

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

REPLY 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," hereby reply to AT&T Corp.'s ("AT&T's") and MCI Telecommunications Corp.'s ("MCI's") oppositions to the Philippines parties' Petition for Reconsideration in the above-captioned proceeding.^{1/}

Among the Commission's stated goals in this proceeding are the promotion of competition in the global market for communications services and reform of international accounting rates. The Philippines parties share these objectives,^{2/} but once again feel compelled to state that the approach adopted by the Commission in its Order will not in any

^{1/} *International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280 (rel. Aug. 18, 1997) ("*Order*"). AT&T Corp., Opposition to Petitions for Reconsideration, filed Oct. 24, 1997; MCI Telecommunications Corp., Opposition to the Philippines Parties' Petition for Reconsideration, filed Oct. 24, 1997.

^{2/} The Philippines parties' commitment to these principles is proven by the fact that the accounting rate on the U.S-Philippines route has declined by approximately 40% since 1990, and the fact that ten carriers compete vigorously in the country's national and international toll services market.

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way further them. The Commission's attempt to dictate the amount foreign carriers may collect for terminating international traffic will delay coordinated efforts to reform the accounting rates system. The Commission's approach has already engendered significant conflict and international hostility; unless reversed, it threatens to overwhelm multilateral reform efforts.

The Philippines parties appeal again to the Commission to reject the unilateral and confrontational approach embodied in the Order, in favor of a renewed commitment to bilateral and multilateral efforts to reform international accounting rates. Movement toward lower settlement rates on the U.S.-Philippines route must take proper account of the legitimate policy considerations upon which such rates are determined, including policies governing the allocation of joint and common network costs and the universal service support obligations of international carriers in the Philippines. Of particular importance is the transition period for implementing lower settlement rates. The transition periods adopted in the Commission's Order are purely arbitrary. The transition periods are based on nothing more than the Commission's conjecture about the time required "for carriers in all countries ... to make the adjustments necessary to transition,"^{3/} supported by no facts and no evidence. No decision is more clearly a policy decision than the appropriate transition period for implementing a radical change in the rate structure for a country's telecommunications services. The Commission's attempt to decide this matter for every other country on the planet, on the basis of its own selective views, is an outright violation of the principle of international comity.

^{3/} Order at ¶ 169.

AT&T's and MCI's oppositions rest almost entirely on the claim that the Commission's Order does not "constitute the exercise of jurisdiction over foreign carriers"^{4/} because the proposed benchmarks nominally apply only to U.S. carriers. AT&T and MCI claim, further, that the Commission has the power to regulate what U.S. carriers pay unaffiliated foreign carriers for terminating international traffic from the United States. They also deny that the Commission's Order violates the principle of international comity. For the reasons explained below, AT&T's and MCI's arguments are baseless. The Commission has no authority either to tell foreign carriers what they may charge to terminate international traffic, or to tell U.S. carriers what they may pay unaffiliated foreign carriers for terminating such calls. Accordingly, the Commission should reconsider its Order as requested in the Philippines parties' petition.

I. The Commission Lacks Authority Under U.S. Law to Impose International Settlement Rate Benchmarks

a. The Commission's Order is an Unlawful Attempt To Exercise Jurisdiction Over Foreign Carriers

AT&T and MCI predicate their entire oppositions on the claim that the Commission's rules apply to U.S. carriers, not their foreign correspondents. AT&T and MCI repeat this argument like a mantra, but repetition of a falsehood can not render it true.

AT&T and MCI do not even purport to argue that the Commission has the authority to regulate the rates charged by foreign carriers for terminating international traffic. They know that the Commission has no such authority. Yet the sole purpose of the Commission's

^{4/} Order at ¶ 279.

Order is to attempt to dictate the amount foreign carriers may charge U.S. carriers for terminating traffic from the U.S. This the Commission may not do. The Commission's jurisdiction extends only to U.S. carriers. The Philippines parties do not question the Commission's authority to regulate the rates U.S. carriers charge for terminating international traffic in the United States, or the rates they charge their end-user customers for international calls from the U.S. But that authority cannot be extended to control the foreign carriers' charges for terminating traffic in their country.

Any attempt to enforce the benchmarks would result in the Commission dictating the settlement rate at which foreign carriers in a given country will terminate inbound international traffic from the U.S. The Commission's characterization of the benchmarks as applying to U.S. carriers, and not their foreign correspondents, is a transparent pretense. Mandating what U.S. carriers may pay to foreign carriers for terminating international traffic is equivalent to dictating what those foreign carriers may charge for terminating such traffic. Either way, the actual effect of the benchmarks would be to regulate -- indeed to dictate -- the rates charged by foreign carriers, not subject to the Commission's jurisdiction, for terminating international traffic. Under well-established legal precedent, the Commission cannot seek to accomplish indirectly what it may not accomplish directly.^{5/}

AT&T and MCI deny that the Commission attempts in the Order to "determine the lawfulness of charges by foreign entities."^{6/} The Commission has done so explicitly, however. As AT&T notes, the Commission finds, at para. 291 of the Order, that settlement

^{5/} See, e.g. *Chesapeake and Ohio Railway Company et al., v U.S.*, 392 F Supp. 358 (1975).

