmark range of reasonable settlement rates on evidence of U.S. carriers' average worldwide network termination costs. The Commission has ample authority to utilize this ratemaking approach.

First, the Commission has broad authority to regulate the terms and conditions of privately negotiated contracts. In particular, Section 201(b) empowers the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the Act]." Further, Section 205 unambiguously declares that "the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge...and what classification, regulation, or practice is or will be just, fair, and reasonable." 47 U.S.C. § 205(a). See In re Lincoln Telephone & Telegraph, 72 F.C.C. 2d 724, 728 (1979) (ordering a billing and collection arrangement pursuant to Commission authority under §§ 201-205). Significantly, this power includes the authority to "make an order that the carrier or carriers shall cease and desist from such [an unreasonable practice or charge]." 47 U.S.C. § 205(a). These provisions are explicitly made applicable to all "foreign communication by wire or radio" by Section 152(a). See 47 U.S.C. § 152(a).

In short, the Communications Act unambiguously authorizes the Commission to declare that certain "charges" and "practices" are unreasonable and unlawful, to order carriers to "cease and desist" from participating in such practices, and even to go so far as to prescribe what particular "charges" and "practices" carriers may adopt. By its terms, this authority applies to foreign as well as domestic communication services.

Second, the Commission has wide latitude in its choice of ratemaking methodologies. Indeed, the Supreme Court has held that "courts are without authority to set aside *any* rate selected by the Commission which is within a 'zone of reasonableness.'" In re Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968) citing FPC v. Hope Natural Gas Pipeline Co., 315 U.S. 575 (1944) (emphasis added). Accordingly, as the Supreme Court put it in FPC v. Hope Natural Gas Pipeline Co., a reviewing court is "not obliged to examine each detail of the Commission's decision; if the 'total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry...is at an end.'" In re

Permian Basin Area Rate Cases at 767, citing FPC v. Hope Natural Gas Co. at 602. The same principles of judicial review that apply to ratemaking decisions under the Natural Gas Act also apply to decisions under the Communications Act. See, e.g., Las Cruces TV Cable v. FCC, 645 F.2d 1041, 1047 (D.C. Cir. 1981) (noting that both acts "can trace their lineage to the prototypical ratemaking statute, the Interstate Commerce Act," and generally applying the principles of judicial review established under the Natural Gas Act to a case under the Communications Act).

In keeping with these principles, reviewing courts accord agencies wide latitude in the choice of ratemaking methodologies, including methodologies that depart from traditional, historic cost-based regulation. For example, in Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Companies, 498 U.S. 211, 225 (1991), the Supreme Court approved the Federal Energy Regulatory Commission's decision to collapse "vintage categories [of natural gas] together" for ratemaking purposes, and to jettison a long-standing ratemaking methodology based on historical costs in favor of a replacement cost formula applicable to all categories. In so doing, the Court reasoned that "[f]ar from binding the Commission, the 'just and reasonable' requirement accords [it] broad ratemaking authority....The Court has repeatedly held that the just and reasonable standard does not compel the Commission to use any single pricing formula...in particular." Id. at 224 (citations omitted).

Similarly, in the Permian Basis Area Rate Cases, the Supreme Court upheld area-wide natural gas rates that did not reflect the actual costs faced by individual carriers, but instead reflected averages for the entire area. In re Permian Basin Area Rate Cases at 768. And the U.S. Court of Appeals has held that the rates adopted by the Commission may "rest[] on a set of evidentiary facts less desirable or complete than one which would exist in some regulatory utopia[.]" NARUC v. FCC, 737 F.2d 1095, 1140 (D.C. Cir. 1984); See also ICORE, Inc. v. FCC, 985 F.2d 1075, 1080 (D.C. Cir. 1992) (although "the absence of cost data" limited the FCC's ability to "implement an absolutely accurate surrogate," the parties' detailed responses nevertheless "provide a substantial basis for the Commission decision").

Thus, under these authorities, the Commission has discretion to adopt any number of rate-setting methodologies including, but not limited to, rates based on proxies for a carrier's actual costs or rates based on the economic costs of U.S. carriers for the network components used to terminate international calls in analogous circumstances.

The use of such proxies in this case is made even more reasonable and appropriate by the absence of reliable information concerning foreign carriers' actual costs. Although numerous foreign carriers participated in this proceeding, we understand that the record is bereft of any foreign carrier termination cost data.

At a minimum, moreover, the Commission could rely on U.S. carriers' network termination costs as part of an interim ratemaking methodology. Use of such a proxy for the costs faced by foreign carriers would certainly be just and reasonable in such circumstances because it would move overall rates closer to costs than a higher rate that the carriers might otherwise try to force upon a U.S. carrier. And, because U.S. carriers' costs would be used only as a proxy, a foreign carrier that considers the resulting rate insufficient to recover its actual cost of providing service could submit supporting evidence to the Commission, which in turn could permit U.S. carriers to pay a higher rate, if warranted. These methodologies, moreover, could continue so long as their justification persists. See, e.g., MCI Telecommunications Corp v. FCC, 712 F.2d 517, 535 (D.C. Cir. 1983) (approving interim rates for a period of investigation that might last five years). Thus, the Commission could, at a minimum, use U.S. carriers' network termination costs as part of an interim methodology while it gradually works to reduce overall accounting rates to a level closer to actual economic costs.

For these reasons, reliance on U.S. carriers' worldwide network termination costs to set the lower end of a benchmark range is well within the Commission's discretion.