CORRECTED

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

In the Matter of	)	
	)	
Petition Pursuant to Rule 64.1002(d)	)	IB Docket No 09-10
Requesting Issuance of Settlements Stop	)	
Payment Order on the U.S.-Tonga Route	)	

REPLY COMMENTS OF AT&T INC.

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SUMMARY

The Tonga Communications Corporation ("TCC"), which is 100 percent owned by the Tongan government, has blocked AT&T's circuits to Tonga since November 24, 2008 after AT&T refused to acquiesce to TCC's demand for a rate increase to more than three times the previous rate level – from approximately US$ 0.09 to US$ 0.30 per minute. Prior to this demand, TCC's rates had actually been decreasing: TCC terminated AT&T's calls to Tonga at the agreed rates of US$0.13 for 2006 through June 2008 and approximately $US 0.09 for the period July 1 though August 30, 2008. In August 2008, however, TCC demanded an increased rate of $0.30 from September 1, 2008 after the Tongan government, without explanation, ordered a minimum termination rate of US$0.30 effective on that date.

After AT&T refused to agree to the increased rate because it is more than 50 percent higher than the FCC benchmark rate and harmful to consumers in both the U.S. and Tonga, TCC blocked AT&T's circuits and has prevented AT&T from completing any traffic to Tonga over these circuits since then. TCC also has blocked Verizon's circuits to Tonga since November 17, 2008, following Verizon's similar refusal to agree to the higher rate. AT&T has accordingly petitioned the Commission requesting intervention on this route under the Rule 64.1002(d) safeguards established in 2004 to prevent anticompetitive conduct on routes like Tonga that are no longer subject to the International Settlements Policy (ISP"). Verizon has filed comments in support of AT&T's request.

As stated in AT&T's petition, TCC's actions meet all three "indicia of potential anticompetitive conduct" identified by the Commission in 2004 as potentially requiring intervention to prevent harm to U.S. consumers: increasing termination rates above FCC

benchmark rates; establishing rate floors above previously negotiated rates; and threatening or carrying out circuit disruptions in order to increase rates. TCC's actions also violates the Commission's longstanding prohibition against foreign carriers using their control of the foreign end of U.S. international routes to engage in "whipsawing" or other coercive conduct to increase termination rates for U.S. carriers and thus raise prices paid by U.S. consumer and business users. AT&T has requested the Commission to take action to prevent such harm, as in similar prior instances of such foreign carrier conduct, by ordering U.S. carriers to stop settlements payments to TCC until all U.S. carrier circuits are restored.

TCC's Opposition fails to distinguish its actions from other similar instances where the Commission has intervened to prevent foreign carriers from using their control of the foreign end of an international route to force U.S. carriers to agree to unreasonable rate increases. Regardless of whether TCC has yet sought to "play off" one U.S. carrier against another, TCC readily may enter into agreements with other U.S. carriers that would place pressure on AT&T and Verizon to comply with TCC's demands, unless the Commission takes action to prevent U.S. carrier payments to TCC until all circuits are restored. The Commission is fully authorized to take such action and TCC does not contest this authority.

Contrary to TCC's further claims, however, international law places no limitation on the Commission's ability to prevent harm to U.S. consumers from foreign government measures by applying safeguard measures to U.S. carriers. U.S. courts have made clear that no nation is required to defer to, or enforce, foreign laws that are contrary to its own laws or public policies. The Commission has taken the same position in withdrawing its former comity-based limitations on call-back services. Both the Commission and NTIA have also made clear that the Commission may properly take action where foreign governments mandate unreasonable termination rate increases. Such action is particularly necessary where, as here, the foreign government is the 100 percent owner of the incumbent foreign carrier and mandates unreasonably high rates for no apparent reason other than to increase settlements revenues at the expense of consumers in other countries, including the United States.

TCC also notably fails in its efforts to demonstrate that Tonga's $0.30 rate is "not unreasonable considering TCC's costs." TCC's Opposition contains no such evidence and TCC's assertion that this rate is among the lowest Pacific Island rates is not correct. Tonga's rate is not only one of the highest among those islands but it is also the highest rate charged by any of the twenty-five countries that AT&T serves by satellite, including many countries that are less developed than Tonga. TCC's agreement to a US$ 0.09 rate in August 2008 also provides compelling evidence that Tonga's $US 0.30 rate is far in excess of costs and AT&T's own study confirms this, based on current satellite circuit prices, domestic calling rates in Tonga and other available information concerning TCC's costs. AT&T's study, provided here at Attachment 1, shows that the total cost of terminating international calls in Tonga is in the range of US$ 0.085-0.17 per minute, and is most likely at or below the lower end of this range.

