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EX PARTE OR LATE FILED

April 3, 1998

RECEIVED
APR 3 - 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

BY HAND
Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-45 -- Universal Service - Report to Congress

Dear Ms. Salas:

On April 3, 1998, George Vradenburg (Vice President - General Counsel), Jill Lesser (Deputy Director - Legal and Public Affairs), Steven Teplitz (Senior Counsel - Law and Public Policy) of America Online, Inc., and I met with Commissioner Tristani and Paul Gallant (Legal Advisor - Office of Commissioner Tristani) to discuss to the above-referenced docket. The discussion reflected the written comments filed by America Online, Inc. in the above-referenced docket. In addition, we discussed the negative impact the FCC's conclusions regarding voice on the Internet services could have on above-cost international accounting rates and the pending litigation in U.S. Court of Appeals for the D.C. Circuit, Docket No. 97-1612. A copy of the Brief of Telstra in that docket was distributed.

Pursuant to Section 1.1206(a)(1) of the Commission's Rules, two copies of this Notice are attached for inclusion in the public record in the above-captioned proceedings. Should you have any questions regarding this matter, please contact me.

Sincerely,

Donna N. Lampert

No. of Copies rec'd 0+1
List ABCDE

cc: Commissioner Gloria Tristani
Paul Gallant

Docket

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CABLE & WIRELESS PLC, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	No. 97-1612 and consolidated cases

On Petitions For Review of an Order
of the Federal Communications Commission

BRIEF OF PETITIONER
TELSTRA CORPORATION LIMITED

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March 23, 1998

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CABLE & WIRELESS PLC, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	Case No. 97-1612 and consolidated cases

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES
OF TELSTRA CORPORATION LIMITED

The undersigned counsel of record for Petitioner, Telstra Corporation Limited ACN 051 775 556 ("Telstra"), pursuant to Circuit Rule 28(a)(1) of the Rules of this Court, certify to the following:

(A) The following are parties or intervenors in the above-captioned consolidated cases before this Court:

Cable & Wireless plc
Kokusai Denshin Denwa Co. Ltd.
Guyana Telephone & Telegraph Co. Ltd.
Hong Kong Telecom International Limited
Telstra Corporation Limited
Singapore Telecommunications Limited
Hispanic-American Association of Research Centers and Telecommunications Enterprises (AHCIET) and Regional Technical Commission on Telecommunications of Central America (COMTELCA)
Chunghwa Telecom Co., Ltd.
ABS-CBN Telecom, North America, Inc.

GTE Service Corporation, GTE Communications Corporation, Hawaiian Tel International Incorporated, The Micronesian Telecommunications Corporation, GTE Telecom Incorporated, Compania Dominicana de Telefonos, C.A., and Compania Anonima Nacional Telefonos de Vanezuela
Teléfonos de México, S.A. de C.V.
Sprint Corporation
Japan Telecom Co., Ltd.
AT&T Corp.
WorldCom, Inc.
MCI Telecommunications Corporation
Syrian Telecommunications Establishment
Directorate General of Telecommunications, P&T, China
Caribbean Association of National Telecommunications Organizations
International Digital Communications
Videsh Sanchar Nigram Ltd.
Ministry of International Trade and Business of the Government of Barbados
Pacific Islands Telecommunications Association
Solomon Islands Government
Teléfonos de México, S.A. de C.V.
AmericaTel Corporation
Eastern Telecommunications Philippines, Inc.
Government of the Kingdom of Tonga
Government of the Republic of Vanatu
Telekom Malaysia Berhad
Nepal Telecommunications Corporation
Gambia Telecommunications Company Limited
Bahrain Telecommunications Company, Jordan Telecommunications Company, and Qatar Public Telecommunications Corporation
Ministry of Public Utilities, Public Works and Transportation of the Government of Antigua and Barbuda
Telecommunications of Jamaica Limited

Telstra is a telecommunications carrier providing services in Australia. One third of the company's shares are publicly traded (the remaining shares are owned by the Government of Australia). Telstra also has issued publicly listed debt securities in the United States and abroad. Otherwise, none of Telstra's affiliates or subsidiaries is publicly traded or has issued debt securities to the public.

