

2300 N Street, NW
Washington, DC 20037-1128

telephone: 202.783.4141
facsimile: 202.783.5851

May 3, 1999

RECEIVED

MAY 3 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Rebecca Arbogast
Chief, Telecommunications Division, International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

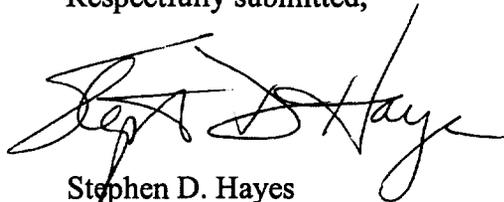
Re: *International Settlement Rates, IB Docket No. 96-261 —
Enforcement Petition of AT&T, et al., Netherlands Antilles*

Dear Ms. Arbogast:

The Government of the Netherlands Antilles, and Antelecom N.V. ("Antelecom") which is acting by and through its attorneys, file the instant Comments in the above-referenced proceeding. Please note that the first signature page includes conforming signature blocks for the three signers of the Comments, and the second, identical signature page includes the facsimile of signatures of Messrs. Adriaens and Eikelenboom, who are resident in the Netherlands Antilles, and the original signature of undersigned counsel for Antelecom. The Appendix to the Comments also includes the facsimile signature of Mr. Lyrio Gomez of Antelecom, who likewise is resident in the Netherlands Antilles. The Commenters would gladly provide, upon request, the original signatures of these individuals under separate cover.

As required by the Commission's Rules and *Public Notice*, DA 99-479, issued March 10, 1999, an original and four copies of these Comments are being filed herewith. An additional one copy each is being provided to International Transcription Services, Inc., the International Bureau Reference Center and the filing petitioners, as well as directly to you and to Ari Fitzgerald in the Office of the Chairman.

Respectfully submitted,


Stephen D. Hayes

No. of Copies rec'd _____
List ABCDE

0 + 5f

EX PARTE OR LATE FILED

RECEIVED

MAY 3 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

In the Matter of)	
)	
International Settlement Rates)	IB Docket No. 96-261
)	
Petition of AT&T, MCI WorldCom and Sprint for)	DA 99-479
Enforcement of International Settlements Bench-)	
mark Rates for Services with the Netherlands)	
Antilles)	

To the Chief, Telecommunications Division:

**JOINT PROTECTIVE COMMENTS OF THE
NETHERLANDS ANTILLES AND ANTELECOM, N.V.**

**MINISTRY OF TRAFFIC AND TRANSPORTATION,
GOVERNMENT OF THE NETHERLANDS ANTILLES**
By: M. H. P. Ph. Adriaens, Minister

ANTELECOM N.V.
By: Hendrik Eikelenboom, President

and

WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037
(202) 783-4141
Attorneys for Antelecom N.V.

By: Leon T. Knauer
Lawrence J. Movshin
Stephen D. Hayes

May 3, 1999

TABLE OF CONTENTS

I.	THE COMMENTERS ARE COMPELLED TO FILE THESE COMMENTS AT THIS TIME TO PROTECT THEIR RIGHTS.....	2
II.	PETITIONERS HAVE FAILED TO GIVE DEDICATED, PRIVATE NEGOTIATION A REASONABLE CHANCE FOR SUCCESS, AND HAVE PREMATURELY FILED THE PETITION.....	5
A.	THE BURDEN OF NEGOTIATION IS ON PETITIONERS, AND THEY HAVE FAILED TO SATISFY THIS BURDEN.	5
B.	ENFORCEMENT ACTION NOW WOULD NOT BE CONSISTENT WITH THE <i>BENCHMARKS ORDER</i>	11
C.	NETHERLANDS ANTILLES IS ONE OF THREE NATIONS TO BE SINGLED OUT FOR ENFORCEMENT ACTION WHILE REVISED SETTLEMENT ARRANGEMENTS WITH OTHER TOP-TIER NATIONS HAVE NOT YET BEEN RESOLVED.	13
D.	TO BE FORCED TO SIMULTANEOUSLY ENGAGE IN BOTH NEGOTIATION AND LITIGATION OVER SETTLEMENT RATE REFORM IS PREJUDICIAL TO A SMALL CARRIER LIKE ANTELECOM, AND WILL LIKELY COMPLICATE REACHING A SOLUTION.	14
E.	THE DIVISION SHOULD DISMISS THE PETITION AS PREMATURE, OR ALTERNATIVELY SHOULD WITHHOLD FURTHER ACTION PENDING A THOROUGH NEGOTIATION EFFORT BY THE U.S. CARRIERS.	15
III.	THE NETHERLANDS ANTILLES IS NOT PROPERLY AMONG THE NATIONS INCLUDED IN THE TOP BENCHMARK TIER.	15
A.	THE RANKING ASCRIBED TO THE NETHERLANDS ANTILLES UNDER THE <i>BENCHMARKS ORDER</i> SHOULD BE REVISED WHEN APPLIED.....	15
B.	THE APPLICATION OF THE TOP-TIER BENCHMARK TO THE NETHERLANDS ANTILLES WOULD HAVE A SUBSTANTIAL NEGATIVE EFFECT ON ITS ONGOING SECTOR REFORMS.....	18
C.	THE SECOND TIER RATE BETTER REFLECTS ANTELECOM’S COSTS.....	19
D.	THE ADOPTION OF A FLEXIBLE APPROACH TO THE APPLICATION OF THE <i>BENCHMARKS ORDER</i> TO THE NETHERLANDS ANTILLES IS APPROPRIATE AND FULLY WITHIN THE DIVISION’S DISCRETION.....	20
IV.	COMMENTERS DESIRE AN AGREEMENT, PRIVATELY REACHED, THAT SATISFIES THE DESIRE OF ALL PARTIES FOR SETTLEMENT RATE REFORM, BUT THAT ALSO ADDRESSES MATTERS OF FUNDAMENTAL CONCERN TO THE NETHERLANDS ANTILLES. ...	22
V.	THE COMMENTERS ARE FRUSTRATED IN THEIR EFFORTS TO OBTAIN RELIEF FROM THE RAMPANT CALL BACK AND REFILEING PROBLEM WITH THE UNITED STATES.	24
VI.	CONCLUSION.....	29

SUMMARY

The Commenters file the instant Comments to protect their rights in this matter, but do so under protest and in the belief that the fast and fair resolution of settlement rate reform between the United States and the Netherlands Antilles would best be promoted through good faith effort on the part of the U.S. carriers to reach a private agreement, and not through premature resort to governmental action.

The Commenters have been faulted for a purported failure to negotiate revised settlement rates with the U.S. carriers. It is, however, the U.S. carriers, and not foreign carriers like Antelecom, that carry the burden of negotiation under the *Benchmarks Order*. The *Benchmarks Order* specifically applies only to U.S. carriers, and thus it is those U.S. carriers which are required to exhaust good faith efforts at negotiation of revised settlement rates before any enforcement action is sought. The Petitioners have failed to satisfy this burden, however. Indeed, the Netherlands Antilles has been singled out for such premature enforcement action, to the detriment of Antelecom and the reform process. The Division should require the U.S. carriers to exhaust the avenues of negotiation before it takes any further action on the Petition.

Not only is this action premature, but there is good reason in this circumstance to flexibly apply the *Benchmarks Order* to the Antillean situation. The Commenters disagree with the categorization of the Netherlands Antilles in the top tier of countries, according to *per capita* GNP. Indeed, the application of the *per capita* GNP measure to the Netherlands Antilles not only fails to reflect the economic realities in the nation, but it also is counterproductive to the very policies underlying the Commission's settlement reform efforts. Additionally, the ranking fails to adequately reflect the costs to Antelecom of the termination of traffic from the United States.

The Commenters believe that this matter is best resolved through private negotiation of a revised settlement rate arrangement that addresses the policy objectives of the United States, but also addresses the significant issues of concern to the Commenters. These issues include the failure of a symmetrical rate relationship to adequately reflect the cost of termination experienced by the U.S. carriers, and the impact on the traffic balance between the United States and the Netherlands Antilles of illegal call-back services and call reorigination and refiling. The Commenters continue to believe that the call back problem should be stopped through the FCC's enforcement on the U.S. carriers of the call back prohibition enacted by the Netherlands Antilles. In the absence of the effective limitation on the participation of the U.S. carriers in these activities, however, the services should *not* be subject to the FCC's standard benchmarks policy, but instead should be handled by separate private negotiation.