Tonga's rate certainly cannot be justified on the basis of AT&T's U.S. termination rates, as TCC further contends. AT&T's rates are set in the highly competitive U.S. marketplace – the direct opposite of the process by which Tonga's US$ 0.30 rate was established. Consequently, AT&T's U.S. termination rates for TCC's traffic, outside very limited areas with high access charges that generally receive little or no traffic from TCC, are less than $0.02 per minute.

To prevent harm to U.S. consumers, both on the U.S.-Tonga route and other international routes if other foreign countries should follow Tonga's example and take similar actions to increase their inbound settlements payments, the Commission should grant AT&T's petition and require U.S. carriers to stop settlements payments to TCC until all circuits are restored.

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REPLY COMMENTS OF AT&T INC.

AT&T Inc., on behalf of its affiliates ("AT&T") hereby submits these reply comments in the above-referenced proceeding.[1] For the reasons set forth below, the Tonga Communications Corporation ("TCC") fails to show that it has not engaged in anticompetitive behavior harmful to U.S. consumers by blocking AT&T's circuits on the U.S.-Tonga route in response to AT&T's refusal to raise termination rates from approximately US$ 0.09 to US$ 0.30.

TCC's action harms the public interest by raising U.S. prices and threatens to cause further harm to U.S. consumers by encouraging similar actions by other foreign carriers. As requested by AT&T's petition, the Commission should take immediate action to prevent such harm by issuing a stop payment order prohibiting U.S. settlement payments to TCC until all U.S. carrier circuits are restored.

I. TCC VIOLATES LONGSTANDING COMMISSION POLICIES PROHIBITING THE USE OF CIRCUIT DISRUPTIONS TO COERCE AGREEMENT TO UNREASONABLE RATE INCREASES

AT&T's petition, TCC's Opposition and the comments filed by Verizon make clear that the facts underlying this proceeding are not in doubt. TCC is the 100 percent government-owned

[1] Public Notice, DA 09-149 (rel. January 29, 2009) ("*Notice*").

incumbent provider of fixed and mobile services in Tonga and terminates all AT&T's traffic to both fixed and mobile numbers in Tonga.[2] TCC terminated AT&T's traffic at the agreed rates of US$ 0.13 per minute for the period January 1, 2006 through June 30, 2008 and approximately $US 0.09 per minute for the period July 1 through August 30, 2008.[3] For traffic terminated after September 1, 2008, however, TCC required the rate to be raised to US$ 0.30 as the result of a ruling by the Tongan government – issued without explanation or justification – establishing this rate as the minimum termination rate for all international traffic after that date.[4]

AT&T informed TCC that it was unable to agree to the new rate, which is unsupported by any cost justification, and is far in excess of the US$ 0.19 benchmark rate required by the FCC, contrary to Tonga's WTO commitments and harmful to consumers in both Tonga and the United States.[5] TCC responded by blocking AT&T's circuits beginning on November 24, 2008 and has allowed no traffic to be terminated over those circuits since that time.[6] TCC also blocked Verizon's circuits to Tonga beginning on November 17, 2008 after Verizon similarly did not agree to increase to US$ 0.30 the below-benchmark rate it had previously agreed to pay TCC.[7] As a result, AT&T now is able to send calls to Tonga only through third countries at significantly increased costs. Verizon states that it is in a similar situation.

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[2] TCC confirms that it is wholly-owned by the Tongan government, and that a government minister or other government official sat on TCC's board throughout 2008. Opposition of Tonga Communications Corporation (filed Feb. 19, 2009) ("Opposition") at 2.

[3] Petition of AT&T for Settlements Stop Payment Order on the U.S.-Tonga Route, IB Docket No. 09-10 (filed Dec. 3, 2008) ("Petition"*)* at 2.

[4] *Id*. at 3.

[5] *Id*. at 4.

[6] *Id*. at 5.

[7] Verizon at 2-3.

These actions by TCC provide all three of the indicia of anticompetitive conduct listed in the *ISP Reform Order* as potentially requiring Commission intervention: "(1) increasing settlement rates above benchmarks; (2) establishing rate floors, even if below benchmarks, that are above previously negotiated rates; or (3) threatening or carrying out circuit disruptions in order to achieve rate increases or changes to the terms and conditions of termination agreements."[8] TCC has increased the settlement rate more than 50 percent above benchmarks, has established a rate floor far above previously negotiated levels, and has both threatened and carried out circuit disruptions in an effort to achieve those rate increases.

