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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

1330 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036-1795

(202) 429-3000
FACSIMILE: (202) 429-3902
TELEX: 89-2503

PHOENIX, ARIZONA
TWO RENAISSANCE SQUARE

TELEPHONE: (602) 257-5200
FACSIMILE: (602) 257-5299

STEPTOE & JOHNSON INTERNATIONAL
AFFILIATE IN MOSCOW, RUSSIA

TELEPHONE: (011-7-501) 258-5250
FACSIMILE: (011-7-501) 258-5251

ALFRED M. MAMLET
(202) 429-6205
amamlet@steptoe.com

October 24, 1997

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VIA HAND DELIVERY

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

Re: In the Matter of International Settlement Rates, IB Docket No. 96-261

Dear Mr. Caton:

Telefónica Internacional de España, S.A. ("Telefónica Internacional"), by its attorneys, hereby submits for filing an original and nine copies of its Opposition to AT&T's Petition for Reconsideration in connection with the above-captioned matter.

Also enclosed is an additional copy of Telefónica Internacional's Opposition which we ask you to date stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

Colleen Sechrest

Alfred M. Mamlet
Colleen A. Sechrest
Counsel for Telefónica Internacional de España, S.A.

Enclosures

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

OPPOSITION OF TELEFÓNICA INTERNACIONAL DE ESPAÑA, S.A. TO AT&T PETITION FOR RECONSIDERATION

Dated: October 24, 1997

TELEFÓNICA INTERNACIONAL DE ESPAÑA, S.A.

Luis López-van Dam
General Secretary
TELEFÓNICA INTERNACIONAL DE ESPAÑA, S.A.
Jorge Manrique, 12
Madrid 28006
SPAIN

Alfred M. Mamlet
Colleen A. Sechrest
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

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OPPOSITION OF TELEFÓNICA INTERNACIONAL DE ESPAÑA, S.A. TO AT&T PETITION FOR RECONSIDERATION

I. INTRODUCTION AND SUMMARY

Telefónica Internacional de España, S.A. ("Telefónica Internacional") hereby opposes the Petition for Reconsideration filed by AT&T Corp. ("AT&T") in the above-captioned proceeding.[1] In its Petition, AT&T asks the Commission to condition the licenses of foreign-affiliated carriers on their foreign affiliates' compliance with the best practices settlement rate of $.08 per minute rather than the upper-end of the Commission's benchmark range.[2] Such a condition would, by definition, preclude foreign entry by carriers from all but one country. The Commission should reject such a blatant attempt to smother competition in the U.S. market for international services.

1/ Petition for Partial Reconsideration filed by AT&T Corp. in IB Docket No. 96-261 (Sept. 29, 1997) ("AT&T Petition").

2/ AT&T Petition at 3-7.

Indeed, ***any*** benchmark condition imposed on a foreign-affiliated carrier's authorization is completely unnecessary and contrary to both the public interest and the United States' commitments under the WTO Agreement.

First, such a condition is unnecessary to prevent predatory price squeezes because there are already more than enough economic and legal deterrents to such anticompetitive behavior. **Second**, such a condition is contrary to the public interest because it would significantly limit foreign entry into the U.S. market, thereby preventing U.S. consumers from enjoying the increased choices and lower prices that come with increased competition. **Third**, the condition would directly conflict with the United States' WTO commitments of market access, national treatment and most favored nation ("MFN") treatment.

II. LOWERING THE BENCHMARK AS A CONDITION TO ENTRY IS UNNECESSARY

Lowering the benchmark rate as a condition to entry is unnecessary to prevent predatory pricing. Indeed, **any** condition is unnecessary, as a foreign-affiliated carrier would stand to lose more than it would gain if it engaged in predatory pricing in the U.S. market, even under the "ideal" (although seriously flawed) conditions posited by Professor Lehr in his model relied on by AT&T.[3/] Such losses would be incurred by both facilities-based and resale carriers. Clearly, no rational carrier faced with these circumstances would engage in predatory pricing in the first place. This significant economic deterrent, combined with current legal safeguards, is more than enough to deter the anticompetitive conduct AT&T fears.

[3/] AT&T Petition at 7, n. 15. *See also* Comments of AT&T filed in IDB Docket No. 97-142 at Attachment 3, Affidavit of William H. Lehr ("Lehr Affidavit") (July 9, 1997).