(B) The parties to the above-captioned case have petitioned this Court for review of the Federal Communications Commission's Report and Order, 12 FCC Rcd 19806 (1997), in the proceeding titled International Settlement Rates, IB Docket No. 96-261. A summary of this Report and Order was published in the Federal Register on August 29, 1997. See 62 Fed. Reg. 45,758 (1997).

(C) To the knowledge of the undersigned, the case on review has not previously been before this Court or any other court. The undersigned are unaware of any other related cases pending before this Court or in any other court.

Respectfully submitted,

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March 23, 1998

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TABLE OF AUTHORITIES

* Authorities upon which we chiefly relied are marked with asterisks.

GLOSSARY

International Message Telephone Service (IMTS) — A standard international telephone service typically provided by a carrier for a per minute charge over a circuit switched telecommunications network.

Accounting Rate — A per minute wholesale price which facilities-based international carriers negotiate for transmitting *IMTS* and other types of telecommunication traffic between two countries in either direction.

Settlement Rate — The portion of the *accounting rate* which each carrier receives for terminating one minute of telecommunication traffic, typically one-half the *accounting rate*.

Benchmark — Here, the maximum per minute *settlement rate* which a U.S. international carrier may pay to a foreign carrier for terminating *IMTS* traffic pursuant to the FCC's Report and Order.

Carrier — An entity which holds itself out as providing telecommunication service to the public.

Internet — A global network of packet-switched communications networks which uses a common digital protocol for transmitting data, voice, text and other media.

International Private Line (IPL) — An international telecommunication circuit which a user typically leases from a carrier at a flat monthly rate.

Internet Service Provider (ISP) — An entity providing *Internet* facilities or services.

IN THE
UNITED STATES COURT OF APPEAL
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CABLE & WIRELESS PLC, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	No. 97-1612 and consolidated cases

BRIEF OF PETITIONER
TELSTRA CORPORATION LIMITED

Statement of Jurisdiction

Petitioner Telstra Corporation Limited ACN 051 775 556 ("Telstra") seeks review of the Federal Communications Commission's ("FCC's") Report and Order, 12 FCC Rcd 19806 (1997) ("R&O") (contained in Joint Appendix ("JA")), in IB Docket No. 96-261. This Court has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342 and 2344.

Statement of Issues

The issues before the Court include:

1. Whether the R&O is unlawfully arbitrary and capricious because it sought to reduce the rates which Telstra and other foreign carriers receive for providing facilities to terminate international telephone traffic while completely failing to address, much less change, the unreasonable charges and practices which U.S. carriers impose on foreign carriers for

terminating international Internet traffic over the same facilities; and

2. Whether the FCC's failure to review the unreasonable provisioning practices of U.S. international carriers regarding Internet facilities violated the FCC's obligation to enforce Section 201 of the Communications Act of 1934, as amended, 47 U.S.C. § 201, which requires, inter alia, that "all charges, practices, classifications, and regulations" of U.S. international carriers be "just and reasonable."

Statutes and Regulations

Pertinent statutes and regulations are appended to Petitioners' Main Brief.

Statement of the Case

This case concerns the charges which international telecommunication providers pay one another to terminate services. The FCC attempted to make some of these charges more cost-based by prescribing benchmark rates or "caps" on the amount which foreign carriers may charge U.S. carriers for terminating telephone calls. But, despite its stated interest in encouraging competition for all international services, the FCC refused, without explanation, to review the non-cost based charges which U.S. carriers impose on foreign companies, such as Telstra, for terminating Internet traffic — the fastest growing international service and a major competitor to the telephone network. The R&O consequently took an irrational approach to the core problem identified in the Notice of Proposed Rulemaking, 12 FCC Rcd 6184 (1996) ("Notice") — i.e., termination charges which distort the market for international services — because it wholly ignored U.S. carrier charging practices for global Internet services.