1. **Commission Action is Necessary to Address TCC's Disruption of U.S. Carriers Circuits**

The Commission emphasized in establishing the competitive safeguards procedures for routes like Tonga that are no longer subject to the International Settlements Policy ("ISP") that "blockage or disruption of U.S. carrier networks by foreign carriers harms the public interest, leads to decreases in call quality or completion and to potential increases in calling prices" and is "unlikely ever appropriate or justified in the public interest."[9] The Commission further stated that it stands ready to intervene under the Rule 64.1002(d) competitive safeguards established by that order if foreign carriers "threaten[] or carry[] out circuit disruptions in order to achieve rate increases."[10]

The Commission has repeatedly acted to prevent foreign carriers from blocking international circuits where U.S. carriers sought to negotiate lower termination rates or refused to

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[8] *International Settlements Policy Reform*, First Report and Order, 19 FCC Rcd. 5709, ¶ 44 (2004) ("*ISP Reform Order*").

[9] *Id.*, ¶ 45.

[10] *Id.*, ¶ 44.

agree to unreasonable rate increases. AT&T at 5-7. Longstanding FCC precedent supports the issuance of stop payment orders in such circumstances to prevent entities controlling the foreign end of a U.S. international route from using such control and the dynamics of the competitive U.S. marketplace to force U.S. carriers to make concessions contrary to the U.S. public interest.[11] As the International Bureau has noted, the underlying cause of such anticompetitive conduct is that the U.S. telecommunications market is substantially more competitive than markets in most foreign countries.[12] The Commission has therefore sought to ensure "that American consumers receive the benefits that result from the provision of international services on a competitive basis."[13]

TCC's efforts (p. 4) to distinguish this precedent are unavailing. TCC acknowledges that it "blocked AT&T's circuits" following "AT&T's express refusal to comply" with the rate increase it demanded from AT&T following the order of the Tongan government. Similarly, foreign carriers blocked the circuits of U.S. carriers refusing to comply with unreasonable rate

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[11] *See Implementation and Scope of the International Settlements Policy for Parallel International Communications Routes*, 3 FCC Rcd. 1614, n.1 (1988) (International Settlements Policy was developed to respond to the ability and incentive of foreign PTTs "to obtain unduly favorable terms and conditions in their relationships with multiple U.S. carriers to the detriment of U.S. carriers and ratepayers. The approach most commonly used has been the manipulation of multiple U.S. carriers against one another in a process known as 'whipsawing'."). *See also, Mackay Radio & Telegraph Co*., 2 FCC 592 (1936), *aff'd by the Commission en banc,* 4 FCC 150 (1937), *aff'd sub nom Mackay Radio & Telegraph Co. v. FCC*, 97 F. 2d 641 (D.C. Cir. 1938) ("to rely upon companies which are bitter competitors not to make concessions to the [foreign] administration which controls all outgoing radiotelegraph traffic is to provide an exceedingly tenuous basis upon which to rest public interest").

[12] *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief*, 18 FCC Rcd. 3519, ¶ 10 (2003), *aff'd*, 19 FCC Rcd. 993 (2004) (Order on Review), *aff'd*, 20 FCC. Rcd. 14106 (2005) (Order on Reconsideration and Order).

[13] *Id*., citing *Implementation and Scope of the International Settlements Policy for Parallel International Communications Routes*, 2 FCC Rcd. 1118, ¶ 2 (1987) (Order on Reconsideration).

demands in the Philippines and Argentina proceedings.[14] Thus, in Tonga, just as in the Philippines and Argentina cases, U.S. carriers have been denied the ability to continue service unless they comply with unreasonable terms and conditions imposed by entities controlling the foreign end of the international route.[15] TCC further contends (p. 4) that it was not seeking to "play off" one U.S. carrier against another. Regardless of whether TCC has engaged in such conduct thus far, TCC readily may enter into agreements to exchange traffic with many other U.S. carriers that would place pressure on AT&T and Verizon to comply with the unreasonable rates dictated by TCC and the Tongan government, unless the Commission takes action to prevent U.S. carrier payments to TCC until the AT&T and Verizon circuits are fully restored.[16]

2. <u>International Law Does Not Prohibit the Commission from Taking Measures to Promote the U.S. Public Interest</u>

The Commission has ample authority under the Communications Act to require all U.S. carriers to stop settlements payments to TCC until all circuits are fully restored. AT&T at 5.

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[14] *Id. See AT&T Corp., Proposed Extension of Accounting Rate Agreement for Switched Voice Services with Argentina*, 14 FCC Rcd. 8306, ¶ 3 (Argentine carrier acknowledged that it blocked AT&T's circuits "because AT&T refused to enter into a new accounting rate agreement"); *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief*, 18 FCC Rcd. 3519, ¶ 11 (Philippines carriers blocked AT&T and WorldCom circuits after the U.S. carriers "did not agree to the price increase").