The Commenters offer a broad outline of the agreement that they are attempting to negotiate with the U.S. carriers. They believe that such an agreement would advance the settlement rate reform goals of both nations, and would also help to resolve the related issues of concern to the Netherlands Antilles. The Commenters believe that the best course now is for the parties to work in earnest to reach a private agreement along these lines, and thereby avoid further action by the FCC or action by the Government of the Netherlands Antilles to protect the interests of its long distance operator.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

In the Matter of)	
)	
International Settlement Rates)	IB Docket No. 96-261
)	
Petition of AT&T, MCI WorldCom and Sprint for)	DA 99-479
Enforcement of International Settlements Bench-)	
mark Rates for Services with the Netherlands)	
Antilles)	

To the Chief, Telecommunications Division:

**JOINT PROTECTIVE COMMENTS OF THE
NETHERLANDS ANTILLES AND ANTELECOM N.V.**

The Government of the Netherlands Antilles, acting through its Ministry of Traffic and Transportation, ("Government") and Antelecom N.V. ("Antelecom") (collectively, "Commenters"), pursuant to the *Public Notice*¹ and the *Orders* dated April 13 and 29, 1999 to extend the comment period in this proceeding,² hereby jointly file these protective Comments to the captioned Petition

¹ *Petitions for Enforcement of International Settlement Benchmark Rates, Public Notice*, DA 99-479, rel. Mar. 10, 1999 ("Public Notice"). This *Public Notice* set an April 14, 1999 filing date for comments and an April 26, 1999 filing date for reply comments

² *International Settlement Rates - Petition of AT&T, MCI WorldCom and Enforcement of International Settlement Benchmark Rates for Services with the Netherlands Antilles, Order on Motion to Extend Comment Period*, DA 99-701 (Int'l Bur. Apr. 13, 1999) ("*Order on Antelecom Motion*"). By this *Order*, the Chief of the Telecommunications Division ("Division") of the International Bureau ("Bureau") denied Antelecom's request for 90 days of time in which to engage in meaningful negotiation of a private solution to the settlement rate question without the need for
(footnote continued next page)

filed by AT&T Corp. ("AT&T"), MCI WorldCom, Inc. ("MCI WorldCom") and Sprint Communications Company, L.P. ("Sprint") (collectively, "Petitioners").³ As will be discussed in greater detail below, the enforcement action undertaken by the Petitioners is premature and seeks to enforce the application of an FCC policy which is flawed – both in general and as it specifically applies to the Netherlands Antilles. Moreover, the Division's apparent unwillingness to require that private negotiation be fully explored prior to advancing this enforcement action is contrary to the requirements of the Commission's benchmarks policy, and is otherwise counterproductive to achieving the Commission's stated goal of satisfactory settlement rate reform.

I. THE COMMENTERS ARE COMPELLED TO FILE THESE COMMENTS AT THIS TIME TO PROTECT THEIR RIGHTS

In its "Motion for Extension of Time to File Comments and Reply Comments" ("Antelecom Motion"), Antelecom asserted that, contrary to the suggestions by Petitioner, private negotiation has not been given a full and fair chance to lead the parties to a mutually-satisfactory private solution to settlement rate reform issues between the United States and the Netherlands Antilles.⁴ This view was supported by the Government in the letter, dated April 8, 1999, of its Minister of Traffic and

government involvement. The Division granted an additional 14 days in which to file comments, however. *International Settlement Rates - Petition of AT&T, MCI WorldCom and Enforcement of International Settlement Benchmark Rates for Services with the Netherlands Antilles, Order on Motion to Extend Comment Period*, DA 99-817 (Int'l Bur. Apr. 29, 1999).

³ Petition of AT&T, MCI WorldCom and Sprint for Enforcement of International Settlements Benchmark Rates for Services with the Netherlands Antilles, IB Docket No. 96-261, filed Feb. 25, 1999 ("Petition").

⁴ Petition of AT&T, MCI WorldCom and Sprint for Enforcement of International Settlements Benchmark Rates for Services with the Netherlands Antilles, Motion for Extension of Time to File Comments and Reply Comments, IB Docket No. 96-261, filed by Antelecom on Apr. 7, 1999 ("Antelecom Motion").

Transportation filed with the Division in support of the Antelecom Motion.⁵ In these filings, the Commenters asserted their belief that a requirement by the FCC for interested parties – including clearly Antelecom and the Government – to submit comments to the Petition before negotiations had been fully explored would be counterproductive. It was argued that the chances for success of those private negotiations would likely diminish in such event, as each of the parties would inevitably begin to harden its position in anticipation of FCC action and possible ensuing litigation. The Division rejected this specific request for time to engage in dedicated negotiation.

Despite the Division's issuance of its *Order on Antelecom Motion* rejecting the request for time, the Commenters continue to believe that private negotiation – not public argument – is the most productive course. Indeed, the Commenters feel so strongly about the wisdom of allowing private negotiation to be fully explored before any action is taken by either government, that representatives from both Commenters traveled from Curaçao to Washington to meet with FCC staff prior to the Division's April 28 comment date. The mission was intended to explain the position of the Government and Antelecom in this negotiation effort, as well as their view of the circumstances surrounding the U.S. carriers effort to resolve this matter by private negotiation, and to explore the position of the Commission on letting private negotiations proceed in earnest for a reasonable period while further governmental intervention by either the United States or the Netherlands Antilles Governments is held in abeyance (and hopefully thereby avoided). In meeting with FCC staff, it became clear to the Commenters that the Division was not of the view that the immediate filing of

⁵ Petition of AT&T, MCI WorldCom and Sprint for Enforcement of International Settlements Benchmark Rates for Services with the Netherlands Antilles, IB Docket No. 96-261, Letter of M. Adriaens, Minister of Traffic and Transportation, Netherlands Antilles, to Rebecca Arbogast, Chief of the Telecommunications Division, International Bureau (filed on Apr. 8, 1999).

comments would have a negative impact on the possibility of a private solution to this matter, or that it would be inclined to further hold the prosecution of the Petition in abeyance.⁶

Nevertheless, the Commenters' views remain unchanged regarding the potential impact of the further prosecution of the enforcement action on the environment for success in the negotiations. The Commenters recognize, however, that any decision to refrain from filing comments now, even under these circumstances, could cast a cloud over the later exercise of their full rights under U.S. law to any adverse actions that may be taken by the Petitioners and the Division in this matter.

Accordingly, the instant Comments are being filed as "protective" comments. By styling these Comments as such, the Commenters wish to go on record, without equivocation, that the instant filing is made under protest, and fully cognizant of the fact that the filing of these Comments now could have a negative impact on the likelihood of a private solution in this matter. Nevertheless, the Commenters are forced by circumstance to file these comments to protect the rights they may seek to exercise under U.S. law for review of any actions which may be taken by the FCC in this matter.

⁶ Importantly, the Division noted to the Commenters that it does not view the filing of the Petition as a prohibition on further discussions between the carriers toward the goal of a private agreement. It further described the normal process of consideration of the Petition, and that the carriers were free – and indeed encouraged – to continue to talk during this period. In this vein, Antelecom has prepared a letter to the heads of the international operations of the Petitioners inviting them to a joint negotiation conference in Washington as soon as possible this month. Antelecom intends to take the initiative again in this matter and to send this invitation to the U.S. carriers promptly after the filing of these Comments.

II. PETITIONERS HAVE FAILED TO GIVE DEDICATED, PRIVATE NEGOTIATION A REASONABLE CHANCE FOR SUCCESS, AND HAVE PREMATURELY FILED THE PETITION.

A. THE BURDEN OF NEGOTIATION IS ON PETITIONERS, AND THEY HAVE FAILED TO SATISFY THIS BURDEN.

Pursuant to the Commission's original *Order* setting out its settlement rate benchmarks policy, U.S. carriers are *required* to negotiate with foreign carriers, like Antelecom, on the matter of settlement rate reform.⁷ As the FCC specifically pointed out in its *Benchmarks Order* (and as the U.S. Court of Appeals noted in its opinion affirming the *Benchmarks Order*⁸), the FCC's jurisdiction applies to U.S. carriers only, and not to foreign carriers. Equally, the requirements of the policy must apply to the U.S. carriers and not to the foreign carriers.⁹ As such, it is patent that the burden

⁷ See, e.g., *In the Matter of International Settlement Rates*, 12 FCC Rcd. 19806, 19816 (1997), *aff'd sub. nom.*, *Cable and Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999) (“*Benchmarks Order*”) (“We will require that U.S. carriers negotiate with their foreign correspondents settlement rates at or below the appropriate benchmark” [emphasis added]).

⁸ See, e.g., *Cable and Wireless*, 166 F.3d at 1230 (“Far from threatening foreign carriers with enforcement actions, the [*Benchmarks Order*] at most states that the FCC will contact ‘responsible [foreign] government authorities’ to ‘seek their support in lowering settlement rates.’ [*Benchmarks Order*, 12 FCC Rcd. at 19893.] Given the structure of the global telecommunications industry and its resulting incentives, we find reasonable the Commission’s view that the [*Benchmarks Order*] regulates domestic carriers, not foreign carriers.”); *Benchmarks Order*, 12 FCC Rcd. at 19935 (“The rules adopted here do not constitute the exercise of jurisdiction over foreign carriers. . . . Where U.S. carriers and their foreign correspondents cannot agree to a settlement rate that falls at or below the relevant benchmark, we will use our power under the [Communications] Act to take enforcement actions that will . . . apply to U.S. carriers within our jurisdiction, not their foreign counterparts.”).

