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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

PETITION FOR RECONSIDERATION OF THE PHILIPPINES PARTIES

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Summary

The Philippines parties, representing both public and private sector opinion in the Philippines, respectfully petition the Commission for partial reconsideration of its Report and Order in IB Docket No. 96-261, International Settlement Rates. The Philippines unequivocally supports ongoing multilateral and bilateral efforts by governments and carriers around the world to reform the traditional accounting rate system for international services. Indeed, the accounting rate on the U.S.- Philippines route has been reduced by approximately 40% since 1990. In addition, the Philippines has a demonstrated commitment to competition in its telecommunications sector. The Philippines currently has one of the most deregulated telecommunications markets in the world: the market leader competes with 67 local exchange carriers, nine national and international toll service providers, and five cellular operators.

While committed to the same fundamental principles as the Commission on accounting rate reform and competitive markets, the Philippines parties object to the specific manner in which the Commission plans to address reform and are compelled to file this petition for partial reconsideration of the Order.

The Order not only contravenes established practices and international comity, it seriously transgresses U.S. domestic and international law by granting the Commission powers unforeseen in the Communications Act of 1934 and unparalleled in the FCC's history. The Commission has no authority to evaluate the lawfulness of a Philippines rate. The Commission has neither the legal standing nor the knowledge necessary to judge the appropriate allocation of joint or common costs and universal service support in a foreign country's rate. In addition, the Commission does not have the authority to tell a subject carrier what to pay an unaffiliated entity. Moreover, even if the Order were legal, which it

clearly is not, it fails the standard of practicability, by not providing an adequate framework to determine how foreign rates will be assessed in relation to the proposed benchmarks. The Philippines parties believe the FCC's assertion of jurisdiction over foreign carriers is offensive to the sovereignty of all nations and is a *de facto* claim of suzerainty over foreign regulatory bodies and governments, as well as private entities operating exclusively outside of the United States.

Portions of the Order, unless reversed, constitute a dramatic departure from, and a substantial threat to, the multilateral system that guides international telecommunications. As a result, the Order is likely to make accounting rate reform more difficult, not easier. If portions of the Order are allowed to stand, regulatory agencies in other countries could be encouraged to make similar assertions of authority, which would result in overlapping claims of jurisdiction as well as widespread confusion. In addition, developing nations, including the Philippines, could be seriously hampered in their national programs of telecommunications infrastructure development.

The Philippines parties believe that, unless the Commission acts to reconsider the Order and reverse particular findings, the Order will be counter-productive to the goals of reform and competition it hopes to achieve.

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PETITION FOR RECONSIDERATION OF THE PHILIPPINES PARTIES

The National Telecommunications Commission of the Republic of the Philippines ("NTC"), Philippines Long Distance Telephone Company ("PLDT"), and Capitol Wireless, Inc., collectively "the Philippines parties," respectfully petition the Federal Communications Commission ("the FCC" or "the Commission") for partial reconsideration of its Rules and Order ("the Order") in Docket No. 96-261, released August 18, 1997. NTC is the principal regulatory agency charged with the duty of implementing and administering telecommunications law in the Philippines. PLDT, the first carrier in the Philippines, is the market leader.

The Philippines parties are concerned that portions of the Order, unless reversed, constitute a dramatic departure from, and rejection of, the multilateral (international) system, which has underlain the provision of international telecommunications services for more than 100 years. As a result, the FCC order threatens the stability and continuation of this remarkable system, which has ensured nearly uninterrupted provision of telecommunications

services. Moreover, the Philippines parties believe the Order is likely to be counter-productive to the very goals of reform and competition that are enunciated in it.

While nominally intended to foster reform of the international settlements system developed on a multilateral basis and ratified by International Telecommunications Union ("ITU") convention, as well as to "protect American consumers," the Order, in fact, does nothing more than assist American carriers in enhancing their profitability.[1/] In so doing, it ignores domestic and international law, established practices, and comity, and it is certain to engender resistance that will make accounting rate reform more difficult, not easier. Moreover, if the FCC is concerned about the reasonableness or lawfulness of the rates charged to American consumers, it has more than adequate powers to solve this "problem" in a lawful manner.

Despite the Commission's attempts in the Order to suggest that it is merely exercising its authority over U.S. carriers, the Order in fact asserts both direct and indirect FCC jurisdiction over foreign regulatory bodies and foreign carriers. The FCC has no jurisdiction over Philippines regulatory bodies or carriers. Furthermore, the filing of this petition for partial reconsideration of the Order by the Philippines parties does not constitute a submission by the Philippines to the FCC's unlawfully claimed authority.