[15] TCC is mistaken in claiming (p. 5) that no agreement was in effect when TCC began blocking AT&T's circuits on November 24, 2008. The agreement setting rates for the July 1 through August 31, 2008 period expressly states that if new rates are not agreed by the expiration of this period "the parties shall continue to provide Service hereunder" unless the parties terminate the agreement, which did not occur. AT&T Petition, McCracken Aff., Att. 1, Annex A to International Telecommunications Services Agreement, ¶ 5. There is no basis for TCC's claim (p. 5, n.7) that this provision was automatically overridden by the Tongan government order, which provides no authorization for any blocking of circuits.

[16] TCC may enter into such arrangements with any of the twelve other carriers with existing facilities-based arrangements on the U.S.-Tonga route or the many more U.S. carriers holding Section 214 global facilities-based authorizations. See *Notice*, n. 1 (listing U.S. carriers with facilities-based arrangements on the U.S.-Tonga route). As noted above, pending the restoration of circuits, AT&T incurs significant additional costs to complete traffic to Tonga through third countries.

TCC does not contest this authority and there is no basis for any such challenge. The Commission has repeatedly found that such action falls well within the scope of its authority to protect the U.S. public interest from anticompetitive behavior and the Courts have consistently upheld such findings.[17]

TCC incorrectly contends (pp. 7-8), however, that the Commission lacks authority to prescribe termination rates paid by U.S. carriers where such rates conflict with foreign country law. In fact, there is no such limitation on Commission authority to establish the termination rates paid by U.S. carriers. TCC overlooks the longstanding exception to the doctrine of international comity as applied by U.S. courts – that no nation is required to enforce "foreign interests that are fundamentally prejudicial to those of the domestic forum."[18] As the Commission accordingly stated in withdrawing its former comity-based prohibitions on call-back, "foreign governments may not, simply by enacting domestic legal, regulatory, or

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[17] *See, e.g., AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief*, 19 FCC Rcd. 993, (2004) (Order on Review) ¶ 37 ("The Commission has broad authority to take action on anticompetitive behavior."); *Atlantic Tele-Network* v. FCC, 59 F. 3d 1384 (D.C. Cir. 1995) (affirming the Commission's broad authority to regulate the U.S. international telecommunications market to promote the public interest); *Mackay Radio & Telegraph Co*., 2 FCC 592 (1936), *aff'd by the Commission en banc,* 4 FCC 150 (1937), *aff'd sub nom Mackay Radio & Telegraph Co. v. FCC*, 97 F. 2d 641 (D.C. Cir. 1938).

[18] *Laker Airways, Ltd. V. Sabena, Belgian World Airlines*, 731 F. 2d 909, 937 (D.C. Cir. 1984) ("[F]rom the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act."). *See also, Treco v. Teco & Hamilton*, 240 F. 3d 148, 157 (2d Cir. 2000) ("It is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States."); *Philippines v. Westinghouse Elec.Corp*., 43 F. 3d 65, 75 (3d Cir. 1994 (comity "must yield to domestic policy" and "cannot compel a domestic court to uphold foreign interests at the expense of public policies of the forum state"). *Cable & Wireless*, cited by TCC (at 8, n.16), does not hold otherwise. *Cable & Wireless plc v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999) (declining to address whether the FCC benchmarks would "frustrate international comity" in the event of a conflict with foreign law "since no foreign carrier in this litigation has complained it actually faces such a predicament" but noting that "both the U.S. Department of State and the U.S. Trade Representative filed comments supporting the [benchmarks] Order"). TCC's other cases (at 8, n.16) do not concern foreign country laws vitiating U.S. public policy and are therefore inapposite.

procedural measures, require the United States to implement such measures as a matter of international law."[19]

TCC's claim (p. 8) that U.S. carriers are similarly required to "comply with the inbound termination rate mandated by the Communications Minister" is therefore unfounded. Neither the Commission nor U.S. carriers have any obligation under international law to comply with a rate that is "fundamentally prejudicial" to longstanding Commission rules and policies seeking to reduce international termination rates to cost-based levels.[20] That is especially the case where, as here, the foreign government establishing the unreasonable rate is the 100 percent owner of the incumbent carrier that will receive the large majority of inbound payments, and the foreign government takes such action based on no apparent justification other than to increase its receipt of above-cost settlements payments.[21] The Commission has no obligation under international law to avoid taking safeguard measures to protect U.S. consumers where a foreign government seeks to raise rates in this manner, or where a foreign carrier owned by such a government blocks the circuits of U.S. carriers not agreeing to the unreasonable rate increase. Similarly, the Commission has no obligation to avoid applying safeguard measures on U.S. carriers that may have indirect effects on TCC even if, as TCC contends (p. 3), it was merely acting in compliance with the order of the Tongan government.[22] Such measures may include enforcement of the

[19] *Enforcement of Other Nations' Prohibitions Against the Uncompleted Call Signaling Configuration of International Call-Back Service*, 18 FCC Rcd. 6077, ¶ 13 (2003).