⁹ As the Commission noted in its *Order on Reconsideration* addressing international call-back services, the United States has advanced the position internationally that it does not “accept any obligation to enforce any provision of the domestic law or regulations of any other [ITU] Member” except voluntarily by the application of the principles of international comity whereby the FCC may elect “to honor the provisions of foreign law or regulation where [it] believe[s] it warranted by exceptional circumstances.” *VIA USA, et al.*, 10 FCC Rcd. 9540, 9556 (1995). The Government asserts no greater or lesser sovereign rights for itself in the matter of the FCC’s purely-domestic benchmarks policy. Against this backdrop, the Government affirms its continuing support for international settlement rate reform as developed through the ITU, and its continuing belief that a mutually-satisfactory revised arrangement between Antelecom and the Petitioners, taking into full

(footnote continued next page)

of initiating and pursuing the renegotiation of existing settlement rate arrangements with foreign carriers is squarely on the U.S. carriers.¹⁰ Indeed, the Commenters assert that the U.S. carriers are not required to merely engage in negotiation, but to exhaust the possibility of a private solution prior to the initiation of enforcement action through dedicated, good faith effort. The U.S. carriers have failed to satisfy this regulatory burden, however.

The Petition is supported solely by an affidavit from Mr. Thomas R. Luciano, Vice President for Settlement Operations in the International Traffic Management Division of AT&T. In his affidavit, Mr. Luciano stated:

account the tenets of the ITU, together with the issues of concern to *both* the United States and the Netherlands Antilles, is the proper course for resolution of this matter.

¹⁰ It should be noted that the Court of Appeals ruling in the *Benchmarks Order* is still subject to appeal to the United States Supreme Court, and as such is not yet final. Although the Commenters recognize that under U.S. law the effectiveness of an underlying order is not held in abeyance pending appeal unless specifically stayed, and no such stay request has been filed, the FCC could – and, the Commenters believe, should – factor this continuing appellate status into its deliberations on whether enforcement should, without substantial harm, be held in abeyance pending further negotiations.

In addition, on April 15, 1999, the Commission issued a “sweeping reform of the longstanding international settlements policy. . . .” FCC News Release, *FCC Lifts Regulations of Inter-Carrier Agreements in Broad Reform of International Settlements Policy*, IB Docket 98-148, Apr. 15, 1999. The Commission adopted these additional reforms to reflect the new realities existing in the international marketplace. The Commission revised its policy to eliminate the settlement policy where there is already competition on the foreign end of a call and where application of the policy could actually impede further development of competition. The Commission has not released the text of this decision. Although, at first blush, it may not appear that this reform is applicable in any way to the instant situation, the Commenters would like to have the opportunity to review the Commission’s latest changes to the settlement rates to ascertain whether, and how, the Netherlands Antilles may be affected by the new decision. Indeed, the Commenters specifically reserve the right to amend these Comments to react to this or any other new or changed facts or circumstances which may arise during the pendency of the Petition.

AT&T informed Antelecom N.V. that the *Benchmarks Order* requires U.S. carriers to negotiate a settlement rate no higher than \$0.15 with Netherlands Antilles effective January 1, 1999 at meetings held in March, May, July and November 1998.

* * *

However, Antelecom N.V. has failed to offer any reductions in the present rate and has indicated to AT&T that it will not agree to the benchmark rate. Accordingly, AT&T has been unable to negotiate the benchmark rate with Antelecom N.V. effective January 1, 1999 for traffic between the U.S. and Netherlands Antilles in conformity with the *Benchmarks Order*.¹¹

Mr. Luciano concludes that the foregoing “demonstrate[s] that AT&T has made good faith efforts to negotiate the applicable benchmark settlement rate with its correspondent in Netherlands Antilles in accordance with the *Benchmarks Order* and that its efforts have not been successful.”¹² AT&T reiterated this account in the Opposition to the Antelecom Motion it filed in conjunction with MCI WorldCom and Sprint.¹³

This short summarization purports to document the exhaustion of good faith efforts to negotiate with Antelecom and to comply with the Commission’s negotiation requirements. Yet the information supplied by AT&T offers an incomplete and inaccurate account of the nature of the contacts with Antelecom on the matter of renegotiating settlement rates, and hardly is sufficient evidence of compliance by a U.S. carrier with the U.S. regulations to which it – but not Antelecom – is subject. By implication, the AT&T account improperly places the burden of negotiation on the *foreign carrier*, in contravention of the *Benchmarks Order* and the Court of Appeals’ opinion.

¹¹ Petition, Affidavit of Thomas R. Luciano, at 2.

¹² *Id.*

¹³ Petition of AT&T, MCI WorldCom and Sprint for Enforcement of International Settlements Benchmark Rates for Services with the Netherlands Antilles, IB Docket No. 96-261, Opposition of AT&T, MCI WorldCom and Sprint (filed on Apr. 13, 1999) (“Opposition to Antelecom Motion”).

As the attached statement of Mr. Lyrio Gomez, Vice President of Antelecom, demonstrates, the contacts since August 1997 between AT&T and Antelecom on the matter of settlement rate renegotiation utterly fail to constitute a good faith effort by AT&T to fulfill its obligations under the *Benchmarks Order*.

- It was Antelecom – and not AT&T or the other U.S. carriers – who first raised the issue of renegotiated settlement rates after the August 1997 issuance of the *Benchmarks Order*. At that time, Antelecom proposed a revised arrangement of the operating agreement which should also address other related matters of concern to Antelecom and the Government. A number of exchanges occurred between Antelecom and the U.S. carriers on this proposal, but without success.
- In the course of the contacts with Antelecom, AT&T proposed a settlement rate arrangement that exceeded the scheme of the *Benchmarks Order*, to the detriment of Antelecom. Specifically, AT&T proposed that the 15 cent benchmark rate be phased into effect in steps beginning in mid-1998. AT&T persisted in its advocacy of this arrangement, which Antelecom could not accept and which was not required by the *Benchmarks Order*.
- Even after the passing on January 1, 1999 of the one-year transition period under the *Benchmarks Order*, Antelecom continued to push the U.S. carriers to negotiate the matter. On February 19, 1999, Antelecom sent to the U.S. carriers by fax its proposal to take on the burden of negotiation and to travel to their offices in the United States to discuss settlement rates. Antelecom understood that it had agreement to meet with MCI WorldCom on March 1, AT&T on March 2, and Sprint on March 3, 1999. Antelecom was surprised when before this round of meetings could take place the carriers filed the Petition on February 26, 1999.

Antelecom cancelled these meetings under the circumstances and hired U.S. telecommunications counsel.

- Contrary to the statement of Mr. Luciano, Antelecom has at no time patently rejected consideration of agreeing to the benchmark rate. On the contrary, it has consistently linked its acceptance of the U.S. benchmark to satisfactory settlement of the related matters of concern to Antelecom (as discussed more fully below).¹⁴

That Petitioners could cast AT&T's contacts (and the minimal contacts of the other Petitioners) to date with Antelecom as sufficient effort to warrant an enforcement petition demonstrates either their unwillingness to engage in meaningful negotiation of settlement rate reform (in conjunction with the issues of concern to the Commenters), or their fundamental misunderstanding of the burdens of the *Benchmarks Order*. As stated above, it appears that the Petitioners believe that the burdens of the *Benchmarks Order* are on Antelecom – over which the FCC has no jurisdiction – and not on the U.S. carriers themselves – over which the FCC does have jurisdiction – jurisdiction it exercised in the *Benchmarks Order*.

The Commenters are concerned that the Division may be similarly in error in its assessment of the burdens in this matter. Taking the Luciano affidavit at face value, the Division stated in the *Order on Antelecom Motion* that Antelecom “had adequate opportunity to renegotiate its settlement rate with U.S. carriers” The Division asserts that the time for negotiation has run out because “Antelecom has had ample notice that the Commission would enforce the requirement that U.S. carriers negotiate a [revised] settlement rate.”¹⁵ Specifically, the Division stated that Antelecom

¹⁴ See Statement of Lyrio Gomez, attached hereto as an Appendix.

¹⁵ *Order on Antelecom Motion*, para. 5.