The Philippines unequivocally supports ongoing multilateral and bilateral efforts by governments and carriers around the world to reform the traditional accounting rate system for international services. The Philippines government and Philippines carriers have acted on

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1/ The courts have recognized that the goal of settlements policy is "to protect ratepayers, not U.S. carriers." *Atlantic Tele-Network v. FCC*, 59 F. 3d 1384, 1390 (D.C. Cir. 1995) (quoting In re: American Tel. & Tel. Co., 4 F.C.C.2d at ¶ 1196).

their belief in the need for accounting rate reform by actively participating in numerous multilateral and bilateral efforts to enact such reform.

The Philippines is an active participant in the International Telecommunication Union's ("ITU's") efforts to reform the international accounting rate system. Like the FCC, the Philippines parties believe that ITU-T Recommendation D-140, which was adopted by the Telecommunications Standardization Sector Study Group 3 in 1992, is a "significant multilateral achievement."[2/] In addition to supporting the use of multilateral fora for pursuing accounting rate reform, the Philippines parties firmly believe that bilateral negotiation of accounting rates is the other appropriate avenue by which such reform can be achieved. Through bilateral negotiations, the primary international service provider in the Philippines, PLDT, has effectively implemented repeated accounting rate reductions with U.S. carriers on the U.S.-Philippines route. The reductions spanning the past seven years amount to a precipitous drop in the accounting rate on the U.S.-Philippines route from US$1.75 per minute in 1990 to US$1.05 per minute in 1996,[3/] representing a reduction of 8.1% per year and 40% overall. The Commission is well aware of ongoing reductions in accounting rates in the Philippines and elsewhere. The Commission noted in the Order that reduced settlement rates are taking effect around the world.[4/] The Philippines parties believe that the active participation of the Philippines government and Philippines carriers in multilateral and bilateral accounting rate reform efforts, which have resulted in a substantial drop in the accounting rate on the U.S.-Philippines route, clearly indicates that the

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[2/] Order at ¶ 17.

[3/] Philippines Long Distance Telephone Company.

[4/] Order at ¶ 39.

Philippines parties are not simply preaching about the need for accounting rate reform, but are aggressively implementing it.

The Philippines parties are also cognizant of the fact that the Order is not intended to stand alone, but that it is an integral part of a larger vision of the Commission to encourage competitive markets around the world. The Philippines parties unreservedly support a competitive model for telecommunications markets. In fact, the Philippines already fosters a level of competition in the telecommunications sector that rivals that in any other country in the world. The U.S. Commerce Department has recognized that "the Philippines telecommunications-services industry is one of the fastest growing, most competitive and deregulated in the world."[5/] The NTC has opened the Philippines to free competition in practically every sector of telecommunications. The proof of this market-opening is in the pudding: PLDT, the primary national carrier, currently competes with 67 local exchange carriers, nine national and international toll service providers, and five cellular operators.[6/] As the Philippines parties have previously noted, success of these competitors has resulted in marked increases in their market share.[7/] This should not be surprising: the Philippines does not have a heritage of a nationalized and monopolist telecommunications sector, as has been the case in many other nations. Rather, the primary carrier, PLDT, has always been privately owned and has a charter that is explicitly non-exclusive in nature. Competition has

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5/ *Philippines - Telecom Overview IMI970602*, June 1997, National Trade Data Bank and Economic Bulletin Board, U.S. Department of Commerce.

6/ National Telecommunications Commission of the Republic of the Philippines.

7/ Comments of the Commissioner of National Telecommunications Commission of the Republic of the Philippines, *In the Matter of International Settlement Rates*, Notice of Proposed Rulemaking, IB 96-261, ("Philippines' NPRM Comments") at 4.

never been foreclosed in the Philippines, unlike the U.S. experience, and, as a result, competition currently is flourishing in the Philippines telecommunications market.

It should be noted that the accounting rate reductions achieved between Philippines carriers and their U.S. counterparts were achieved despite the fact that these reductions lowered the net settlements revenue received by the Philippines. Consequently, the Philippines parties are startled that the Commission has taken actions based on a perceived need to protect and assist U.S. carriers. The Order appears to be predicated on the assumption that during past bilateral negotiations, U.S. carriers have been unduly taken advantage of by Philippines carriers. U.S. carriers, traditionally among the most profitable companies in the world, are well-known for their business acumen as well as their economic and political "clout." To suggest that these sophisticated companies with extensive negotiating leverage have been universally cowed into accounting rate agreements is simply unreasonable. Further, to suggest that bilateral agreements engineered by these dynamic companies in concert with Philippines carriers should now be superseded by U.S. government intervention is equally unreasonable.