A. <u>Introduction</u>

Telstra is one of Australia's leading international telephone service carriers. It is also a major Internet service provider (ISP) in Australia through its Big Pond™ products, which offer retail and wholesale connections to the Internet.

To provide telephone service to the United States, Telstra connects its international circuits with matching circuits owned by U.S. carriers, such as intervenors AT&T Corp. ("AT&T") and MCI Communications Corporation ("MCI"). Interconnection typically occurs at the mid-point of a trans-Pacific telecommunications cable or satellite system. To provide customers of Telstra's Big Pond™ services access to Internet computers globally, Telstra also connects its Internet circuits — often using exactly the same trans-Pacific facilities — with major U.S. companies providing Internet services, such as AT&T and MCI.

In contrast to the shared ownership and costing arrangements for international telephone facilities, however, Telstra is required to obtain dedicated circuits known as international private lines ("IPLs") to handle its Internet traffic, and Telstra must pay U.S. carriers for the U.S. half of the IPLs as well as providing the Australian half. Telstra's Internet facilities thus connect with U.S. carriers in the U.S., where the IPLs terminate, rather than at a midpoint. Moreover, whereas Telstra and its U.S. correspondents compensate one another for using each other's international telephone circuits based upon the amount of traffic each carrier terminates (i.e., by using accounting rates[1]), the IPL charges which Telstra must

[1] <u>See</u> Glossary, <u>supra</u> p. iv.

pay to U.S. carriers for Internet services are not subject to accounting rates. Nor are these IPL charges traffic-sensitive, even though the IPLs carry a substantial volume of data from Australian Internet sites which is transmitted to the U.S. in response to requests from the Internet customers of U.S. carriers.

In the R&O at issue here the FCC adopted new rules limiting the per minute accounting rates which Telstra and other foreign carriers may receive from U.S. carriers for terminating international telephone traffic.[2] Yet, despite the FCC's stated goal of encouraging carriers to introduce "cost-based pricing for all telecommunication services,"[3] and Telstra's objections to the non-cost based services offered by U.S. carriers for Internet access — services for which Telstra currently must pay more than $20 million annually[4] — the R&O completely ignored the other half of this cost-equation.

B. The 1996 Rulemaking Notice

The new FCC rules at issue here have their immediate origin in a December 1996 rulemaking notice proposing to align U.S. settlement rates for telephone service more closely with foreign carriers' estimated termination costs by prescribing new, much lower

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2 The R&O prescribes a benchmark settlement rate of $.15 per minute for carriers operating in Australia and other upper income countries. R&O ¶ 111, App. C (JA at ___, ___). When the R&O was adopted, Telstra's average settlement rate for IMTS was .154 Special Drawing Rights ("SDRs") or approximately $.21 per minute. See Order and Authorization, 11 FCC Rcd 12292, 12294 (¶ 5) (1996).

3 R&O ¶ 2 (JA at ___).

4 Telstra Comments at 4 (JA at ___).

"benchmark" settlement rates for foreign carriers.[5] The FCC asserted that its Notice was designed, inter alia, to end "significant competitive distortions in the rapidly growing international market for telecommunications services."[6] According to the agency, "[r]ecent service innovations . . . accentuate the market distortions caused by above-cost settlement rates. . . ."[7] For example:

> Use of the Internet . . . has emerged as an alternative to higher priced IMTS. Though Internet traffic and switched voice traffic are carried over virtually identical facilities, the price for Internet service is far cheaper because switched traffic is subject to international settlement rates, while Internet traffic is exchanged outside of the traditional accounting rate system.[8]

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5 See Notice ¶¶ 1-3 (JA at ___). As detailed in Petitioners' Main Brief, however, the FCC adopted voluntary settlement benchmarks for U.S. carriers in 1992. See Second Report & Order and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 8040 (1992). Thereafter, AT&T and other U.S. carriers persistently lobbied the FCC to reduce the level of the benchmarks and to make them mandatory. For example, in IB Docket No. 96-261 below, twelve different AT&T executives made thirteen different ex parte presentations to sixteen different FCC officials to advance AT&T's interests. (See JA at ___-___.) AT&T also supplied the FCC with critical data, on an ex parte basis, for deriving new benchmarks — data which the Petitioners were never afforded a fair opportunity to review. See Petitioners' Main Brief at ___-___.