“should have been on notice” – *i.e.*, that it had *constructive* notice of the requirements of the *Benchmarks Order* – upon the original issuance of the *Benchmarks Order* in 1997, and that it “has been on notice” – *i.e.*, that it had *actual* notice of the *Benchmarks Order* – since the issuance of a letter from by the Bureau to the Ministry (with a copy to Antelecom) in December, 1998, in which the FCC solicited the assistance of the Government in the successful renegotiation of settlement rates between Antelecom and the U.S. carriers.¹⁶

It is unreasonable to deem Antelecom – a foreign carrier not subject to U.S. jurisdiction and thus with no reason to follow FCC activities – to have constructive notice of all U.S. legal and regulatory actions that might somehow affect their business on some day and in some way simply because the FCC has issued an order on a matter. Moreover, the actual notice which Antelecom is deemed to have received fails as sufficient notice to fault it for failing to successfully react in time to the notice to avoid regulatory enforcement action.¹⁷ In reality, what Antelecom may or may not have had legal notice of is irrelevant. What *is* relevant, and what the Division should recognize, is that it is precisely the *Petitioners* – who *are* subject to the jurisdiction of the FCC – who have been on notice since August 1997 of the *Benchmarks Order* and who have nevertheless for over two years utterly failed in their obligation to fully exhaust negotiations with Antelecom to meet its obligations under the *Benchmarks Order*. Indeed, by their very silence in the Petition, MCI WorldCom and Sprint have shown their total failure to actively engage Antelecom in negotiating settlement rates.

¹⁶ *Id.* at para. 4.

¹⁷ The “actual notice” Antelecom is deemed to have received in December, 1998 was in the form of a courtesy copy of a letter from the Division to the Ministry seeking the latter’s assistance in achieving settlement rate reform. This letter, however, wasn’t even sent by the Division until less than a month before the end of the benchmark transition period. This hardly constituted sufficient actual notice prior to this enforcement action, in light of the lengthy task of negotiation involved.

AT&T's admission that its first contact with Antelecom was in March, 1998, some seven months *after* the issuance of the *Benchmarks Order* but only nine months *before* the end of the transition period, and that it thereafter engaged in only four contacts with Antelecom (without explanation as to the lack of more vigorous efforts), similarly demonstrates its own failure to fulfill its regulatory obligations.¹⁸

In sum, before the Division proceeds to take any action to enforce its benchmarks policy (in the purported absence of good faith negotiation by Antelecom) it should ensure that the U.S. carriers under its jurisdiction have fully explored the possibilities of private negotiation as they are obligated to do by law. We assert that the U.S. carriers have not faithfully fulfilled their obligations, that the Division cannot as a result reach such an assurance, and that this enforcement action is plainly premature.

B. ENFORCEMENT ACTION NOW WOULD NOT BE CONSISTENT WITH THE *BENCHMARKS ORDER*.

In the *Benchmarks Order*, the Commission indicated that the "initial measure" it would take to promote compliance with its benchmarks policy would be to "identify foreign carriers that are reluctant to engage in meaningful progress toward [re]negotiating settlement rates" and "convey to the responsible government authorities [its] concern about . . . settlement rates . . . and seek their support in lowering settlement rates."¹⁹ The Commenters are unaware, however, of any effort by the Division to contact Antelecom before the issuance of the *Public Notice* to determine the status of settlement rate renegotiations, or to solicit its views on what issues may be impeding progress toward

¹⁸ See *Petition*.

¹⁹ *Benchmarks Order*, 12 FCC Rcd. at 19893.

revised rates.²⁰ Yet it is patent from the specific language of the *Benchmarks Order*, as amplified by the Court of Appeals, that enforcement action is to be a last – not a first – resort. Rather, the first action must be the exhaustion of private negotiation, with the assistance of the relevant governments, if necessary.

The Government did receive the above-discussed letter from the International Bureau in December, 1998 regarding settlement rate reform. However, this letter in alone, without further action, fails to live up to the clear expectations of the Commission and the Court of Appeals. The Commenters believe that the holdings of the Commission and the Court of Appeals – as well as the tenets of comity between sovereign nations and courtesy toward carriers outside of U.S. jurisdiction – required the Division to take additional steps to resolve this matter before it advanced this enforcement proceeding through the issuance of the *Public Notice*. The Commenters believe that among the possible actions the Division could have taken, and should now take, are:

- Additional government-to-government efforts by the Bureau to promote revised settlement rates between the two nations;
- Contacts by the Bureau with Antelecom; and
- Convening a meeting of all involved carriers before FCC staff.

The Division elected instead to rapidly place the Petition on Public Notice and usher this matter to a litigatory conclusion through the denial of specific additional time for negotiation outside of the threat of enforcement action. Indeed, the Division has effectively acquiesced in the apparent effort by the U.S. carriers to avoid the resolution of difficult issues through the threat of FCC

²⁰ Such an effort by the Division might have been useful in promoting a private solution and avoiding altogether the need for this FCC enforcement action, in light of what we perceive as a real reluctance by the U.S. carriers to find a mutually-satisfactory private solution.

enforcement action. However, the Court of Appeals made it very clear that the *Benchmarks Order* requires not the threatening of enforcement action against a foreign carrier or government, but rather significant preliminary activity to reach a private solution and only the resort to enforcement action when the private effort has been faithfully tried and it fails.²¹

C. NETHERLANDS ANTILLES IS ONE OF THREE NATIONS TO BE SINGLED OUT FOR ENFORCEMENT ACTION WHILE REVISED SETTLEMENT ARRANGEMENTS WITH OTHER TOP-TIER NATIONS HAVE NOT YET BEEN RESOLVED.

Petitioners filed three, virtually-identical enforcement petitions with the Division on February 25, 1999. In addition to the Petition regarding service to the Netherlands Antilles, petitions were filed regarding service to Kuwait and Cyprus.²² Obviously, the Commenters are not parties to the private settlement negotiations U.S. carriers may be conducting with other carriers around the world whose nations are listed among the group to be subject to the January 1, 1999 implementation date in the *Benchmarks Order*. Nevertheless, it appears from the information available to the Commenters that Petitioners are still in the process of negotiating settlement rates with a number of other countries that are part of the top-tier benchmark countries.²³ In light of this situation, the

²¹ The Court of Appeals held that “[f]ar from threatening foreign carriers with enforcement actions, the *Order* at most states that the FCC will contact ‘responsible [foreign] government authorities’ to ‘seek their support in lowering settlement rates.’” *Cable and Wireless*, 166 F.3d at 1230 (citing *Benchmarks Order*, 12 FCC Rcd. at 19893) [emphasis added].

²² See *Public Notice*.

²³ The Commenters base this conclusion on the contacts they have had with representatives of a number of the carriers in the top-tier countries, and with their regulators. It is based, as well, on information available in the trade press. See, e.g., *Communications Daily*, Vol. 19, No. 43, at 7 (Mar. 5, 1999). As the best source of reliable information on the state of negotiations with carriers in other top-tier nations, the U.S. carriers should be required to disclose in this proceeding the status of any on-going negotiations and the rationale for initiating the current enforcement actions regarding some, but apparently not all, of the nations where revised arrangements are still pending.

Commenters have – and the Division *should* have – serious questions regarding why Petitioners have selected only three countries for enforcement action, and why these three were singled out.²⁴

Other than what they have stated in their petitions regarding service to Kuwait and Cyprus, the Commenters do not know the nature of the contacts which may have occurred between the U.S., Kuwaiti and Cypriot carriers. We *do* know the nature of the contacts to date between the U.S. carriers and Antelecom, as discussed above. As we have stated, the contacts with Antelecom do not warrant the move to an enforcement action at this juncture. That the Netherlands Antilles has been singled out for such premature treatment is even more evident in light of the ongoing negotiations taking place with other countries in the top tier.

D. TO BE FORCED TO SIMULTANEOUSLY ENGAGE IN BOTH NEGOTIATION AND LITIGATION OVER SETTLEMENT RATE REFORM IS PREJUDICIAL TO A SMALL CARRIER LIKE ANTELECOM, AND WILL LIKELY COMPLICATE REACHING A SOLUTION.

As stated in the Antelecom Motion, the Commenters are firmly of the view that this premature rush to enforcement will only inhibit, and not further, negotiations between the parties. Unlike Petitioners, which are huge companies and able to deploy vast resources (especially when working in concert), Antelecom is a small company and does not have the resources to thoroughly defend (and indeed possibly to litigate) its rights, while at the same time fully engaging in meaningful negotiations with AT&T and the other U.S. carriers.²⁵ Nevertheless, Antelecom stands ready to pursue both alternatives simultaneously, to the best of its abilities, and the Government

²⁴ In light of the minimal and unproductive contacts that Antelecom has had with the Petitioners, and the rush of the Petitioners to seek FCC enforcement action, we can only speculate whether the U.S. carriers are truly interested in reaching a private solution to settlement rate reform, as the FCC and the Commenters prefer, or are merely running for the cover of FCC enforcement action and thereby abdicating their regulatory duty to negotiate.

²⁵ Antelecom's difficulties would be further exacerbated if the U.S. carriers force it to engage
(footnote continued next page)

stands ready to defend the rights and economic vitality of its sole long distance carrier,²⁶ unless this matter is resolved favorably to all parties of interest.