[20] *See also, Benchmarks Order*, ¶ 311 ("We cannot accept the view of certain foreign governments and carriers that the U.S. government must agree to allow U.S. carriers to settle their traffic at whatever rates the foreign carrier deems appropriate regardless of the impact on the U.S. public interest.")

[21] *See also, Cable & Wireless*, 166 F. 3d at 1233 (rejecting challenge to FCC benchmark rates as inadequate to compensate foreign carrier's payment of a "government mandated charge" that was "simply a 'left pocket-right pocket' transaction between two subsidiaries of the same company").

[22] As noted above, there is no evidence that the Tongan government required TCC to block U.S. carrier

(Footnote continued on next page)

benchmark settlement rate on this route, or any other rate required to prevent harm to U.S. consumers.[23]

Indeed, as noted in AT&T's petition (p. 8), both the Commission and the executive branch have made clear that the Commission properly may take action where foreign governments mandate unreasonable rate increases. NTIA highlighted "recent attempts by foreign governments to intervene in previously competitive markets and establish artificial price floors" in its comments in the *ISP Reform Order* proceeding and requested "the automatic examination of a route when a foreign government mandates a price floor that increases rates above competitively negotiated levels, regardless of whether the increase is below current benchmarks."[24] The Commission stated that "[c]onsistent with NTIA's concerns [regarding price floors mandated by foreign governments]," U.S. carrier complaints would "address anticompetitive harm against U.S. competition and U.S. customers, and the rebuttable presumption of harm in the event of retaliation against U.S. carriers will expedite such findings."[25] The Commission further stated that where foreign governments require rate increases it would "assess the basis of foreign regulatory action to determine whether and to

(Footnote continued from previous page)

circuits.

[23] *See International Settlement Rates*, 14 FCC Rcd. 9256, ¶ 224 (1999) (Report and Order on Reconsideration and Order Lifting Stay) ("The benchmarks, as with all regulations affecting international commerce will by necessity have an indirect effect on foreign entities. If this type of indirect effect were considered to run afoul of the principle of international comity, no nation would be able to adopt regulations that apply to international commerce.")

[24] Letter dated Aug. 5, 2003 to The Honorable Michael K. Powell, Chairman, FCC, from Nancy J. Victory, Assistant Secretary for Communications and Information, U.S. Department of Commerce, IB Docket No. 02-234, at 2.

[25] *ISP Reform Order*, n.115.

what extent regulatory intervention is required."[26]

Tonga's action, as described below, is supported by no evidence of increased costs and merely seeks to increase settlements revenues at the expense of consumers in other countries including the United States. Accordingly, the Commission should intervene to protect the interests of U.S. consumers and carriers on this route by requiring U.S. carriers to stop settlements payments until all circuits are restored.

II. **THERE IS NO SHOWING THAT TONGA'S US$ 0.30 RATE IS COST-BASED**

A major concern of the Commission in establishing the *ISP Reform Order* safeguards was the need to address unreasonable rate increases, including where rates are raised above benchmark or previously negotiated levels.[27] The Commission noted that "upward movement in rates that are not cost-based is not consistent with the development of competition in the U.S. market."[28] The Commission further stated that "if U.S. carriers or other parties can demonstrate harms to U.S. competition or U.S. customers, including non-cost-based increases in rates, pursuant to the process we adopt in this Order, we will consider action to the extent necessary to prevent anticompetitive harm to U.S. customers."[29]

Such action is clearly necessary here, as demonstrated below and in the attached cost

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[26] *Id*., ¶ 46

[27] *Id*., ¶ 44.

[28] *Id*., ¶ 48.

[29] *Id*., ¶ 49. Such action is consistent with the Commission's longstanding policy to encourage "lower, more economically efficient, cost-based international accounting rates" and to deny any requested "non-cost-based increases in, or surcharges to, the accounting rate" on routes subject to the International Settlements Policy, unless these are shown to be in the public interest. *Regulation of International Accounting Rates*, 6 FCC Rcd. 3552, ¶¶ 3, 16 & n.30 (1991). *See also, e.g.,1998 Biennial Regulatory Review, Reform of the International Settlements Policy and Associated Filing Requirements*, 14 FCC Rcd. 7963, ¶ 9 (1999) (authorizing rejection of agreements not serving "the public interest in achieving cost-based rates"); *International Settlement Rates*, 12 FCC Rcd. 19,806, ¶ 101, n.176 (1997) ("*Benchmarks*

(Footnote continued on next page)

study. Tonga's US$ 0.30 rate exceeds the FCC benchmark rate required on the U.S.-Tonga route from January 1, 2002 by more than 50 percent and is very far above cost-based levels.