6 Notice ¶ 11 (JA at ___).

7 Id. ¶ 12 (JA at ___).

8 Id. ¶ 13 (JA at ___). See also id. ¶ 60 & n.63 (JA at ___). Prior to adopting the Notice, FCC Chairman Reed Hundt frequently pointed to the Internet's role in advancing FCC competition policies: "Internet telephony may well become, in time, a competitive alternative to additional circuit-switched voice telephony, especially in areas like international calls . . . . We want to encourage that kind of competition, not limit it. . . ." Speech of FCC Chairman Reed Hundt, Wall Street Journal Business and Technology Conference, Washington, D.C., Sept. 18, 1996, available at http://www.fcc.gov/Speeches/Hundt/spreh636.txt.

C. Telstra's FCC Comments

Telstra supported the agency's general goal of ending competitive distortions in the provision of international telecommunication services (e.g., above-cost termination rates). But this goal can not be achieved, said Telstra, without also reforming the termination practices of U.S. carriers for international Internet services.[9]

Telstra explained:

> To access U.S.-based Internet sites . . . U.S. carriers have insisted that foreign carriers pay for both of the required international half-circuits, i.e., for 100% of the cost of the international link. . . .
>
> When Telstra first established international capacity to the U.S. to meet the needs of Australian Internet users, the traffic was almost all "one-way" — asymmetrically from the U.S. to Australia, as Australian users accessed Web-sites in the U.S. and down-loaded information and content. [But now] the traffic flow has shifted significantly. Telstra estimates the flow is in the order of 70:30 U.S.-to-Australia vs. Australia-to-U.S., due mainly to U.S. Internet users increasingly drawing on Australian Internet content (this includes traffic to significant 'mirror' sites located in Australia and to many Australian web sites such as a new family-oriented Internet directory service located in Melbourne).[10]

Consequently, "foreign carriers are effectively subsidizing U.S. carriers and U.S. Internet service providers [ISPs] (which, of course, are frequently under common ownership)"[11] because Telstra must pay for all of the international transmission capacity used for international Internet services but the capacity is also used to carry U.S.-Australia Internet

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[9] Telstra Comments at 2 (JA at ___).

[10] Id. at 3 (JA at ___).

[11] Id. at 4 (JA at ___). Intervenors AT&T and MCI are both major U.S. Internet service providers.

traffic for the customers of U.S. carrier ISPs. For Telstra alone, "this subsidy to the U.S. in respect of the 82 Mbps [Megabits per second] capacity currently in place for Internet traffic (equivalent to 5000 voice channels), presently amounts to approximately U.S. $9.6 million per annum."[12] Telstra therefore urged the FCC "to review the current tariffing practices of U.S. carriers for [IPLs] which are required to provide Internet access," because these practices are unreasonable and "likely violate Sections 201 and 203 of the U.S. Communications Act, and Part 61 of the FCC's Rules."[13]

Shortly after these comments were filed, in March 1997, then FCC Chairman Hundt underscored the direct link between the FCC's accounting rate reform agenda and a competitive global Internet by making an Internet telephone call to Israel via Delta Three Global Network Inc. ("Delta Three"), which pioneered Internet telephony. He later told Delta Three that "[t]his call illustrates how new technologies are putting pressure on an obsolete accounting rate system . . ." and noted that the FCC had "taken several steps to change this system," referring expressly to the agency's "benchmark NPRM which proposes a significant decrease in settlement rates. . . ."[14]

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12 Id.