A. High Settlement Rates Do Not Lead to "Price Squeezes" in the U.S. Market

AT&T bases its claim that above-cost settlement rates will lead to predatory price squeezes on the theoretical model described by Professor William H. Lehr. Under this model, a foreign carrier can generate additional settlement revenue by establishing a U.S. subsidiary. This subsidiary can lower prices, thereby generating more revenue through increased calls.[4/] At the same time, unaffiliated U.S. carriers are forced to match these lower prices in order to maintain their market share.[5/] As these U.S. carriers are already pricing at cost, any price decrease will result in a loss for them.[6/] However, the losses that the affiliated carrier itself suffers is more than made up for by the increase in settlement rate revenue.[7/] The result: "U.S. carriers could suffer losses at levels that would be 'unlikely to be sustainable without severe harm to US industry and consumers.'"[8/]

The scenario that Professor Lehr describes is completely unrealistic. This is because Professor Lehr's model is based on several erroneous assumptions about the U.S. telecommunications market, including: (1) that the U.S. market is fully competitive and U.S. carriers price at cost; (2) that U.S. consumers readily switch all their domestic long distance and international traffic between carriers in response to a price reduction on one international route; and (3) that U.S. carriers will lower their prices in response to a price reduction by a foreign-affiliated carrier. In order for Mr. Lehr's model to work, each of these assumptions must hold true. As demonstrated

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4/ *Id.* at 26; Lehr Affidavit at 13-15.

5/ Lehr Affidavit at 15-16 & 18-19.

6/ *Id.*

7/ Lehr Affidavit at 13-15.

8/ Comments of AT&T at 26 (*citing* Lehr Affidavit at 16).

below, none do. As a result, a rational foreign carrier would not attempt to use its U.S. affiliate to "price squeeze" its U.S. competitors. Indeed, if it did, it would lose more revenue than it would gain -- hardly an incentive to engage in anti-competitive conduct.

1. U.S. Carriers Do Not Price at Cost

One of the most critical assumptions that Professor Lehr makes is that the U.S. market is sufficiently competitive that U.S. carriers price their services at cost.[9/] Accordingly, these carriers will incur losses if forced to lower their prices in response to a price cut by a foreign-affiliated competitor. However, as the Commission has itself acknowledge, there is only "limited competition in the [U.S.] IMTS market."[10/] As a result, U.S. carriers are able to operate with huge margins -- an average of $0.55 per minute on international calls.

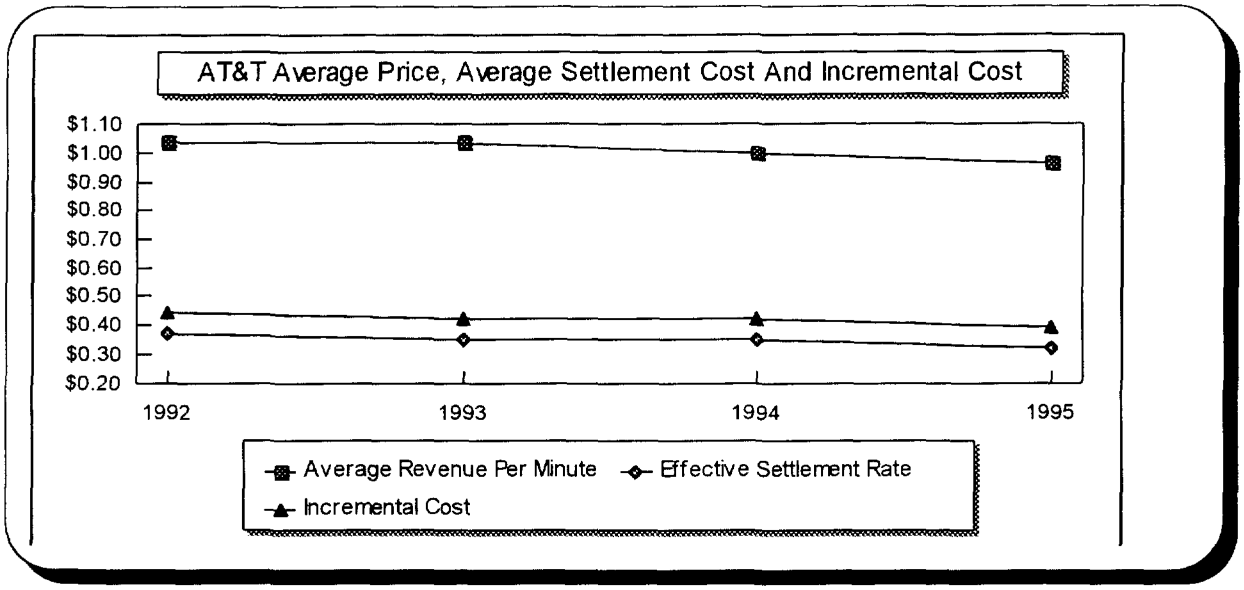
AT&T itself provides an excellent example of the excessively high margins that U.S. carriers currently enjoy. Using the data that AT&T itself provided in the *Benchmarks* proceeding, Figure 1 plots AT&T's average revenue per minute against its incremental cost of providing IMTS.[11/]