1. Neither the Tonga Government Nor TCC Offers Any Cost Justification For the Rate Increase

Nothing suggests that the Tongan government established the US$ 0.30 rate on the basis of increased termination costs. The August 11, 2008 order by the Tongan government offers no justification for this amount, or for raising the rate from the much lower levels previously agreed by TCC with AT&T and Verizon.[30] The order also does not indicate that that the Tongan government held any proceeding or considered any specific facts regarding termination services in Tonga to establish this rate. Similarly, notwithstanding TCC's bald assertion (p. 2) that the $0.30 rate is "not unreasonable considering TCC's costs," TCC offers no evidence that this huge rate increase is required to meet any increased costs, or any other cost information to support this claim.

TCC simply asserts (p. 6) that Tonga's US$ 0.30 rate is "among the lowest rates charged by Pacific Island countries," and that "[c]arriers in developing countries such as Tonga have higher costs" for reasons relating to geography, climate, population size, greater equipment costs, and lower network efficiencies. Neither claim in any way justifies increasing TCC's previously negotiated rate of approximately US$ 0.09 (in the case of AT&T) by more than 230 percent.

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Order")("We reiterate that our goal is ultimately to achieve settlement rates that are cost-based.").

[30] *See* Petition, McCracken Aff., Att. 2.

In fact, Tonga's US$ 0.30 rate is one of the highest termination rates among Pacific Island countries. To AT&T's knowledge, French Polynesia, the Marshall Islands, Micronesia, Palau and (notwithstanding TCC's claim to the contrary) Western Samoa all charge lower termination rates.

Tonga's US$ 0.30 rate is also higher than *any* rate charged by the twenty-four other countries world-wide that, like Tonga, AT&T serves only through use of satellite transmission facilities – many of which are less developed than Tonga.[31] Rates in a number of these other countries served by satellite are similar to – or lower than – the approximate US$ 0.09 rate on the U.S.-Tonga route agreed by AT&T and TCC through August 31, 2008. Indeed, as noted in AT&T's petition, average U.S. termination rates in *all* countries world-wide were only US$ 0.06 in 2006.[32]

Far from justifying the new rate, TCC has implicitly acknowledged the non-cost-based nature of the US$ 0.30 rate by agreeing to accept approximately US$ 0.09 to terminate AT&T's traffic for the period July 1 though August 31, 2008.[33] TCC signed this agreement with AT&T on August 18, 2008, only a week after the Tonga government issued the August 11, 2008 order mandating a rate of US$ 0.30 effective by September 1, 2008. Similarly, for the period February 1, 2006 though June 30, 2008, AT&T's traffic was terminated at the agreed rate of US$ 0.13. As noted above, TCC offers no evidence that those rates were insufficient to cover its costs. TCC thus provides no evidentiary basis for increasing rates above those previously agreed with

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[31] A majority of these countries that AT&T serves only by satellite are classified as Low Income" or "Teledensity Less Than One" under the *Benchmarks Order*, while Tonga is classified as a "Lower Middle Income" country. *Benchmarks Order*, App. C.

[32] AT&T at 3; FCC, *Section 43.61 International Telecommunications Data* for 2006.

[33] *See Petition*, McCracken Aff., Att. 1.

AT&T.[34]

2. <u>Termination Rates For U.S.-Tonga Calls Are No Higher Than 8.5-17 U.S. Cents</u>

AT&T's own study, based on available information concerning TCC's costs for the three ITU-recognized network components for international call termination – international transmission, international switching and national extension – demonstrates that the total cost of terminating U.S. calls in Tonga is in the range of US$ 0.085-0.17 per minute and is most likely at or below the lower end of this range. The study is provided at Attachment 1.

The study shows that international transmission costs for U.S.-Tonga calls are in the range of US$ 0.039-0.069 per minute based on current Intelsat satellite circuit prices. International switching costs are very conservatively estimated as being in the range of US$ 0.005-0.019 per minute. TCC's national extension costs for the domestic transport of inbound international calls in Tonga from the international switch to the called party are in the range of $US 0.041-0.082, based on rates for domestic calling in Tonga adjusted to remove retail costs such as marketing, advertising, and billing and collection that are not incurred by international call termination.