- E. THE DIVISION SHOULD DISMISS THE PETITION AS PREMATURE, OR ALTERNATIVELY SHOULD WITHHOLD FURTHER ACTION PENDING A THOROUGH NEGOTIATION EFFORT BY THE U.S. CARRIERS.

In sum, because the instant enforcement action is wholly premature and runs counter to the requirements of the *Benchmarks Order*, as affirmed, it should be dismissed. Alternatively, the Division should formally hold further action on this Petition in abeyance pending a thorough effort by the involved carriers – led as it must be by the U.S. carriers – to reach a private solution.

III. THE NETHERLANDS ANTILLES IS NOT PROPERLY AMONG THE NATIONS INCLUDED IN THE TOP BENCHMARK TIER.

- A. THE RANKING ASCRIBED TO THE NETHERLANDS ANTILLES UNDER THE *BENCHMARKS ORDER* SHOULD BE REVISED WHEN APPLIED.

In the *Benchmarks Order*, the FCC placed the Netherlands Antilles among the nations in the first group of nations to be subject to a benchmark. To reach this conclusion – and indeed to place all nations into different tiers for the application of the benchmarks and implementation periods –

in separate talks with each carrier.

²⁶ In this regard, the Netherlands Antilles Government is currently considering taking a number of actions to protect its operator and its national interests. The options being actively considered include the adoption of measures similar to those already undertaken by the FCC to address its concerns. Specifically, the Ministry is contemplating the issuance of a set of orders: (1) requiring Antillean carriers to apply an asymmetrical rate structure to foreign settlements, if warranted by cost imbalances between the Antillean and foreign carriers, and (2) requiring separate rating schedules for call back and call reorigination services to and from the Netherlands Antilles (which schedules reflect the costs incurred and revenues lost by Antillean carriers as a result of these services) unless and until involved foreign carriers and their national regulators institute effective measures in control of these activities that are deemed satisfactory by the Netherlands Antilles. Other measures being considered include actions before the ITU and the WTO. The Commenters wish to note that the Court of Appeals left open the question of the validity of the *Benchmarks Order* in the face of conflicting actions by foreign governments. *Cable and Wireless*, 166 F.3d at 1230.

the FCC relied upon a 1996 World Bank study that categorized the nations of the world according to their *per capita* Gross National Product (“GNP”). The FCC further declined to employ the rate of national teledensity as the tier criterion.²⁷ The 1996 *per capita* GNP figure used by the FCC, however, overvalues the actual state of economic development in the Netherlands Antilles, and forces a more restrictive benchmark regime on the nation than are warranted by the realities of Antillean economic or telecommunications development.²⁸

The predominant domestic industry in the Netherlands Antilles is tourism. However, the proximity of the Antillean island of Curaçao to the rich oil fields off the Venezuelan coast has led to a significant degree of activity on the island in the refinement of Venezuelan oil. This industry, however, is owned by Venezuelan companies, and the incomes generated therefrom are largely expatriated. Additionally, the Netherlands Antilles has increasingly become a haven for offshore business enterprises, which take advantage of a presence in the nation for financial and other reasons. Again, however, these businesses are foreign owned, and their incomes are largely expatriated.

The *per capita* GNP analysis of the Netherlands Antilles used by the FCC takes into account *all* of these economic activities, regardless of their actual impact on the real economic development enjoyed by the average Antillean citizen. Indeed, in studies of teledensity, the Netherlands Antilles ranks below most of the nations in the top-tier of the *per capita* GNP groupings – which nations are

²⁷ *Benchmarks Order*, 12 FCC Rcd. at 19858-60.

²⁸ *Per capita* GNP, of course, is not a static measurement, but is constantly in flux. The *Benchmarks Order* apparently has no mechanism to account for the dynamics of this yardstick over the five-year implementation life of the order. As a result, the last transition tier will be implemented based on *per capita* GNP rates from what will by then be a study at least seven years old.

primarily the highly-developed nations of Europe and Asia.²⁹ For the Netherlands Antilles, teledensity represents a more accurate measurement of the state of economic development in the nation than does *per capita* GNP. Accordingly, the Division should take into account the lower teledensity rate of the Netherlands Antilles in applying the FCC's benchmark rates and determine not to enforce the application of the top-tier benchmark to service to the Netherlands Antilles, applying instead the second-tier policy of a 19 cent rate and a two-year transitional period.³⁰

Although the Commission considered (but rejected) the concept of using teledensity as the overall measure of economic development in other nations and thus as the basis for their

²⁹ See, e.g., Report R 14 of ITU-T Study Group 3, wherein the Netherlands Antilles is found to rank within a second tier of nations with teledensities between 35 and 50, with the top tier having teledensities of greater than 50. (The top tier included the United States, the United Kingdom, France, Germany, Australia, Canada, the Netherlands, Switzerland, Taiwan, and other leading economies of Europe and Asia.) ITU-T Com 3-R 14-E, Jan. 1999, p. 26 (Annex 5) ("COM 3 Report").

³⁰ It is appropriate for the Commenters to raise questions now regarding the *Benchmarks Order* in this enforcement context. In a long line of cases stretching from *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir.), *cert. denied*, 361 U.S. 813 (1959), the notion of the availability of review of the *application* of a rule of general applicability has been sustained. The Court in *Functional Music* stated unequivocally that "[a]s applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule when properly brought before this court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Id.* at 546-47. Similarly, the Court in *Commonwealth Edison Co. v. NRC*, 830 F.2d 610 (7th Cir. 1987), held that "[w]hile *Functional Music* was decided in the context of whether review existed over a denial to reconsider a legislative rule, its language created a clear exception for actions in which the agency applies a general rule to a particular party. . . . [A final order] should not undercut the right to challenge the underlying rule when an agency applies it. Later cases have applied this language to enforcement cases. *E.g. Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1984); *Tri-State Motor Transit Co.*, 739 F.2d 1373, 1375 n. 2 (8th Cir. 1984)". *Id.* at 615. See also *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1039 (D.C. Cir. 1997); *Amer. Tel. & Tel. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992); *National Labor Relations Board v. Federal Labor Relations Authority*, 834 F.2d 191 (D.C. Cir. (footnote continued next page)

categorization within the benchmark tiers, in doing so it nevertheless found that there is generally a “close relationship” and a “strong correlation” between the level of economic development and telecommunications development in a nation.³¹

The *Benchmarks Order* made clear, however, that the use of any yardstick was to determine “a country’s ability to transition to a more cost-based system of settlement rates without undue disruption to its telecommunications network.”³² Because of the skewing effect of oil refining and offshore businesses on the *per capita* GNP of the nation, teledensity offers a much more accurate – and thus fair – measure of the ability of the Government to institute settlement rate reform in the Netherlands Antilles without substantially harming its ongoing telecommunications development and reform.

B. THE APPLICATION OF THE TOP-TIER BENCHMARK TO THE NETHERLANDS ANTILLES WOULD HAVE A SUBSTANTIAL NEGATIVE EFFECT ON ITS ONGOING SECTOR REFORMS.

Antelecom calculates that the imposition of the top-tier 15 cent benchmark rate to services involving the Netherlands Antilles as specified in the *Benchmarks Order*, would result in an 8 to 10 percent annual loss of telecommunications revenues, and an even greater net impact on the operating income of the company, which income could otherwise be devoted to telecommunications rate restructuring and other reforms. The imposition of the second-tier 19 cent benchmark obviously

1987); *RCA Global Communications, Inc. v. FCC*, 758 F.2d 722 (D.C. Cir. 1985).

³¹ It is important to note that in ITU is moving from a *per capita* GNP to a teledensity approach, and has identified the Netherlands Antilles as among the second tier nations. The United States has raised no firm objection to either action. See COM3 Report.

³² *Benchmarks Order*, 12 FCC Rcd. at 19858-59.

would result in significantly diminished losses in revenues and income, and thus would have a diminished impact on the pace of reforms in the nation.³³

C. THE SECOND TIER RATE BETTER REFLECTS ANTELECOM'S COSTS.

It bears reiteration that the goal of this entire benchmarking effort by the FCC is to drive settlement rates down to cost-based levels. Because of the difficulty of conducting cost analysis on a country-by-country basis, the FCC elected to utilize cost-approximation tiers based on overall economic development. Antelecom, however, *can* accurately measure its own costs.³⁴ Having done so, it has determined that the application the 19 cent benchmark rate would better approximate Antelecom's costs than the 15 cent rate.³⁵

³³ Among the reforms already undertaken by the Government was the implementation of an August 1998 Government ruling reducing by approximately 60 percent the interconnection charges paid to the local exchange carriers in the Netherlands Antilles. This reduction allowed Antelecom to reduce its collection rate on international traffic equally. This move was reflective of the Government's institution of a basic cost orientation approach to rate regulation in the nation.