13 Id. See also Telstra Reply Comments at 3-4 (JA at ___). Singapore Telecom, which provides international telephone and Internet services in Singapore, also told the FCC that "any effort to achieve cost-based international communication charges must include consideration of tariff practices for Internet services." Reply Comments of Singapore Telecommunications Limited at 11 (JA at ___). Two Japanese carriers filed similar comments. See Reply Comments of Kokusai Denshin Denwa Co. Ltd. at 26 (JA at ___); Supplemental Reply Comments of International Telecom Japan, Inc. at 1 (JA at ___).

14 "Statement of Chairman Reed Hundt Regarding Demonstration of Internet (continued...)

D. The 1997 Report and Order

On August 7, 1997, the FCC adopted the R&O at issue here. It precludes U.S. international carriers from paying Telstra more than $.15 per minute for terminating U.S. telephone calls beginning in April 1998.[15] The FCC reiterated that these accounting rate reforms were required to keep the international public switched telephone network competitive:

> For example, internet telephony has the potential to be a significant alternative to the accounting rate system. Calls made over the internet are not subject to the accounting rate system, and as a result, we anticipate that charges for internet telephony will be substantially closer to the actual cost of providing service, and much lower than most collection rates for international service.[15][16]

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[14](...continued)
Telephony," available at http://www.deltathree.com/press/telephony1.html.

[15] The benchmarks apply beginning on April 1, 1998, to: (1) foreign affiliated carriers which already hold authority to provide facilities-based service to a foreign affiliate; and (2) certain foreign affiliated carriers, such as Telstra, Inc., an affiliate of Telstra, which are subsequently granted facilities-based international service authority. See R&O ¶¶ 228, 231 (JA at ___).

[16] R&O ¶ 11 (JA at ___). Footnote 15 in the R&O refers to page 5 of a trade newsletter article about the potential for Internet-protocol telephony or "IP Phone," which includes a profile of Delta Three and other IP Phone companies previously praised by FCC Chairman Hundt. See "The Model is Extensible," Telemedia News & Views, May 1, 1997. Relevant portions of the trade newsletter article are attached hereto as Appendix 1.

Summary of Argument

I. A. The FCC violated the Administrative Procedure Act when it adopted new policies designed to make international telecommunication services more cost-based because it did not consider, much less act upon, the requests of various parties to reform the non cost-based terms on which U.S. carriers provide facilities for the fastest growing international service — the Internet. The R&O was therefore arbitrary and inconsistent with the agency's stated goals in the rulemaking proceeding.

B. The FCC's unexplained and willful rejection of petitioner's Internet comments provides adequate grounds for vacating the R&O because the agency's inaction further distorted competition for international telecommunication services — the very evil the FCC said it wished to end. Why? Internet phone calls now compete directly with the public switched telephone network. They use the same international transmission facilities. And the same companies typically provide Internet and switched telephone services. In addition, e-mail messages carried via the Internet often substitute for switched telephone services, including facsimile messages. The FCC's attempt to reform the termination costs for one international service — switched telephony — and not the other — the Internet — was therefore irrational, prejudicial to Internet services, and unlawfully one-sided.

II. The R&O also is unlawful because, by ignoring the petitioners' Internet concerns, the FCC violated its statutory obligation under Sections 1 and 201 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 201, to ensure that all U.S. carriers' charges and practices are just and reasonable.

Argument

I. The Report and Order Is Arbitrary And Capricious Because It Does Not Mention, Much Less Respond To, The Comments Of Telstra And Other Parties Regarding The Anti-Competitive Practices Of U.S. Carriers In Providing International Private Lines (IPLs) For Internet Services.

A. The FCC Willfully Ignored The Parties' Comments Regarding Internet Facilities.

In a rulemaking proceeding, such as IB Docket No. 96-261, the FCC may adopt final rules only after due "consideration of the relevant matter" presented by interested parties.[17] This obligation under the Administrative Procedure Act (APA) was wholly ignored here.