The data sources and assumptions used in this study are highly conservative, particularly at the upper end of the indicated cost ranges, and greatly overstate the termination costs that TCC actually incurs or readily could obtain. For example, TCC's international transmission costs could easily be reduced to the lower end of the indicated range through the use of widely available and inexpensive digital circuit multiplication equipment. Similarly, the ITU

[34] *See, e.g.,Benchmarks Order*, ¶ 88 (a foreign carrier seeking reconsideration of the benchmarks must demonstrate that the established benchmark does "not permit the recovery of the incremental costs incurred to receive, transmit, and terminate international service").

international switching rate used as the upper end of the range of international switching costs is long out of date and even the rate used as the lower end of the range, based on long-established FCC findings and other cost proxies, greatly exceeds current industry switching costs. The upper end of the national extension rate is based on discounted retail prices for end-to-end domestic calling in Tonga and thus includes domestic call origination functions that are not required to terminate international calls.

For these reasons, and because of other conservative assumptions used by the study, TCC's actual termination costs are very likely at or below the lower end of the US$ 0.085-0.17 per minute range. This is confirmed by TCC's agreement to rates of US$ 0.13 to terminate AT&T's traffic during 2006 and 2007, and further by TCC's agreement in August 2008 to accept a rate of approximately US$ 0.09 to terminate AT&T's international traffic in Tonga for the period July 1, 2008 through August 31, 2008.

3. <u>AT&T's U.S. Rates Provide No Support for Tonga's Rate Increase</u>

Remarkably, TCC attempts (pp. 6-7) to justify Tonga's US$ 0.30 rate based on AT&T's termination rates for very limited areas of the United States subject to very high access charges, while ignoring that AT&T's termination rates for TCC's traffic to all other parts of the United States are less than US$ 0.02 per minute. Moreover, these rates are established through the operation of competitive market forces, unlike Tonga's termination charge. AT&T's termination rates to high access charge areas also have had no effect on the overall U.S.-inbound rate paid by TCC, since none of TCC's U.S.-inbound traffic terminated in these areas during July and August 2008. Because of the very low AT&T U.S. termination rates that would otherwise apply, AT&T's agreement with TCC includes higher termination rates for high access charge areas to prevent any adverse impact if TCC should send large amounts of traffic to these areas, such as by re-originating calls from third countries.[35] Thus, there is no basis for TCC's claim that AT&T's U.S. rates in any way justify Tonga's rate increase.[36]

[35] Contrary to TCC's assertion (p. 7, n.13) that none of the relevant U.S. access rates are "more than a small fraction" of AT&T's charge for this traffic, AT&T pays up to 16.5 cents per minute to terminate U.S.-inbound calls in these high access charge areas.

AT&T currently seeks to negotiate termination arrangements for U.S.-inbound traffic under which all such traffic is subject to the same rate, except where more than a certain amount (as compared to typical traffic patterns) of the foreign carrier's U.S.-bound traffic terminates in high access charge areas. In such instances, the traffic exceeding the threshold may be subject to a higher rate.

[36] In a further attempt to divert attention from Tonga's grossly inflated inbound rate, TCC contends (p. 7, n.14) that AT&T's retail rates on this route are unreasonable, a claim that has no relevance to the conduct at issue here or the costs underlying Tonga's termination charges. In any event, AT&T's U.S. retail rates for international services are set in a highly competitive marketplace in which, as the Commission has found, there are "approximately 40 facilities-based carriers and approximately 770 resellers providing IMTS service." *SBC Communications, Inc. & AT&T Corp*., 20 FCC Rcd. 18290, ¶162 (2005). Further, "[m]any of these carriers offer service on all or most international routes and sell directly to residential and small business customers." *Id.* AT&T competes for U.S. mass market customers by offering a wide range of rates for U.S.-Tonga calls on different consumer plans and pre-paid cards, including a rate of US$ 0.25 per minute on pre-paid cards available at AT&T retail stores. However, the latter rate is based on former termination rates with TCC and is likely soon to increase as the direct result of TCC's disruption of AT&T's circuits. See *SBC Communications, Inc. & AT&T Corp.*, ¶ 154 ("[i]n contrast to domestic long-distance customers, . . . mass market customers of international long-distance telecommunications generally appear more willing to access carriers other than their presubscribed carrier through the use of prepaid calling cards and dial-around services"). *See also, id.*, ¶ 161 ("The facts that IMTS resale comprises such a large portion of IMTS minutes, and dial-around carriers and pre-paid cards make up a high proportion of IMTS resale, suggest that many consumers approach IMTS as a 'a la carte' service often purchased from providers other than their presubscribed carrier, including independent resellers.") AT&T also offers low wholesale rates that allow U.S. resellers to offer U.S-Tonga calls to U.S. consumers and businesses. However, as the result of TCC's disruption of AT&T's circuits, AT&T's wholesale rates have increased significantly on this route.