More generally, since 1996, the value-added services and data communications markets in the Netherlands Antilles have been liberalized, as well as the mobile telecommunications market. Concurrently with these market reforms, the Government officially separated its long distance and several local exchange carriers into distinct companies, and separated regulatory oversight into a new regulator, the Bureau of Telecommunications. These moves were preliminary to the currently-ongoing process of privatizing each of the government-controlled operators by attracting private investment into the sector. The privatization and liberalization processes are scheduled for completion by 2002.

³⁴ Antelecom will not reveal its cost data in this public forum. To the degree the availability of this information to the Division would be critical to the application to the Netherlands Antilles in the second tier rate, Antelecom would gladly make special arrangements with the Division for a confidential submission of this data.

³⁵ As the Division is aware, the Netherlands Antilles is comprised of five islands, stretching some 500 miles across the Caribbean Sea. Its overall population of approximately 200,000 persons, spread out over these five islands, results in relatively low-capacity, but widely-disbursed network. These factors obviously result in significantly higher costs for Antelecom.

If, on the contrary, the Division maintains the current categorization of the Netherlands Antilles among the top tier nations of Europe and developed Asia, then it should adopt a more flexible approach to the implementation of the settlement rate benchmarks to the Netherlands Antilles. For example, in the *Benchmarks Order*, the Commission stated its willingness to consider the grant of additional transition time in those instances where the involved nation would experience a greater than 20 percent reduction in its annual telecommunications revenues as the result of the implementation of the lower benchmark rates.³⁶ Although the Commenters do not suggest that the imposition of the benchmark would have an impact of this tremendous magnitude on Antelecom, it nevertheless will have a major impact, which the Division can, and should, help to deflect through the granting of additional transition time.

D. THE ADOPTION OF A FLEXIBLE APPROACH TO THE APPLICATION OF THE *BENCHMARKS ORDER* TO THE NETHERLANDS ANTILLES IS APPROPRIATE AND FULLY WITHIN THE DIVISION'S DISCRETION.

For all of the reasons discussed above, the Division should adopt a flexible implementation policy related to services to the Netherlands Antilles. This flexible implementation would better reflect the costs of terminating traffic in the Netherlands Antilles as well as the other, real world factors affecting the health of the telecommunications industry in the nation. Under the *Benchmarks Order*, since the benchmark policy is applicable only to U.S. carriers, it must be the U.S. carriers – and not the foreign carriers who are not subject to the *Benchmarks Order* in the first instance – who are positioned to request benchmark flexibility from the FCC.³⁷ Not surprisingly given the lack of

³⁶ *Benchmarks Order*, 12 FCC Rcd. at 19888-89.

³⁷ *Id.* at 19889 (a U.S. carrier providing service to a country that meets the 20 percent revenue reduction criterion “may file a request with the International Bureau seeking a waiver of the applicable transition period.”)

negotiations by the U.S. carriers, none has yet engaged Antelecom in a discussion of the flexible application of the benchmark policy to the Netherlands Antilles. The Division, however, has the authority to implement such flexibility on its own motion.³⁸ The Commenters urge the Division to consider such flexibility in the present circumstance.

³⁸ It has long been held that an administrative agency's authority to proceed into complex areas of regulation by means of rules of general applicability, such as the FCC's global benchmarks policy, comes with the equal authority to engage in the flexible application of the general rules to address special circumstances. *U.S. v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). The FCC's authority to flexibly apply its own rules has similarly long been recognized. In *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993), for example, the Court of Appeals held that waivers are permissible devices for the "fine tuning" of regulations (citing *Telocator Network v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982)), and are an appropriate method of curtailing the "inevitable excesses" of an agency's general rule, provided that the underlying rules are rational (citing *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988)). In *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), the Court of Appeals noted that the FCC's discretion to proceed in difficult areas through general rules is "intimately linked" to the existence of a "safety valve procedure" for the consideration of exemptions for special circumstances. Indeed, the Court determined that the Commission has an *obligation* to seek out the public interest in particular matters and individualized situations.

Indeed, the Bureau – and by delegation, the Division – has specifically been granted the authority to flexibly apply the Commission's settlement rate policies. As the Commission noted in *AT&T Corp., MCI Telecommunications Corp., Petitions for Waiver of the International Settlements Policy*, 13 FCC Rcd. 23924, 23940 (1998), "the Bureau Order relied on the standard established by the Commission in 1991 that 'delegated authority to the Common Carrier Bureau to consider, on a case-by-case basis, granting [accounting rate modification] requests that include a lower, more economically efficient, cost-based, international accounting rate when supported by a sound analysis of the benefits that will result from the implementation of that rate.'" This authority of the Common Carrier Bureau was transferred to the International Bureau upon its creation in 1994. See *Amendment of Parts 0, 1, 25, 43, 64 and 73 of the Commission's Rules to Reflect a Reorganization Establishing the International Bureau, Order*, 9 FCC Rcd. 7050 (1994).

Moreover, the authority to consider flexible application of the benchmarks policy in specific circumstances, such as the instant where the established benchmark does not adequately reflect the foreign carrier's costs, was clearly noted by both the Commission and the Court of Appeals. *Cable and Wireless*, 166 F.3d at 1228 (citing *Benchmarks Order*, 12 FCC Rcd. at 19842) ("Any carrier may ask [the Commission] to reconsider, in a specific case, the benchmarks on the grounds that they do not permit the carrier to recover [its costs]").

IV. COMMENTERS DESIRE AN AGREEMENT, PRIVATELY REACHED, THAT SATISFIES THE DESIRE OF ALL PARTIES FOR SETTLEMENT RATE REFORM, BUT THAT ALSO ADDRESSES MATTERS OF FUNDAMENTAL CONCERN TO THE NETHERLANDS ANTILLES.

As the Commenters have stated consistently, they share the desire of the United States to reform international settlement rates. They also respect the efforts made to date in this regard at the ITU. The Commenters do not seek confrontation with the U.S. Government or the U.S. carriers, but rather prefer to maintain a cooperative and open attitude toward satisfying all parties' interests. It is important to note in this regard that the Commenters are endeavoring to satisfy the FCC's procedural requirements out of international comity, even in the absence of jurisdiction over Antelecom or the sovereign Netherlands Antilles.

In this vein, the Commenters wish to state for the record the essence of their position with regard to settlement rate revision between our nations. Antelecom does not intend to negotiate its revised rate structure with the U.S. carriers publicly in this forum. Antelecom also does not wish to diminish its negotiating position with the U.S. carriers by providing excessive information on its negotiating objectives. However, in an effort to spur the resolution of this matter to a successful conclusion – a conclusion which hopefully avoids the need for excessive government involvement or which has a negative impact on bilateral relations between the United States and the Netherlands Antilles – the Commenters state the following:

- If settlement rates are to be truly cost-based and fair, then the termination rates for the United States and the Netherlands Antilles should reflect the imbalance in costs between U.S. and Antillean carriers, and be asymmetrical.

- Assessing the settlement rate that should be applicable to U.S. call terminations under the FCC's analysis in the *Benchmarks Order*,³⁹ the termination rate to the United States should be approximately 6 cents per minute, regardless of the benchmark rate applied to the foreign carrier.
- Unless the U.S. carriers whose facilities are being used to provide the services can accurately identify call back traffic on their networks, an agreed percentage of all annual call terminations to the Netherlands Antilles from the United States should be deemed to be the result of call back activities, and will be rated outside of the agreed asymmetrical benchmarks rates.
- Similarly, unless the U.S. carriers whose facilities are being used to provide the services can accurately identify reoriginated traffic on their networks, an agreed percentage of all annual call terminations to the Netherlands Antilles from the United States should be deemed to be the result of reorigination activities, and will be rated outside of the agreed asymmetrical benchmarks rates.
- Other specialized services, such as audiotext, 800 number and country-direct services, may by agreement be subject to specialized rating.
- Together with all of the foregoing, Antelecom will accept payment from U.S. carriers at the applicable benchmark rate determined by the FCC on all calls initiated by callers physically located in the United States – the true U.S. consumers – to the Netherlands Antilles.

³⁹ An analysis relative to the United States was not performed in the *Benchmarks Order*, as it should have been. Rather, the *Benchmarks Order* has the U.S. carriers receiving the windfall of payments based not on their own costs, but rather the generally higher costs of foreign carriers (especially those from lesser-developed nations).

The Commenters believe that the foregoing outline is eminently reasonable under the circumstances, and would like to be given a chance to fully explore with the U.S. carriers the possibility of a private solution along the foregoing lines, without further government intervention.

V. THE COMMENTERS ARE FRUSTRATED IN THEIR EFFORTS TO OBTAIN RELIEF FROM THE RAMPANT CALL BACK AND REFILING PROBLEM WITH THE UNITED STATES.