The NTC, joined by Philippines telecommunications providers and carriers, is compelled to file this petition for partial reconsideration of the Order. While the Philippines parties share some fundamental views with the FCC on the benefits of accounting rate reform, the Philippines parties object to the specific manner in which the Commission plans to proceed.

I. The Order Ignores and Is Inconsistent with Domestic and International Law

The Philippines parties believe that the Order is an attempt to exert unlawful authority over both Philippines regulatory bodies and carriers, taking away from them the very same powers to determine appropriate rate levels and policies, such as supporting universal service through international termination rates, that U.S. carriers and regulators enjoy. Although the Commission denies that it is exercising jurisdiction over foreign carriers, that is exactly what it is doing in practice and effect. Its action is predicated on a claim of authority to determine the lawfulness of charges by Philippines telecommunications carriers for Philippines telecommunications services under the Communications Act. In addition, the Order purportedly only regulates U.S. carriers by establishing rates that U.S. carriers must pay their foreign counterparts to terminate traffic in foreign countries. Despite FCC insistence to the contrary, the effect of the Order is in fact to assert the Commission's regulatory authority over Philippines carriers, specifically the rate charged by Philippines carriers to their U.S. counterparts. The FCC lacks the legal authority under both U.S. domestic and international law (1) to determine the reasonableness and lawfulness of foreign carriers' termination charges; or (2) to prescribe what U.S. carriers are permitted to pay foreign counterparts for terminating traffic in their countries.

A. The FCC Has No Authority to Evaluate the Lawfulness of Philippines Rate

The FCC asserts the general authority to determine when settlement rates in other countries, such as the Philippines, are lawful.[8/] The Commission then goes on to make

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[8/] "The benchmark settlement rates we adopt in this Order are necessary because under the current international accounting rate system the settlement rates U.S. carriers pay foreign carriers to terminate U.S.-

(continued...)

specific findings as to the lawful rate levels -- substituting its own judgment for the judgment both of foreign regulatory bodies and of foreign carriers on matters such as the proper allocation of fixed local network costs to charges for terminating international calls.[9] As noted by NTC in its comments, the FCC, while foreclosed by law from judging the lawfulness of the rate charged one carrier by another for terminating intrastate toll or local calls, appears to believe that it has jurisdiction to determine the lawfulness of a foreign carrier's charge for terminating an international toll call, even where that charge might be set or approved by a regulatory body.[10]

The FCC assertion of its claimed authority over Philippines carriers is patently illegal under U.S. domestic law and international law. There certainly is no provision in the Communications Act of 1934 ("the Communications Act") that empowers the FCC to determine the lawfulness of charges by foreign entities.[11] As discussed in more detail below, the Commission's actions also violate international law by contravening the United

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[8](...continued)
originated traffic are in most cases substantially above the costs foreign carriers incur to terminate traffic." Order at ¶ 2. Later in the Order, the FCC asserts, "To the extent the above-cost portion of settlement rates paid by U.S. carriers to their foreign correspondents leads to those settlement rates being 'unjust or unreasonable,' section 201 requires us to declare such 'charges' or 'practices' unlawful." Order at ¶ 26. In conducting its evaluation, of course, the Commission asserts its authority to utilize whatever definition of "cost" it currently wishes to apply.

[9] *Id.* at ¶¶ 44-45.

[10] Philippines' NPRM Comments at 29.

[11] While they do not necessarily endorse the legality or wisdom of the FCC attempting to determine and prescribe the just and reasonable rates to be charged by U.S. carriers for the termination of international traffic, the Philippines parties are not seeking reconsideration of the FCC's exercise of its asserted authority to ensure that termination rates (and collection rates) charged by U.S. international carriers are just and reasonable. Indeed, the FCC itself has recognized recently that rates for terminating traffic need not be the same in both directions of a given route. *See, e.g., In the Matter of AT&T Corp., MCI Telecommunications Corp. Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Various Countries*, Memorandum Opinion, Order and Authorization, DA-97-1952 (rel. September 10, 1997) ("ISP Waiver Order").

States' ITU obligations, which are a part of U.S. law. By exerting jurisdiction over Philippine carrier accounting rates, the FCC vests itself with authority over how Philippines carriers allocate joint and common costs as well as support universal service in their nation. The Philippines parties believe that the FCC's assumption of authority over, *inter alia*, a determination of the appropriate allocation of joint and common costs and universal service support is an infringement on the sovereignty of the Philippines. Besides being unlawful, this FCC action is grossly offensive not only to the Philippines, but to many other public and private entities.