9/ Lehr Affidavit at 14.

10/ *Benchmarks NPRM* at ¶ 9.

11/ Comments of AT&T filed in IB Docket IB Docket No. 96-261 at 11, Chart B (filed Feb. 7, 1997) (Figure 1 replicates AT&T's Chart B and adds a new line showing the incremental cost to AT&T of providing IMTS, based on the "effective settlement rate" calculated by AT&T and the $0.075 per minute average network cost figure supplied by AT&T).

Figure 1



The entire region between AT&T's average revenue per minute (top line with squares) and AT&T's incremental cost (middle line with triangles) is AT&T's margin above incremental cost. According to AT&T's own calculations, its margin for IMTS was at least $0.565 per minute each year. With margins of this magnitude, any price reductions up to $0.565 per minute by a foreign-affiliated carrier would be pro-competitive because U.S. carriers can reduce their prices by this amount (even with no change in the settlement rate) **without** pricing below incremental cost. Such competition should be welcomed by the Commission and consumers, if not by AT&T.

2. U.S. Consumers Will Not Switch All of Their Traffic to a Carrier on the Basis of Lower IMTS Prices

Professor Lehr also assumes that consumers are extremely sensitive to price decreases and will readily switch to a different carrier to take advantage of lower IMTS rates. He also contends that "customers who leave to take advantage of cheaper calls . . . are likely to take all of their traffic to the new carrier (including domestic long distance and local service business)."[12/] As a result, according to Professor Lehr, when

[12/] Lehr Affidavit at 19.

a foreign-affiliated carrier lowers prices, its U.S. competitors will be forced to follow suit in order to retain their market share.[13/]

This assumption is completely unfounded. Customers are indeed price sensitive. However, Professor Lehr offers no evidence that a significant number of customers would switch all of their domestic long distance and international traffic on the basis of a lower rate on one country pair route. In reality, virtually all customers select their carrier on the basis of the basket of prices for domestic long distance service and all international routes. Thus, a foreign-affiliated carrier would have to reduce prices for U.S. domestic long distance and IMTS on **all** of its routes in order to induce a significant number of customers to switch carriers. In other words, it is very unlikely that the $0.10 per minute price cut on a single affiliated route posited by Professor Lehr in his model will force U.S. carriers to similarly cut their prices to retain their market share.

3. U.S. Carriers Will Not Lower Prices, and thus Incur Losses, in Response to a Price Cut by a Foreign-Affiliated Carrier

Even if Professor Lehr's other assumptions held true, it would be irrational for U.S. carriers to lower their prices to match a price cut by a foreign-affiliated carrier. This is because U.S. carriers could inflict significant losses on a foreign-affiliated carrier merely by maintaining their current prices. Using Professor Lehr's own assumptions, Table 1 calculates the **losses** incurred by foreign-affiliated carrier with at 10% market share whose $0.10 price cut goes unmatched by its unaffiliated competitor. These losses increase as the foreign affiliated carrier's market share increases from 10% to 50%. This example demonstrates that a rational foreign carrier would not price below cost because it would lose money, even considering increased settlement revenue from increased traffic.