^{6/} AT&T Opposition at 6; MCI Opposition at 3-4.

rates that exceed the proposed benchmarks are "unjust and unreasonable."^{7/} This is an express determination regarding the lawfulness of rates charged by foreign carriers. No matter how the Commission -- or AT&T -- couches this finding, it is simply beyond the Commission's power. The Commission's authority under Section 201 of the Communications Act to determine the lawfulness of rates extends only to the rates charged by carriers subject to its jurisdiction. Settlement rates are charges collected by foreign carriers for terminating international traffic. AT&T and MCI acknowledge the incontestable fact that foreign carriers are beyond the Commission's jurisdiction. The Commission therefore lacks the authority to declare settlement rates charged by foreign carriers unjust and unreasonable.

Certainly, the decision in *RCA Communications, Inc. v. United States* does not, as the Commission, AT&T and MCI claim,^{8/} grant the Commission authority to dictate the rates U.S. carriers can pay to their foreign correspondents. AT&T acknowledges that the *RCA* decision concerned the amounts U.S. telegraph carriers charged their customers for telegraph services, and not the amounts such carriers paid to their foreign correspondents. AT&T nonetheless discerns in the *RCA* decision a holding that "the Commission could modify rates established in contracts between U.S. and foreign carriers, and thereby reduce payments made by U.S. carriers to their foreign correspondents."^{9/} AT&T bases this invalid interpretation on a partial quotation from the decision, deliberately abridged to change the

^{7/} AT&T Opposition at 6.

^{8/} AT&T Opposition at 2-4; MCI Opposition at n. 5.

^{9/} AT&T Opposition at 4.

plain import of the ruling. Judge Hand found no such thing. At issue in the case was whether the Commission could modify the rate charged by U.S. carriers to their end-user customers for "urgent" international telegraph messages. What the court clearly held with respect to settlement arrangements was this: That the existence of an operating agreement between a U.S. carrier and a foreign correspondent does not deprive the Commission of its authority to regulate the U.S. carrier's rates. In particular, the Commission's power to regulate a U.S. carrier's rates is not foreclosed by the existence of any terms in an operating agreement that establish a link between the amount the U.S. carrier charges its customers for a message or call and the amount the U.S. carrier pays the foreign carrier to terminate the call.^{10/} This is the entire purpose and meaning of Judge Hand's discussion of settlement arrangements.

The *RCA* court found that it would be "impracticable, if not impossible" for U.S. carriers to reduce their rates to the level mandated by the Commission "without making new agreements" with their foreign correspondents. The court went so far as to list the alternatives available to resolve this problem.^{11/} Not one word of the court's discussion of this issue contemplates or even suggests the possibility of the Commission abrogating or modifying the terms of the U.S. carriers' agreements with their foreign correspondents. The sole import of the *RCA* decision is that the Commission may regulate the rates U.S.

^{10/} By the same token, a U.S. carrier cannot, by entering into an operating agreement that establishes a link between the amount the U.S. carrier charges and the amount the U.S. carrier pays the foreign carrier to terminate such calls, take the Commission's authority over what the U.S. carrier charges and extend it to other matters by linking them to what the carrier charges.

^{11/} The options enumerated by the court were for the U.S. carriers to negotiate "an amendment of the existing agreements"; break their contracts; "bear the loss on outgoing messages" themselves; or stop providing the service. *RCA* at 11.

carriers charge end-users in the United States. The Philippines parties have never questioned the Commission's right to exercise this authority. To the extent the court addressed the settlements process between U.S. and foreign carriers, nothing in its decision could be interpreted to give the Commission the power to dictate or modify the rates charged by foreign carriers for terminating messages.

b. The Commission Has No Jurisdiction to Control the Amount U.S. Carriers Pay Foreign Carriers to Terminate International Traffic

Knowing that the Commission lacks jurisdiction to regulate foreign carriers' rates, AT&T and MCI argue that the Order in fact regulates a "practice" of U.S. carriers "in connection with foreign communication service." As explained fully in the Philippines parties' petition, payments by a U.S. carrier to an unaffiliated entity are not a "practice" within the meaning of Section 201(b) of the Communications Act. AT&T and MCI cite not one Commission or court decision in support of the proposition that an expense incurred by a carrier constitutes a practice in connection with a communication service, because no such order or case exists. The Commission has no authority to regulate the amount AT&T or MCI pays for goods and services they purchase from unaffiliated entities that are not subject to the Commission's jurisdiction.