The Notice described the importance of the Internet in promoting a competitive international telecommunication market[18] and expressly sought comments on various options for promoting cost-based international services.[19] In response, Telstra twice submitted comments stating that the FCC's competitive agenda required the agency simultaneously to address the terms on which U.S. carriers provided international facilities for Internet services.[20] Other parties voiced the same concerns.[21] Having invited these comments, though, the agency then ignored them; the R&O does not contain one word about the Internet provisioning practices of U.S. carriers.

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17 5 U.S.C. § 553(c).

18 See supra notes 7-8 and accompanying text.

19 See, e.g., Notice ¶ 29 (JA at ___).

20 See Telstra Comments (JA at ___-___); Telstra Reply Comments (JA at ___-___).

21 See Reply Comments of KDD (JA at ___-___); Reply Comments of Singapore Telecom (JA at ___-___); Supplemental Reply Comments of International Telecom Japan (JA at ___).

It is also evident that the FCC's indifference to the Internet issues presented by interested parties was willful. The R&O indicates that Telstra's comments were read and acknowledged only where it served the agency's own narrow agenda.[22] But where Telstra raised competition issues that ran contrary to the basic presumption of the FCC's docket — namely that foreign, not U.S. carrier termination practices, are responsible for reducing international service competition — the FCC chose to remain silent. This unexplained rejection of Telstra's concerns can not be squared with the APA and is grounds for vacating the R&O.[23]

B. The FCC's Decision To Ignore The Parties' Internet Concerns Was Unlawful Because They Were Directly Relevant To The Docket's Competition Goals And Concerned Payments For The Same International Facilities Between The Same Companies Providing International Telephony.

The FCC's silent rejection of the parties' Internet concerns was also unlawful because the terms on which U.S. international carriers furnish Internet capacity were unquestionably relevant to the stated goals of IB Docket No. 96-261. First, as the FCC acknowledged,

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[22] See, e.g., R&O ¶ 269 & nn.446, 451 (JA at ___). The Reply Comments of KDD and Singapore Telecom, which also raise the Internet pricing issue, are cited at various points in the agency's decision. See, e.g., id. ¶ 38 n.45 (JA at ___), ¶ 59 n.94 (JA at ___), ¶ 159 n.284 (JA at ___), ¶ 269 n.444 (JA at ___).

[23] Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir. 1977) ("[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public." (citing Portland Cement Ass'n v. Ruckleshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974)); see also Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172-73 (D.C. Cir. 1994) (vacating FCC rule requiring cellular radio licensees in Gulf of Mexico to maintain fixed service boundaries because agency "altogether overlook[ed]" petitioner's comments below regarding transmitter site concerns of Gulf licensees).

"Internet traffic and switched voice traffic are carried over virtually identical facilities . . . ."[24] Hence, it was irrational and arbitrary for the FCC to mandate cost-based charges for U.S. carriers to terminate international voice traffic on said facilities without addressing U.S. carriers' non cost-based charges for terminating Internet traffic on the same facilities.

Second, as the Commission again acknowledged, Internet telephony provides a direct competitive alternative to telephone calls routed over the public switched network.[25] The terms and conditions upon which one of these services can be offered directly affect the competitive options for the other service and vice versa. The FCC, therefore, had an obligation to address the termination costs for these two services in tandem, especially given the FCC's view that Internet telephony is already closer to the actual cost of service.[26] Otherwise the FCC ran the risk of exacerbating the very competitive distortions it sought to end.

Third, the provision of international switched telephone and Internet services are financially linked. The same foreign and U.S. companies (e.g., Telstra and MCI) typically provide both services and thus termination arrangements often involve payments between exactly the same companies. A U.S. company, such as MCI, which makes net out payments to a foreign carrier, such as Telstra, for landing switched telephone services has an obvious incentive to recoup these payments by levying higher charges for terminating Telstra's Internet traffic — charges which may also defray the expenses of MCI's affiliated ISP.

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[24] Notice ¶ 13 (JA at ___).

[25] See id.

[26] See R&O ¶ 11 (JA at ___).