Ultimately, the FCC's attempt to assume jurisdiction over the rate base of Philippines carriers has major negative consequences for the Philippines national telecommunications policy of universal service. The Philippines government's ability to regulate Philippines carriers' rate base is critical to the nation's ability to appropriately derive and develop funding for the build-out of the Philippines' telecommunications infrastructure. It is universally recognized that many developing nations rely on cross-subsidies from national and international toll service rates to assist in the development of national telecommunications infrastructure. It is also a well-documented fact that the Commission has in the past sanctioned similar cross-subsidies within the U.S. rate structure from toll services, including international services,[12/] and continues to support the use of cross-subsidies to maintain low local telecommunications rates in the U.S.[13/] In the Philippines, which has one of the

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[12/] *See* discussion in the Commission's Universal Service Order, *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket-No. 96-45 (rel. May 8, 1997), at ¶¶ 8-18 .

[13/] In its Universal Service Order, the Commission repeatedly noted the importance of preventing any increase in local residential rates in order to keep rates "affordable," while it adopted a subsidy mechanism that was intended to be more efficient, *Id.* It was nonetheless a decision to continue the subsidy of local service by

(continued...)

lowest national teledensities in the world,[14] the principle of cross-subsidization is explicitly embodied in law. By law, the NTC, the national regulator, is obliged to:

> Mandate a fair and reasonable interconnection of facilities of authorized public network operators and other providers of telecommunications services through appropriate modalities of interconnection and at a reasonable and fair level of charges, which make provision for the cross subsidy of unprofitable local exchange service areas so as to promote telephone density and provide the most extensive access to basic telecommunications services available at affordable rates to the public.[15]

Insofar as it deems unlawful the provision for cross subsidy mandated of Philippines carriers by Philippines law, the Order attempts to hamper telecommunications infrastructure development, and national economic development, in the Philippines.

B. The FCC Has No Authority to Tell a Subject Carrier What to Pay an Unaffiliated Entity

The Philippines parties also believe that the Order is a blatant attempt to exert unlawful authority over U.S. carriers by implicitly asserting jurisdiction over all cost components affecting end user charges for international services.[16] The FCC does not have the authority to direct a U.S. carrier as to what that carrier can pay a third party for a service rendered to that carrier. The FCC's analysis of its authority under §§ 201-205 of the

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[13](...continued)
other customers. *See also Access Charge Reform*, Notice of Proposed Rule-Making, Third Report and Order, and Notice of Inquiry, CC Docket No. 96-262 (rel. December 24, 1996).

[14] The current teledensity of the Philippines is approximately 3 main stations per 100 inhabitants.

[15] Republic Act No. 7925, Section 5, C. Article III. ADMINISTRATION.

[16] Order at ¶ 24.

Communications Act to protect consumers through control of "components that are reflected in the rates charged to end-users"[17] is flawed. While the Philippines parties in no way challenge the authority or obligations of the FCC to ensure that collection rates charged by U.S. international carriers are just and reasonable, this portion of the Communications Act provides no basis whatsoever for controlling the price paid by carriers to unaffiliated entities for goods or services.

The Commission attempts to create legal authority for its assertion that it may dictate what U.S. carriers pay unaffiliated entities, but no such authority exists. The Order first cites *R.C.A. Communications, Inc. v. United States*[18] to claim jurisdiction to dictate the rates U.S. carriers can pay to their foreign correspondents, but this case supports neither this proposition nor the FCC's assertion of authority.

The FCC order upheld by the district court in *RCA* only forbids U.S. telegraph carriers from *charging* above a specified amount for terminating traffic in the United States.[19] It did not prescribe what those carriers must *pay* to their foreign correspondents for terminating U.S.-originated traffic in their countries, as the Order does.[20] This is emphasized by the court's statement that a U.S. carrier could amend its existing agreements

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[17] *Id.* at ¶ 24.

[18] 43 F.Supp. 851 (S.D. New York, 1942).

[19] *RCA* at 855. The court only noted that the "order forbids the plaintiff from participating in messages at the 2 to 1 ratio, *originating abroad and terminating in or passing through the United States*." (Emphasis added.)