As the Commission should be well aware as the result of the several filings on the matter to the FCC over the past few years, Antelecom experiences substantial call-back problems from companies using the telecom services provided by U.S. carriers. The Commission authorized call-back services by order issued in June, 1995. In doing so, the Commission expressly prohibited U.S. carriers from providing call back service to customers in countries which declare such services to be illegal.⁴⁰ To date, however, Antelecom has been unable to secure protection from these unlawful services.

In a letter sent in January, 1996, the Government informed the Commission that the Telecommunications Act of the Netherlands Antilles forbids international call-back services provided to or from the Netherlands Antilles. The FCC acknowledged receipt of this notification.⁴¹ Since that time, the Netherlands Antilles continues to be included in the "Public File Country List" of nations prohibiting call-back services.⁴² Nevertheless, as demonstrated in Antelecom's most recent call back initiative to the United States, to this day U.S. carriers are actively marketing call-

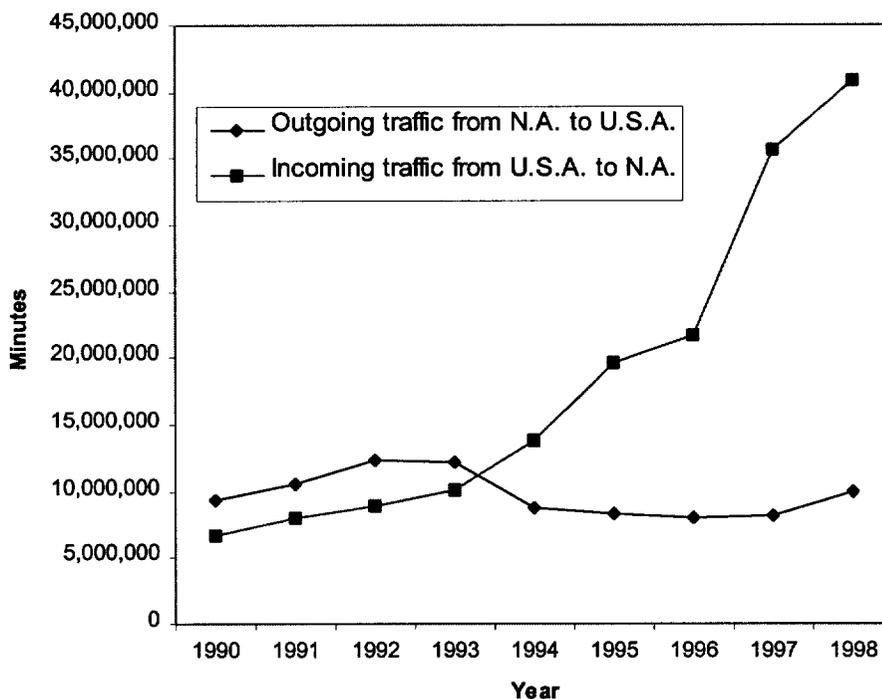
⁴⁰ See *VIA USA*, 10 FCC Rcd. at 9558.

⁴¹ Letter from Regina Keeney, Chief of the International Bureau, to M. Adriaens, Minister of Traffic and Transportation, Netherlands Antilles, dated January 16, 1996.

⁴² The list is publicly available on the World Wide Web at www.fcc.gov/ib/td/pf/callback.

back services in and to the Netherlands Antilles.⁴³ Moreover, Antelecom has requested each of the major U.S. carriers doing business with Antelecom to comply with the Commission's call-back mandate, prohibit call-back services to and from the Netherlands Antilles, and to provide a list of known call-back providers using their facilities.

FIGURE: USA TERMINATING TRAFFIC FROM AND TO THE NETHERLANDS ANTILLES



⁴³ Letter from M. Adriaens, Minister of Traffic and Transportation, Netherlands Antilles, to Rebecca Arbogast, Chief of the Telecommunications Division, International Bureau, dated Apr. 13, 1999.

Antelecom's efforts have been to no avail so far, however. Call-back services in the Netherlands Antilles are epidemic and have become a significant problem. Indeed, as demonstrated in the previous chart, since the advent of call-back services, the country has changed from a net originator of calls to the U.S. to a net terminator of calls from the U.S.⁴⁴ As a result, call-back services provided in the Netherlands Antilles have significantly impaired Antelecom's telecommunications services and revenues. Applying international settlement benchmark rates without accounting for the asymmetry associated with illegal call-back services simply exacerbates this already serious problem.

As discussed above, the current benchmark rates *do not* reflect the true costs of terminating calls in the U.S. Indeed, the Commission undertook no analysis of the costs of terminating international traffic in the U.S., relying instead upon its general analysis of the costs of terminating traffic in foreign nations – nations outside of its jurisdiction. As a consequence, the *Benchmarks Order* authorizes U.S. carriers to receive windfall of payments based not on their own costs, but rather the generally higher costs of foreign carriers. Moreover, in the case of the Netherlands Antilles, this windfall to U.S. carriers is even greater due to the volume of unlawful call-back traffic terminated in the country.

⁴⁴ Just as the Commenters are not in a position to prove which U.S. carriers sponsor the continuing call-back problem, and to what degree, are thus are only able to assess the effects of call-back through empirical data, so to the Commenters can only allege the cause for the major shift in traffic balances which began in 1993-94 and accelerated in 1996 as the initiation and expansion of call-back and call reorigination and refiling activities through the U.S. carriers. The other factors that typically account for a such a wholesale shift in traffic balances – *e.g.*, a sudden influx of Antillean citizens into the United States, who then tip the balance with increasing volumes of calls to their homeland – have simply not occurred, and cannot reasonably be concluded to constitute the cause of this phenomenon.

Such a result is fundamentally unfair and flies in the face of important principles of international comity. The principle of international comity underlies the Commission's decision to prohibit U.S. carriers from providing call-back services in countries where such services have been determined to be unlawful.⁴⁵ The Government accepts its role as the primary entity responsible for enforcing its law against call-back services, and has undertaken responsible efforts to control such services. However, the Government also believes that the Commission simply cannot ignore the provision of such unlawful services by its domestic carriers and, at a minimum, should amend its benchmark rates to ensure that U.S. carriers do not receive an economic windfall from providing unlawful call back services.⁴⁶

The Commenters believe that the adoption of lower, cost-based rates – asymmetrical to reflect asymmetrical costs – will significantly control the call-back phenomenon. To the degree it does not, however, Antelecom proposes that the benchmarks policy be modified to provide for the special treatment of call-back services. A certain percentage of call terminations to the Netherlands Antilles should, by agreement of the carriers, be deemed to be the result of call-back techniques. Such percentage would be rated under separately-agreed rates, which may not fall within the

⁴⁵ *VIA USA*, 10 FCC Rcd. at 9557 (“We therefore find, as a matter of international comity, that the Commission should prohibit carriers authorized to provide call-back services utilizing uncompleted call signaling from providing this offering in countries where it is expressly prohibited.”).

⁴⁶ Treating call-back rating by private agreement and outside the FCC's benchmarks policy also would avoid the peculiar situation of the FCC regulating the rate for an illegal activity. Indeed, the Commenters' approach in this matter would be to have the FCC exercise its authority to prevent call-back in the first place, and thereby not even be presented with the dilemma of setting rates for an illegal activity. However, if the FCC is unable or unwilling to act to stop call-back, then the Commenters are prepared to accept a *private* arrangement regarding the rates that should be associated with these services until they can be effectively prevented.

standard benchmark rate, unless U.S. carriers could affirmatively document that such Antillean terminations are not the result of illegal call back services.

The other problem of great significance to the Commenters is call reorigination and refiling. The Commenters assert that these services as well should be treated specially, by agreement, and outside of the FCC's standard benchmarks. Again, the Commenters believe that the attractiveness of reorigination and refiling services will diminish as settlement rates overall are reformed to true cost-based levels. However, to the degree they are not, the Commenters propose to seek compensatory arrangements for such services through its settlement scheme with other carriers.

In this instance, the FCC should not wish to exercise any jurisdiction over the matter. Indeed, the Commenters are of the view that the FCC would lack proper jurisdiction over reoriginated and refiled traffic, especially over the rate regulation of such services. Simply put, call reorigination and refiling are sham transactions that mask their true origination point. Since these calls do not involve U.S.-based consumers, but instead merely transit the United States en route to somewhere else, they fall outside of the Commission's jurisdiction.

The Commission has broad regulatory jurisdiction over "all interstate and foreign communications by wire or radio."⁴⁷ The term foreign communications is defined as "communications to or from any place in the United States to or from a foreign country."⁴⁸ Call reorigination and refiling simply do not fall within this express statutory definition. In such calls, there is no "communications to or from any place in the United States to or from a foreign country."

A call originates in a third country and terminates in the Netherlands Antilles. The U.S. is involved

⁴⁷ 47 U.S.C. § 152(a); *see also* 47 U.S.C. § 201(b).