In short, the FCC's policies governing the termination arrangements for international telephony and Internet services were and are inextricably linked. To address the costs for one service — international telephony — and not the other service — the Internet — was irrational; prejudicial to Internet providers; and contrary to the competitive goals of the agency's proceedings. This Court has previously rejected the FCC's attempts to reform international telecommunications regulations in a one-sided fashion and it should follow that precedent here.[27]

II. The FCC's Failure To Address The Unreasonable Practices Of U.S. Carriers In Provisioning Internet Capacity Violated The Agency's Obligations To Enforce Section 201 Of The Communications Act.

Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), states as follows: "All charges, practices, classifications, and regulations for and in connection with [interstate or foreign communication offered by common carriers] shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful." Pursuant to Section 1 of the Communications Act, 47 U.S.C. § 151, the FCC

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[27] See ITT World Communications, Inc. v. FCC, 725 F.2d 732, 754-55 (D.C. Cir. 1984) (vacating FCC order authorizing the Communications Satellite Corporation (Comsat) to provide service directly to non-carriers because agency had not considered other relevant factors (e.g., direct carrier access to Comsat space segment) affecting stated FCC policy of promoting more competition between international satellite and undersea cable services). Here the FCC's stated goal of encouraging competition for all international communications services, whether routed over the switched telephone network or the Internet, was obviously impaired by the agency's failure to consider the unreasonable terms on which U.S. carriers furnish international transmission capacity for Internet services. Moreover, fundamental principles of administrative law require the FCC to act equitably and to treat all competitors in a fair and evenhanded manner. See, e.g., Niagara Mohawk Power Corp. v. FCC, 379 F.2d 153, 160 (D.C. Cir. 1967); Dixon v. Attorney General of Commonwealth of Pennsylvania, 313 F. Supp. 653, 656 (M.D. Pa. 1970) ("[E]quity delights to do justice but not by halves.").

has an obligation "to execute and enforce the [law's] provisions."[28]

In its comments, Telstra advised that the practices of U.S. international carriers in providing IPLs for Internet services "likely violate Sections 201 and 203 of the U.S. Communications Act . . . ."[29] Once again, however, the FCC ignored its statutory obligations: The R&O entirely fails to address Telstra's Section 201 IPL concerns.

This omission stands in sharp contrast to the extensive restatement and enforcement of the FCC's asserted Section 201 authority over international settlement rates elsewhere.[30] The R&O thus shut its eyes to Section 201 when it came to the charges and practices that enrich U.S. carriers — namely, the provisioning of IPLs for global Internet services — but chose to enforce it unsparingly when it came to foreign carrier charges (i.e., IMTS termination rates) that were alleged to violate the law. This arbitrary and unexplained enforcement of Section 201 is contrary to the agency's statutory mandate, and for this reason too the R&O must be vacated.[31]

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[28] See also Notice ¶ 18 (JA at ___) ("We have a statutory mandate to ensure that consumers pay reasonable charges for communications service."); id. ¶ 106 (JA at ___).

[29] Telstra Comments at 4 (JA at ___).

[30] See R&O ¶¶ 278-86 (JA at ___). In contrast to foreign carrier settlement charges, the IPL services of U.S. carriers are routinely tariffed, and neither the FCC nor any party below has ever contended that the terms and conditions for that service are not subject to Section 201. This makes the FCC's failure to take up the parties' Section 201 concern regarding IPLs all the more arbitrary.

[31] See supra notes 23, 27.

Conclusion

For all of the foregoing reasons, the R&O is unlawful and should be vacated.

Respectfully submitted,

Alan Y. Naftalin
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R. Edward Price

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Attorneys for Telstra Corporation Limited

March 23, 1998

SPECIAL APPENDIX

"The Model is Extensible," Telemedia News & Views, May 1997, at 5-7. This article is cited in the FCC's R&O, 12 FCC Rcd 19806, 19812 (¶ 11) n.15 (1997) (JA at ___).