The Commission's authority to regulate "practices in connection with foreign communication service" does not encompass the power to dictate the amount U.S. carriers may pay to unaffiliated foreign entities for terminating international traffic. The Philippines parties noted that such reasoning would appear to extend the Commission's authority to include regulation of the rates charged to U.S. carriers for advertisements and lawyers'

services. Remarkably, AT&T and MCI appear to concede such power to the Commission, at least where it serves their interests. In fact, the Commission has no direct power over a carrier's expenses. Its power to disallow is the power to exclude imprudently incurred expenses from a carrier's ratebase -- not to disallow or regulate the expense itself. Needless to say, given the fact that the Commission has deregulated all U.S. international carriers' rates, the benchmarks Order is not an exercise of this power.

AT&T and MCI both make much of the fact that Section 211 permits the Commission to require the filing of contracts between carriers. This is of no relevance here. The authority to require the filing of contracts in no way implies any Commission authority to regulate rates or terms contained in such contracts that are beyond its jurisdiction. The cases cited by MCI in support of the proposition that the Commission has the authority under Section 211 to "modify or abrogate carrier-to-carrier contracts" is totally inapposite. At issue in the cases cited by MCI were rates charged by a carrier subject to the Commission's jurisdiction, and included in a contract. In addition, the rates were charged to end-users in the U.S. Neither of these circumstances applies to the settlement rates charged by foreign carriers, and listed in operating agreements filed by U.S. carriers with the Commission.

MCI's claim that the Order "fulfills the Commission's statutory mandate to ensure that U.S. consumers receive communications services at reasonable prices"^{12/} is simply ludicrous. The Commission has unquestioned authority to regulate the rates U.S. carriers charge their customers for international services (subject only to the prohibition on overall

^{12/} MCI Opposition at 2.

confiscation of carriers' property).^{13/} In 1996, the Commission eliminated the remaining rate regulation of the international end-user marketplace. Moreover, there is no direct relationship between settlement rates and the rates U.S. carriers charge for their services. When it suits their purpose, AT&T and MCI themselves stress this point by dwelling on net settlement costs as opposed to settlement rates. That said, the U.S. carriers have failed systematically to pass settlement cost reductions on to their customers, and nothing in the Commission's Order compels them to do so in the future. Indeed, nothing in the Order even requires the carriers to disclose publicly sufficient information to enable interested parties to determine whether they pass settlement cost reductions on to their customers. If the Commission believes that the inflated rates U.S. carriers charge for international services, and their earnings are unreasonable, it has ample authority to address this problem directly.

II. MCI's and AT&T's Own Arguments Demonstrate That the Order Violates the Principle of International Comity

Perhaps unwittingly, AT&T provides in its Opposition proof that enforcement of the Commission's benchmarks would violate the principle of international comity and hinder international efforts to reform the settlements system. AT&T states that "[t]he principle of comity applies only where 'there is in fact a true conflict between domestic and foreign law,' such that 'compliance with the laws of [two] countries [would be] impossible.'"^{14/} The Commission's benchmarks Order establishes precisely such a circumstance. The Commission purports to dictate the amount foreign carriers will collect for terminating

^{13/} See p. 5, *supra*.

^{14/} AT&T Opposition at 7 (internal citations omitted).

international traffic from the U.S. This assertion of authority -- although unlawful -- is almost certain to prompt regulators in many other countries to take similar action and adopt rules dictating the rates to be collected by their national carriers. Indeed, the Philippines parties understand that such situations have already arisen since the Commission adopted its Order. Having itself claimed authority over settlement rates, the Commission would have no grounds to challenge other sovereign nations' identical claim of jurisdiction. The result is a "true conflict between domestic and foreign laws."

In such circumstances, and contrary to MCI's assertion, "issues of international comity" unquestionably arise, and the principle of comity must be respected. Moreover, as a practical matter, overlapping jurisdictional claims would produce the exact opposite result to the one desired by the Commission and the Philippines parties: gridlock and stalemate.^{15/}

^{15/} *Id.* at 22-23.

III. Conclusion

For these reasons and others elucidated in the petition, the Philippines parties respectfully urge the Commission to reconsider its findings that the Commission has authority (1) to determine the lawfulness of settlement rates charged by foreign carriers to U.S. carriers; and (2) to direct a U.S. carrier as to the amount that carrier may pay an unaffiliated entity for a service rendered by the unaffiliated entity to the U.S. carrier.^{16/}

Respectfully Submitted,



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November 6, 1997

^{16/} *Id.* at 23-24.

CERTIFICATE OF SERVICE

I, Katina Yates, hereby certify that on the 6th day of November, 1997, a true copy of the foregoing Reply of the Philippines Parties was delivered, either by hand or first-class mail, to the following:

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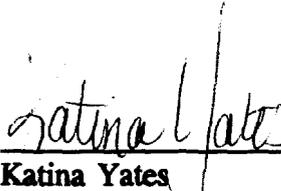
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