[20] The *International Settlement Rates Order* tacitly acknowledges this in its description of the order at issue in RCA stating, "We directed RCA Communications and other telegraph companies to cease and desist from the practice of *charging* amounts for 'Urgent' messages" greater than 1½ times the charges for "ordinary" telegraph messages. Order at ¶ 281 (emphasis added).

with foreign correspondents or "break its contracts for foreign messages or . . . bear the loss on outgoing messages itself."[21]

In addition, *RCA* noted that the telegraph rates at issue were settled by an international agreement to which "[n]either the United States, the plaintiff, nor any of the other carriers subject to the terms of the order of the Commission were parties . . . ."[22] In contrast (and as discussed in more detail below), the United States is a member of the ITU, whose regulations specifically note that accounting rates shall be established and revised by *mutual* agreement.[23] That has not happened in this instance, and the FCC's current assertion of authority to limit U.S. carriers' payments based on *RCA* is wholly unsupported by that case.

The Order also claims authority by comparing its current action with a 1977 Commission order disallowing certain expenses from AT&T's interstate rate base for goods purchased from its Western Electric affiliate.[24] Contrary to the Commission's assertion, however, that action was not "similar" to the action taken in the Order. In fact, that case stands for a wholly different proposition than the Commission purports. First of all, the

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[21] *RCA* at 855.

[22] *Id.* at 855 (referring to the "Telegraph Regulations of Madrid or Cairo which most foreign nations agreed upon and which provided a 2 to 1 ratio for rates for '[u]rgent' foreign messages.").

[23] International Telecommunications Regulations, Final Acts of the World Administrative Telegraph and Telephone Conference, art. 6.1.1 (done at Melbourne, Australia 1988). While the United States has not ratified the most recent ITU Constitution, it is expected to do so shortly. *See Government and Industry Push Senate Approval of ITU Treaty to Regain U.S. Vote*, Communications Daily, September 18, 1997 at 5-6; *International Telecommunications Union Constitution and Convention Ratification Before the Senate Comm. on Foreign Relations*, 105th Cong., 1st Sess. (September 17, 1997) (testimony of Ambassador Vonya B. McCann). Furthermore, despite the impending ratification, the United States has continued to work within, and rely upon, the ITU framework.

[24] Order at ¶ 280 (referring to *AT&T Company and Associated Bell System Companies Charges for Interstate Telephone Service*, Phase II Final Decision and Order, 64 F.C.C.2d 1 (1977)).

1977 order involved an affiliated entity, not an unaffiliated foreign carrier as the present instance. Second, in that decision, the Commission only barred AT&T from including certain expenses in its interstate rate base, it did *not* restrict what AT&T could pay for contracted goods.

The Order also compares its actions with those used for "regulatory oversight on components that are reflected in the rates charged to end users."[25] The example that the Order uses to support this assertion is the Commission's limitation on local exchange carrier charges for origination or termination of traffic.[26] In that circumstance, however, the Commission has jurisdiction over both parties involved and is implementing a specific legislative mandate, unlike the situation addressed in this Order.

While the Commission has exercised its authority in determining what costs should be allowed in calculating a regulated carrier's rate base, this does not transmogrify into the altogether different authority to dictate what a carrier may pay for contracted goods or services from an unaffiliated entity. As noted, the FCC refers to its traditional powers to exclude from the rate base expenses that were paid to affiliated entities for goods and services. It apparently reasons that since it no longer engages in rate-of-return regulation and, hence, no longer oversees a revenue requirement, it has acquired new powers over carriers' actual expenditures. Specifically, the FCC claims the power to determine whether any payments made by a U.S. telecommunications service provider that it characterizes as

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[25] *Id.* at ¶ 24.

[26] Interestingly, the order phrases this limitation slightly differently, noting that it limits what interexchange carriers "must pay for access" when in fact the Commission limits what the LECs may charge. Such wording is only a semantical difference in explaining the same effect. Similarly, throughout the order, the Commission claims that it is only dictating what U.S. carriers pay, but this has the same effect as prescribing what foreign carriers may charge, which is clearly outside the FCC's jurisdiction.

"components" of end-user rates are just and reasonable.[27] Moreover, it asserts the unprecedented power to order a carrier to not pay contractually agreed prices to an unaffiliated entity based on "expectations" that the savings gained from breaching contracts would be passed through to consumers as a result of competitive pressures.[28] If the Commission actually had the broad powers it claims to regulate charges paid by carriers to unaffiliated entities, the Commission could issue similar orders (in response to complaints) about the rates charged by the advertising media, lawyers, and, perhaps, celebrities who "overcharge" for their endorsements. The imposition of requirements by the Order on what U.S. carriers must pay to unaffiliated foreign carriers simply is not authorized by U.S. law or precedent, nor is it supported by, or even related to, the cases cited by the Commission.