13/ *Id.*

Table 1

Using Dr. Lehr's Assumptions, Foreign Carries Lose Money if U.S. Carriers Keep Prices at Cost

Assumptions (all prices and costs are in dollars per minute):[14/]

Price for US carriers		$0.40		Price for US based foreign subsidiary	$0.30	
Cost for US carriers		$0.40		Cost for US based foreign subsidiary	$0.40	
Settlement rate		$0.25		Demand elasticity	0.7	
			Losses incurred by a foreign-affiliated carrier with a $0.10 price reduction			
	Base Case			**increasing market share**		
Percent market share of foreign affiliated carrier	10%	10%	20%	30%	40%	50%
Average market price[1/]	$.40	$0.39	$0.38	$0.37	$0.36	$0.35
Change in market price[2/]	0	-2.5%	-5%	-7.5%	-10%	-12.5%
Change in total minutes[3/]	0	1.75%	3.5%	5.25%	7%	8.75%
Total minutes[4/]	1,000,000	1,017,500	1,035,000	1,052,500	1,070,000	1,087,500
Total minutes of foreign affiliated carrier[5/]	100,000	101,750	207,000	315,750	428,000	543,750
Profit/loss of U.S. carrier[6/]	0	$0	$0	$0	$0	$0
Profit/loss of foreign-affiliated carrier[7/]	0	-$10,175	-$20,700	-$31,575	-$42,800	-$54,375
Increase in settlement payments[8/]	0	$4,375	$8,750	$13,125	$17,500	$21,875
Consolidated net profit/loss to foreign-affiliated carrier and foreign carrier[9/]	0	**-$5,800**	**-$11,950**	**-$18,450**	**-$25,300**	**-$32,500**

1/ Average market price is the weighted average of the U.S. carrier and the affiliated carriers prices.

2/ Percent change in market price is the percentage difference between the Base Case market price of $0.40 and the average market price.

3/ Percent change in total minutes in the percent change in market price multiplied by the demand elasticity of 0.7.

14/ All assumptions are from Professor Lehr's Affidavit. *See* Lehr Affidavit at 13-15.

4/ Total minutes are the Base Case minutes (1,000,000) plus the percentage change in minutes multiplied by the Base Case minutes.

5/ Minutes for the foreign-affiliated carrier are total minutes multiplied market share.

6/ Profit/loss of the U.S. carrier is price ($0.40) minus cost ($0.40) multiplied by minutes.

7/ Profit/loss of foreign-affiliated carrier is price ($0.30) minus costs ($0.40) multiplied by minutes.

8/ Increase in settlement payments is settlement rate ($0.25) multiplied by the increase in minutes.

9/ Consolidated net gain to foreign-affiliated carrier and foreign carrier is price ($0.30) minus costs ($0.40) multiplied by minutes plus settlement increase.

Table 1 clearly demonstrates that U.S. carriers are better off if they do not respond to the price cut of a foreign-affiliated carrier and continue to price at cost. In this way, U.S. carriers ensure that they do not sustain losses, even if they lose market share. At the same time, they ensure that the foreign-affiliated carrier sustains significant losses. Moreover, these losses increase both as the foreign-affiliated carrier decreases its price and as it gains market share.

In short, Professor Lehr's assumption that a U.S. carrier will match a foreign affiliated carrier's price cut is completely irrational, as it assumes that U.S. carriers will act against their own best interests. Recognizing that U.S. carriers will act rationally, a rational foreign-affiliated carriers will not incur the significant and inevitable losses by attempting a price squeeze. For this reason, there is no rational basis for the Commission to conclude that a foreign-affiliated carrier could or would attempt a price squeeze.15/

15/ *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578, 2588 (1993) (*citing Masushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986)).

B. There Is No Evidence to Support AT&T's Claim that Foreign-Affiliated Carriers Ever Have or Ever Will Engage in Predatory Pricing

That entry by foreign-affiliated carriers presents no risk of predatory pricing is supported by the facts: there is no evidence that foreign-affiliated carriers ever have or ever will abuse their facilities-based or resale authorizations by engaging in predatory pricing. Indeed, no one has proven or even alleged that a foreign-affiliated carrier has actually priced its services below cost in order to price squeeze its unaffiliated competitors. Significantly, if this behavior were going to occur, it would have done so when settlement rates were at their peak (and foreign-affiliated carriers could rely on the settlement funds to offset losses), not now when they are decreasing. Indeed, settlement rates have fallen a staggering 48% since 1987[16/] and show every indication of continuing to fall -- a fact which demonstrates that predatory pricing is now diminishing as a threat.

Yet even with these serious market disincentives, AT&T claims that the risk of detection and prosecution is insufficient to prevent carriers from engaging in predatory pricing, particularly now that markets are opening around the world.[17/] There is no rational basis for such a claim. Any foreign carrier positioning itself to compete in the U.S. market will not do so by engaging in highly speculative behavior that carries with it the risk of having that market closed to it. Moreover, not only will a carrier engaged in predatory pricing risk losing its authorizations, but it will also be subject to prosecution under the U.S. antitrust laws.[18/] In other words, the risks are simply too

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16/ FCC, *Accounting Rates For International Message Telephone Service Of the United States* 6 (Jan. 1, 1997).