⁴⁸ 47 U.S.C. § 153(17).

only by virtue of the transit service which masks the true origin of the call. Consequently, these services fall outside of the jurisdiction of the Commission. As such, these calls may not be subject to the Commission's settlement benchmark rates.

Given the difficulties of identifying reoriginated and refiled calls, however, Antelecom again proposes to, by agreement, identify representative call volumes that will be deemed to be the result of reorigination and refiling services, and will rate them separately from the *Benchmarks Order*. U.S. carriers would be able to document if some or all of these covered calls do not result from reorigination and refiling activities.

The call back and reorigination and refiling issues are of great concern to the Commenters. Indeed, they should be of great concern to U.S. carriers as well. As the chart below demonstrates, until 1994, the Netherlands Antilles was a net payor of settlement fees to the United States, and not a net payee. In short, the Netherlands Antilles was not being subsidized by U.S. carriers, as is one of the complaints of U.S. carriers underlying the benchmarks policy. With the advent of call-back services in 1994, and the advent of reorigination and refiling a few years later, the Netherlands Antilles has become a net payee for settlement rates. With call back, reorigination and refiling, and settlement rates brought into control, the Commenters anticipate that the balance of traffic between the two nations might again return to a net balance in favor of the United States.

VI. CONCLUSION

The Commenters reiterate that they are filing the instant Comments under protest and in the belief that a delay in the filing of comments in this proceeding would be the best way to promote a privately-negotiated solution to this matter. Nevertheless, to protect their rights, the Commenters are raising the objections to the Petition and the application of the benchmarks policy set out above.

In sum, the *Petitions for Enforcement of International Settlement Benchmark Rates* should be denied, and relief from application of the *Benchmarks Order* should be granted to Antelecom consistent with the foregoing discussion.

Respectfully submitted,

**MINISTRY OF TRAFFIC AND TRANSPORTATION
GOVERNMENT OF THE NETHERLANDS ANTILLES**

By: /s/ _____
M.H.P.Ph. Adriaens
Minister

ANTELECOM N.V.

By: /s/ _____
Hendrik Eikelenboom
President

and

By: /s/ _____
Leon T. Knauer
Lawrence J. Movshin
Stephen D. Hayes

WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037
(202) 783-4141

Attorneys for Antelecom N.V.

May 3, 1999

In sum, the *Petitions for Enforcement of International Settlement Benchmark Rates* should be denied, and relief from the *Benchmarks Order* should be granted to Antelecom consistent with the foregoing discussion.

Respectfully submitted,

**MINISTRY OF TRAFFIC AND TRANSPORTATION
GOVERNMENT OF THE NETHERLANDS ANTILLES**

By: 

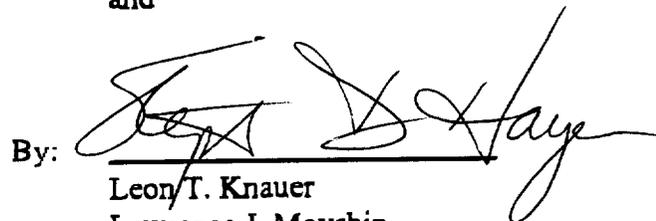
M.H.P.Ph. Adriaens
Minister

ANTELECOM N.V.

By: 

Hendrik Eikelenboom
President

and

By: 

Leon T. Knauer
Lawrence J. Movshin
Stephen D. Hayes

WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037
(202) 783-4141

Attorneys for Antelecom N.V.

May 3, 1999

Statement of Mr. Lyrio A. G. Gomez

I, Lyrio A. G. Gomez, a citizen and resident of the Netherlands Antilles, state the following:

1. I am the Vice President of Antelecom N.V. ("Antelecom"), the sole long distance provider in the Netherlands Antilles. My business address is Schouwburgweg 22, P.O. Box 103, Curaçao, Netherlands Antilles.
2. I have been involved, either directly or through the oversight of other employees of Antelecom, in the negotiation of settlement rate arrangements with foreign carriers, including those of the United States.
3. In late 1997, after taking notice of the August 1997 *Benchmarks Order* of the U.S. Federal Communications Commission ("FCC"), I took the initiative to present the U.S. carriers with a proposal to terminate the current operating agreement and initiate a revised agreement. Under the Antelecom proposal, the transition period would be used to negotiate an overall operating agreement with the U.S. carriers that would address the concerns of all the parties thereto. It was further proposed that an appropriate tariff for each of the services maintained between parties would be addressed individually.
4. Following this initial contact, additional contacts were maintained with the U.S. carriers and a draft operating agreement was exchanged with the U.S. carriers for comment and discussion.

5. While some comments were received from the U.S. carriers on the Antelecom draft, no agreement was ever reached on a final text. The U.S. carriers failed to consider adequate resolution of the issues of concern to Antelecom as part of the revised settlement arrangement.

6. Some discussions occurred on several occasions during 1998 between Antelecom and AT&T. In these discussions, AT&T persisted in proposing a tier reduction of the current accounting rates, beginning as of mid-1998, with several stepped reductions occurring throughout the remainder of 1998 until the January 1, 1999 effective date of the FCC's *Benchmarks Order*. The proposal to begin the reduction of the current accounting rate even before the January 1, 1999 effective date of the *Benchmarks Order* was rejected by Antelecom, as an unwarranted advancement of any applicability of the FCC's benchmarks, but also in light of the failure of the U.S. carriers to discuss the other matters of concern to Antelecom, such as asymmetrical rates.

7. No meaningful contacts regarding settlement rates that could reasonably be described as negotiations have taken place with MCI WorldCom or Sprint since August 1997.

8. Although a number of contacts have taken place with the U.S. carriers as a group since 1997 on the issue of renegotiating settlement rates, in my opinion these contacts do not amount to a good faith effort on the part of the U.S. carriers to reach a mutually-satisfactory private solution to these issues in this matters.

9. On February 19, 1999, after the passing of the January 1, 1999 effective date of the U.S. benchmarks, I directed that Antelecom send faxes to representatives of the three major U.S. carriers on the matter of settlement negotiation. In the letter, Antelecom proposed to fly its top executives to the United States, at Antelecom's expense, to meet with each of these carriers in their U.S. offices and discuss the resolution of the accounting rate matter. The proposed schedule

called for a meeting with MCI WorldCom on March 1, with AT&T on March 2, and with Sprint on March 3, 1999.

10. I was surprised to learn on February 26, 1999, shortly before the proposed dates for meetings, that the U.S. carriers jointly filed the enforcement petition with the FCC. In light of this filing, Antelecom cancelled the proposed meetings and hired U.S. telecommunications counsel.

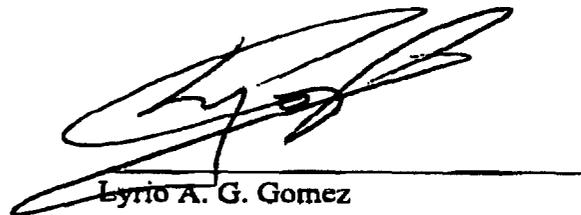
I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

/s/ _____
Lyrio A. G. Gomez

called for a meeting with MCI WorldCom on March 1, with AT&T on March 2, and with Sprint on March 3, 1999.

I was surprised to learn on February 26, 1999, shortly before the proposed dates for meetings, that the U.S. carriers jointly filed the enforcement petition with the FCC. In light of this filing, Antelecom cancelled the proposed meetings and hired U.S. telecommunications counsel.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



Lyrio A. G. Gomez

CERTIFICATE OF SERVICE

I, Michelle O. Mesen, do hereby certify that a copy of the foregoing "Petition of AT&T, MCI WorldCom and Sprint for Enforcement of International Settlements Benchmark Rates for Services with The Netherlands Antilles" was sent this 3rd day of May, 1999, by facsimile, first-class U.S. mail, and/or first-class U.S. airmail, postage prepaid, to the following:

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

Robert S. Koppel
J. William Busch
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Leon M. Kestenbaum
Kent Y. Nakamura
James W. Hedlund
1850 M Street, N.W., Suite 1100
Washington, D.C. 20036

Ari Q. Fitzgerald
Legal Advisor
Office of the Chairman
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Roderick Porter
Acting Chief, International Bureau
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Adam Krinsky
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Troy Tanner
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20054

Kenneth Stanley
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

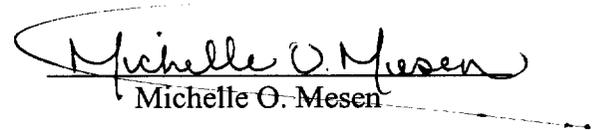
Kathy O'Brien
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

International Bureau Reference Center
Federal Communications Commission
Room 102
2000 M Street, N.W.
Washington, D.C. 20554

Rebecca Arbogast
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C. 20037


Michelle O. Mesen