Moreover, the FCC's additional claim that jurisdiction over settlement rates (specifically, the rates paid by U.S. carriers to their correspondents) is granted by the "plain language of Section 201,"[29] since those rates constitute a "charge or practice in connection with foreign communications service,"[30] is both contrary to precedent and overreaching in the extreme. This claim seems to cover *any* practice engaged in by a non-U.S. correspondent carrier for traffic originating or terminating in the United States -- a definition

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[27] Order at ¶ 24.

[28] In the Order, the FCC states, "We thus find that it is not in the public interest at this time to mandate a particular approach U.S. carriers should take to pass through to consumers reductions in net settlements that occur as a result of the settlement rate benchmarks we adopt in this Order." Later, the FCC adds, "We expect to see U.S. carriers pass on to consumers the savings in net settlement payments on a route-by-route basis because settlement costs, and consequently savings, are incurred on a route-by-route basis." *Id.* at ¶ 272.

[29] *Id.* at ¶ 26.

[30] "To the extent the above-cost portion of settlement rates paid by U.S. carriers to their foreign correspondents leads to those settlement rates being 'unjust or unreasonable,' section 201 requires us to declare such "charges" or "practices" unlawful." *Id.* at ¶ 26.

that includes not only foreign collection rates but foreign rules on resale, unbundling, and billing and collection policies. The Order argues that jurisdiction over all this and more is granted to the FCC by the U.S. Congress under the "plain language" of the Communications Act. As noted below, any other country could claim similar authority to examine and judge the practices of U.S. carriers originating traffic to or terminating traffic from that country.

While the Philippines parties totally reject the FCC's claim of either direct or indirect authority over the settlement rates charged by Philippines carriers, we note that even if such jurisdiction existed, the FCC's procedures are badly flawed and violate both the Communications Act and the Constitution of the United States. The FCC claims that its rulemaking in Docket No. IB 96-261 comports with the procedural requirements of Section 205 of the Communications Act. It supports this position by citation to *Florida East Cost Railway*,[31] which it believes, apparently, to stand for the proposition that an informal rulemaking fully satisfies the requirements in Section 205 of the Communications Act.

But that section requires that, as a precondition for convening a hearing under Section 205, the Commission receive a complaint or issue an order of investigation. The Commission's Rules grant significant procedural rights to a party after a complaint is filed concerning its charges or practices. In addition to not issuing an order of investigation as required by the statute, the Commission has afforded none of these procedural protections to any parties in this rulemaking.

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[31] *U.S. v. Florida East Coast Railway*, 410 U.S. 224 (1973).

Moreover, the Commission's construction of the Communications Act to permit a U.S. carrier to file a complaint that alleges it is itself paying a service provider too much, and to permit the Commission to order a reduction in the payment without making the carrier whose revenues, would be reduced a party to the proceeding raises serious questions concerning compliance with the due process requirements of the Fifth Amendment to the Constitution. Apart from the procedural difficulties inherent in inviting a carrier to file a complaint alleging that its own practices are unlawful, the carrier clearly does not and cannot represent the interest of the foreign correspondent. The foreign carrier is merely permitted to file comments just as any other interested party. If the correspondent were found to be engaged in an activity regulatable by U.S. law (a proposition explicitly rejected by the Philippines parties), it would be entitled to procedural and substantive due process. Because the Communications Act grants the Commission no jurisdiction over a non-U.S. carrier that interconnects with a U.S. carrier, either at the midpoint of cables or mid-circuit on satellite transmissions, it cannot or has not even required such carriers to hire a U.S. agent for service of process. The Commission's claim that such patently unlawful and unconstitutional powers are granted by the "plain language" of the Communications Act cannot and will not stand up to scrutiny by the courts and should be reconsidered and abandoned.

In addition, the Commission's prescription of benchmarks is not sufficiently clear to place even U.S. carriers (much less the foreign correspondents that negotiate these arrangements with them) on notice as to what rates are unlawful. For example, are benchmark rates to be applied to peak traffic rates? Average traffic rates based on each carrier's actual traffic? Average rates based on total traffic handled by a foreign correspondent? Average rates handled by all foreign correspondents? Or some other figure?

The Commission's Order contains no guidance. Even if the Commission had jurisdiction, this lack of specific information (or, indeed, any specific definition of what a benchmark is) would constitute a fatal flaw in the Order. Indeed, the construction of the Order suggests that the Commission may well have "cut corners" in developing and defining its benchmarks, recognizing that its claim of jurisdiction is unlikely to be upheld in the courts.