17/ AT&T Petition at 6.

18/ *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 101, 117 (1986); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *International Telephone and Telegraph Corp.*, 104 F.T.C. 280, 423 (1984)).

high for a foreign-affiliated carrier to engage in behavior that is in itself inimical to its own financial interests.

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In short, a foreign-affiliated carrier acting in its own best interests would not engage in predatory pricing at all. Instead, its ideal strategy would be to price just above cost. Such a pricing strategy would ensure that it both underprices AT&T (who operates with huge margins) and earns a reasonable profit. This is the competition that the Commission should be encouraging, and it is precisely what AT&T is seeking to prevent through its "best practice" benchmark proposal. The Commission should not countenance such a thinly disguised attempt to undermine its pro-competitive goals.

III. LOWERING THE BENCHMARK RATE AS A CONDITION TO ENTRY IS CONTRARY TO THE U.S. PUBLIC INTEREST

Lowering the benchmark rate as a condition to entry is clearly contrary to the U.S. public interest, as it would significantly impede competition in the U.S. market for international services by virtually precluding foreign carrier entry on affiliated routes. Indeed, by definition, AT&T's proposal would preclude entry by foreign carriers from all but one country. More specifically, imposing AT&T's "best practice" condition on foreign-affiliated carriers' authorizations may force many foreign carriers to settle below cost in order to enter the U.S. market. As the Commission has itself acknowledged, settlement costs vary among countries and the Commission simply does not have -- and cannot get -- the data necessary to know what a given country's real costs are.[19/] Thus, the "best practice" rate, which is the lowest rate available anywhere in the world, may very well be below the costs of many countries. At best, then, AT&T's proposed condition would seriously handicap foreign carriers and their U.S. affiliates; at worse, it

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[19/] *In the Matter of International Settlement Rates,* IB Docket No. 96-261, ¶¶ 101 & 111 (rel. Aug. 18, 1997) ("*Settlement Rate Order*").

would prevent them from participating in the U.S. market at all -- a risk that the Commission already faces with its current entry condition.

The Commission itself recognized the anticompetitive consequences of AT&T's proposal in its *Settlement Rate Order*:

> Such a condition is not necessary to prevent distortions in the U.S. market for IMTS services, and in fact, it could harm the development of further competition in that market. We believe AT&T's proposed condition could effectively deter many carriers from providing facilities-based service from the United States to affiliated markets. This result would impede our goal of increasing competition in the U.S. market for IMTS to the detriment of U.S. consumers."[20]

In short, the net result of AT&T's proposal is that U.S. consumers never receive the benefit of the lower prices and increased choices that go hand-in-hand with increased competition. Indeed, with the threat of new competitors significantly diminished, AT&T would be free to maintain or even raise its high margins at the U.S. consumers expense. Such a result is indisputably contrary to the public interest.

IV. LOWERING THE BENCHMARK RATE AS A CONDITION TO ENTRY VIOLATES U.S. GATS OBLIGATIONS

Lowering the benchmark rate as a condition to entry also clearly conflicts with the United States' commitments under GATS. Indeed, **any** benchmark condition directly conflicts with U.S. MFN and market access obligations. **First**, a benchmark condition violates the principle of MFN by discriminating between carriers from different WTO countries. It does this by: (1) imposing conditions on market access for IMTS providers on particular routes, and (2) requiring settlement payments that vary

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[20] *Settlement Rate Order* at ¶ 221 (rejecting AT&T's request to condition a foreign-affiliated carriers' authorization on the affiliated foreign carrier offering U.S. carriers settlement rates at or below a TSLRIC-based rate).

arbitrarily from the Commission's own estimates of individual country costs for terminating international calls on their domestic networks.

Second, a benchmark condition violates the GATS principle of market access. Conditioning entry on a best practices rate would block access to the U.S. market for carriers from almost all WTO countries. Such a result simply cannot be viewed as consistent with the market opening purpose of the GATS Agreement, or the U.S. commitments.