The flaws in the Commission's approach are accentuated by the fact that the FCC has recently decided to remove all (or virtually all) regulatory control over prices charged to U.S. customers for international services.[32] It is universally recognized that U.S. carriers earn dramatically higher returns -- *i.e.*, many times more -- on their international toll traffic than on domestic toll traffic.[33] Even accepting the U.S. approach in determining the "cost" of providing international service, it is clear that a substantially greater amount of the prices paid by U.S. consumers is due to this greater profit than to the "excess" net settlement costs charged by foreign correspondents. To ignore the former, while taking these dangerous and unlawful steps to address the latter in the name of consumer protection, is disingenuous in the least.

The Philippines does not, of course, claim the authority to attempt to evaluate U.S. policies or regulation of U.S. carriers' charges for international toll traffic. In contrast, the FCC seeks to appoint itself as a review body for NTC's and the Philippines legislature's

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[32] *See In the Matter of AT&T Corp. to be Declared Non-Dominant for International Service*, Order, 11 FCC Rcd 17963 (1996).

[33] *See, e.g., Internet Fax: LD Slayer in the Making?*, by Tod A. Jacobs and Carl E. Walker, Sanford C. Bernstein & Co., Inc., July 11, 1997, (noting, "[O]n a cents-per-minute basis, international long distance at AT&T drives 6-7 times the revenue, 5 times the gross margin, but more like 13-14 times the estimated operating profit of domestic long distance.").

decisions about the advancement of universal service while relying entirely on "expectations"[34] to fulfill its responsibilities to ensure just and reasonable rates for international toll services in the U.S.

In dealing with the internationally sensitive issue of accounting rate reform, the FCC has the opportunity to send a constructive message and assume a role of enlightened leadership. That opportunity has nearly passed. Instead of applying enlightened leadership on this issue, the Commission thus far seems content to exercise its dominant position to subject nations around the world to an illegal and offensive order.

C. The FCC's Actions Violate International Obligations that Are Part of U.S. Law

In addition, the FCC's settlement rate benchmarks appear to conflict with the United States international obligations and thus U.S. law as well. The United States has been a member of the ITU since before the 1934 Communications Act was enacted, and it is signatory to many of the ITU's related international agreements.[35] The ITU's International Telecommunications Regulations ("ITR") provide that "administrations shall by *mutual consent* establish and revise accounting rates to be applied"[36] and that "the provision and

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[34] *See, e.g.*, Order at ¶ 272, declaring "[w]e expect to see U.S. carriers pass on to consumers the savings in net settlements payments on a route-by-route basis because settlement costs, and consequently, savings, are incurred on a route-by-route basis. U.S. customers that make calls on routes on which foreign carriers lower their settlement rates should enjoy the benefits of such reduced rates."

[35] As noted above, the United States has expressed its interest in renewing its ITU membership and is expected to shortly ratify the ITU's revised Constitution and Convention.

[36] International Telecommunications Regulations, art. 6.2.1 (emphasis added).

operation of international telecommunication services . . . is pursuant to mutual agreement between administrations."[37]

The Commission concedes that the ITU's Regulations "require administrations to negotiate accounting rates 'pursuant to mutual agreement,'" but asserts the ITR does "not suggest that governments cede sovereignty," which the Commission attempts to use as a basis for its findings.[38] While the ITR does not require the United States to cede sovereignty over its own carriers or require them to cede sovereignty themselves, it likewise does not grant the United States hegemony over other nations' carriers, as the reach of the Commission's Order attempts to do. In fact, any reasonable construction of the ITU's language respecting the sovereignty of nations would be inconsistent with claims that the FCC makes to exert its control over what other nations' carriers may charge. If every nation were to mirror the FCC's claim and assert control over what their carriers pay to foreign carriers for terminating international traffic, then the result would be myriad overlapping claims of authority, impinging upon other nations' sovereignty and interests. Treaties, in general, serve to mesh disparate national laws under a practicable international code. As such, treaties play a critical role in maintaining the fluidity and soundness of international trade and commerce. To disregard the importance of such covenants, as the FCC proposes to do, is to invite instability and the degeneration of global interaction into a Hobbesian state of perpetual international conflict.

The purpose of international treaties, including those of the ITU, is to foster cooperation in areas of common interest and reduce conflict among nations. It is well-

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[37] International Telecommunications Regulations, art. 1.5.

[38] Order at ¶ 311.

established that international treaties to which the United States is a party are regarded as part of U.S. law. The Constitution of the United States establishes that the Constitution, U.S. laws and treaties "shall be the supreme law of the land."[39] As such, treaty obligations have long been held as equivalent to U.S. federal laws.[40] The Supreme Court has stated that, "a treaty is placed on the same footing, and made of like obligation, with an act of legislation."[41] As a result, the ITU "mutual agreement" obligations do not cede sovereignty of the U.S., but are, in fact, incorporated as part of U.S. law to be followed.[42]

The two U.S. statutory provisions cited in the Order as a basis for the Commission's authority[43] do not confer specific power unilaterally to dictate accounting rates with other nations, whereas the ITR makes clear that mutual agreement is an integral requirement for accounting rates among nations. Even where an apparent conflict between U.S. laws and treaty obligations exists, the general rule of statutory construction is that U.S. courts attempt to reconcile any conflicting provisions so as not to invalidate treaty obligations.[44] In fact, it is easy to read the Communications Act as being in harmony with the ITU's regulations, despite the Commission's attempt to read the Act as granting the Commission greater power than it is permitted. Furthermore, ordinary statutory construction assumes that Congress was

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[39] *United States Constitution*, art. VI.

[40] See *Whitney v. Robertson*, 124 U.S. 190 (1880); *Head Money Cases*, 112 U.S. 580 (1884).

[41] *Whitney v. Robertson* at 194.

[42] In addition, U.S. courts may also recognize non-treaty based sources of international law as part of U.S. law. In commenting on this, the Supreme Court has stated that "[i]nternational law is part of our law." *The Pacquete Habana*, 175 U.S. 677, 700 (1900).

[43] Order at ¶¶ 282-298 (referring to 47 U.S.C. §§ 201 and 205).

[44] *See Whitney v. Robertson* at 194.

aware of the international obligations of the U.S. and chose not to override those obligations absent specific, subsequent statutory language.

Moreover, even if the courts determine that a statute and international obligations directly conflict and reconciliation is impossible, U.S. law is clear that the treaty or federal statute later in time controls.[45] The ITRs are later in time, coming well after either section 201 or 205 of the Communications Act, which the Order cites as authority for its actions.[46] Furthermore, the statutory sections cited by the Order use only broad, general language but there is "a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action."[47] To accept the Order's conclusion would violate these principles.

D. The Order Contravenes the Principle of International Comity

The FCC's actions, which are equivalent to dictating what foreign carriers may charge for terminating international traffic in their own countries, also violates the international law principle of comity between nations. This principle is based on the respect for other nations' interests, practices and legal authority. The Commission itself has

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[45] *See, e.g., Id.*

[46] Section 201 of the Communications Act was enacted in 1934 and last amended in 1938. Section 205 was also enacted in 1934 and last amended in 1989, but that amendment only changed the monetary amount for noncompliance under 205(b) and did not change or affect the generalized language of 205(a).

[47] *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984).

recognized international comity as the "mutual recognition and accommodation by nations of their differing philosophies, policies, and laws."[48]

Although the Philippines has enjoyed strong, cooperative relations with the United States, as discussed above, the principle of comity nevertheless "applies regardless of the status of relations between the state exercising jurisdiction and another state whose interests may be affected."[49] It is a maxim in U.S. interpretation of international law that U.S. statutes be interpreted to avoid unreasonableness or conflict with principles of comity and "[t]his rule of construction applies not only to courts, but also to Executive Branch officials and regulatory bodies interpreting the authority granted to them in legislation."[50]

Furthermore, application of comity "is not conditional on a finding that the state affected by a regulation would exercise or limit its jurisdiction in the same circumstances to the same extent."[51] In applying the principle of comity, whether by courts or regulatory agencies, "it is useful to consider whether the regulating state would regard it as reasonable were the other state to exercise regulatory jurisdiction if the circumstances were reversed."[52] Using this an additional guide, it seems unlikely the United States would acquiesce to another country imposing requirements that would be equivalent to imposing either "ceilings" or "floors" on what U.S. carriers may charge for terminating traffic in the

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[48] *Regulatory Policies and International Telecommunications*, Notice of Inquiry and Proposed Rulemaking, 2 FCC Rcd. 1022, (1987) at ¶ 52 .

[49] Restatement (Third) of the Foreign Relations Law of the United States, § 403, Comment a.

[50] *Id.* at § 403(g).

[51] *Id.*

[52] *Id.* at Reporters Notes 5.