Significantly, neither the GATS Agreement itself, nor the WTO Telecom Agreement Reference Paper contain any exceptions which permit the Commission to violate the United States' MFN and market access commitments.[21/] The GATS contains a number of affirmative obligations designed to ensure that Members do not, except in specified circumstances, adopt regulations that impair fundamental GATS obligations. For example, article V(e) of the GATS Annex on Telecommunications directs Members to ensure that no condition is imposed on access to and use of the public telecommunications network and service other than as necessary to: (1) safeguard the public service responsibilities of network and service suppliers; (2) protect the technical integrity of public telecommunications transport networks or services; or (3) ensure that service suppliers of any other Member do not supply services not permitted under the scheduled commitments. AT&T's proposed best practices condition serves none of these limited purposes.

Additionally, Article VI:4 of the GATS expressly requires Members to ensure that their licensing standards are "not in themselves a restriction on the supply

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21/ The GATS agreement provides for only limited exceptions to its fundamental obligations of MFN, national treatment and market access. These exceptions relate to emergency safeguards (article X), balance of payments safeguards (article XII), government procurement (article XIII), security exceptions (articles XIV bis), and certain general exceptions (article XIV). None of these exceptions can be interpreted to permit the Commission to impose mandatory benchmarks as a condition to entry.

of the service."[22] Mandatory benchmarks which most countries of the world cannot meet are nothing but a restriction on the supply of service. As such, they cannot possibly be construed as GATS-consistent.

The WTO Basic Telecom Agreement Reference Paper expressly provides that: "Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices."[23] This provision allows the United States to impose regulations to prevent major suppliers in the **U.S. market** from engaging in anti-competitive practices. Clearly, no foreign-affiliated carrier is a major supplier in the United States. This provision does not authorize the U.S. to regulate major suppliers in foreign markets.

Moreover, this Reference Paper provision represents an additional commitment pursuant to article XVIII of the GATS and does not supersede any other GATS obligations. To hold otherwise would be to permit GATS members to undermine the fundamental market-opening purpose of GATS by erecting regulatory trade barriers in the guise of anti-competitive safeguards. AT&T's proposed best practices condition would be just such a disguised trade barrier.

Finally, any regulatory safeguard must be proportional to the problem it seeks to address. All but eliminating future foreign entry on the basis of misconduct that is only remotely possible cannot possibly be construed as a proportionate response.

V. CONCLUSION

For the reasons set forth above, Telefónica Internacional strongly urges the Commission to reject AT&T's proposal to condition the authorizations of

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22/ GATS, art. VI:4.

23/ Reference Paper, ¶ 1.1.

foreign-affiliated carriers on their affiliates' compliance with the Commission's "best practice" settlement rate.

Dated: October 24, 1997

Respectfully submitted,

Telefónica Internacional de España, S.A.

Colleen Sechrest

Alfred M. Mamlet
Colleen A. Sechrest
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Luis López-van Dam
General Secretary
TELEFÓNICA INTERNACIONAL DE ESPAÑA, S.A.
Jorge Manrique, 12
Madrid 28006
SPAIN

CERTIFICATE OF SERVICE

I, Colleen Sechrest, do hereby certify that a copy of the foregoing has been sent, by hand (or as otherwise indicated), on this 24th day of October, 1997 to the following:

Mark C. Rosenblum*
Lawrence J. Lafaro
James J.R. Talbot
AT&T Corp.
295 N. Maple Avenue
Room 3252H3
Basking Ridge, NJ 07920

Regina Keeney, Chief
International Bureau
Federal Communications Commission
Room 800
2000 M Street, N.W.
Washington, D.C. 20554

Ruth Milkman
Deputy Chief, International Bureau
Federal Communications Commission
Room 821
2000 M Street, N.W.
Washington, D.C. 20554

Diane J. Cornell
Chief, Telecommunications Division
International Bureau
Federal Communications Commission
Room 838
2000 M Street, N.W.
Washington, D.C. 20554

Troy Tanner
Chief, Policy and Facilities Branch
Telecommunications Division
International Bureau
Federal Communications Commission
Room 800
2000 M Street, N.W.
Washington, D.C. 20554

Kathryn O'Brien
International Bureau
Federal Communications Commission
Room 822
2000 M Street, N.W.
Washington, D.C. 20554

*via first class mail, postage pre-paid

John Giusti
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Washington, D.C. 20554

Adam Krinsky
International Bureau
Federal Communications Commission
Room 800
2000 M Street, N.W.
Washington, D.C. 20554

Robert McDonald
International Bureau
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

Colleen Sechrest
Colleen A. Sechrest