CONCLUSION

AT&T's petition and this reply demonstrate that TCC is engaging in anticompetitive behavior on the U.S.-Tonga route harming U.S. consumers and the opposition by TCC does not show otherwise. The Commission should issue a settlements stop payment order on this route requiring U.S. carriers to stop settlements payments to TCC until all circuits are restored.

Respectfully submitted,

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ATTACHMENT 1

Termination Costs For U.S.-Tonga Calls

This study demonstrates that the total cost of terminating AT&T's traffic on the network of Tonga Telecommunications Corporation (TCC) is in the range of US$ 0.085-0.17 per minute. The study is based on available information concerning TCC's costs for the three ITU-recognized network components for international call termination – international transmission, international switching and national extension in the foreign country. [1]

The study shows that international transmission costs for U.S.-Tonga calls are in the range of US$ 0.039-0.069 per minute based on current Intelsat satellite circuit prices. International switching costs are very conservatively estimated as being in the range of US$ 0.005-0.019 per minute. TCC's costs for the domestic transport of inbound international calls in Tonga from the international switch to the called party are in the range of 0.041-0.082, based on rates for domestic calling in Tonga adjusted to remove retail costs such as marketing, advertising, and billing and collection that are not incurred by international call termination.

The data sources and assumptions used in this study are highly conservative, particularly at the upper end of the indicated cost ranges, and greatly overstate the termination costs for this traffic that TCC actually incurs or could readily obtain. For example, TCC's international transmission costs could easily be reduced by almost 50 percent through the use of widely available and inexpensive digital circuit multiplication equipment. The ITU international switching rate used as the upper end of the range of international switching costs is long out of date and even the rate used as the lower end of the range, based on long-established FCC findings and other cost proxies, greatly exceeds current industry switching costs. The upper end of the national extension range is based on discounted retail prices for end-to-end domestic calling in Tonga and thus includes domestic call origination functions that are not required to terminate international calls.

For these reasons, and because of other conservative assumptions used by the study, TCC's actual termination costs are likely at or below the lower end of the US$ 0.085-0.17 per minute range. This is confirmed by TCC's agreements to rates of US$ 0.13 to terminate AT&T's traffic during 2006 and 2007 and its agreement in August 2008 to accept a rate of approximately US$ 0.09 to terminate AT&T's international traffic in Tonga for the period July 1, 2008 through August 31, 2008.

International Transmission

AT&T and TCC send international traffic to each other by using 1.024 Mbps satellite half-circuits leased from Intelsat. Intelsat's current monthly rates under a 5-year contract for a 1.024 Mbps global half-channel IDR (International Data Rate) circuit from the Pacific region to the United States reflecting TCC's use of a standard B-antenna are

[1] *See*, ITU, Recommendation D.140; *International Settlement Rates*, 12 FCC Rcd. 19806 (1997) ("*Benchmarks Order*"), Appendix E, Section I.

approximately US$ 10,700. Based on average monthly AT&T traffic volumes terminated with TCC during January though October 2008 of approximately 155,000 minutes, and the Intelsat rate noted above, TCC's per-minute international transmission costs (US$ 10,700/155,000) are no greater than $US 0.069.

Although TCC is one of very few international carriers not presently using circuit multiplication equipment to terminate AT&T's international traffic via satellite, TCC's termination costs are properly based on the usage of this inexpensive and widely available technology. A DTX 240 terminal and associated central office equipment allowing four voice grade circuits to be derived from each 64 kbps half-channel may be purchased for approximately $10,000 and a full turnkey installation including training of carrier personnel may be completed for approximately $28,000.[2]

Using such commonly available circuit multiplication equipment, TCC may terminate AT&T's traffic by using a 512 kbps global IDR circuit from Intelsat under a 5-year contract at a monthly rate of approximately $US 6,000. Again, this cost reflects TCC's use of a Standard-B antenna. Based on the use of standard circuit multiplication equipment, a multiplication factor of 4:1 and a very conservative monthly usage of 8,000 minutes for each voice channel, a total of 240,000 minutes may be transmitted over a 512 kbps circuit each month. The FCC used these same assumptions concerning international circuit capacity in calculating the settlement rate benchmarks.[3] For the purpose of estimating TCC's termination costs here, however, this study again uses average monthly AT&T traffic volumes terminated with TCC during January though October 2008 of approximately 155,000 minutes. Based on those volumes and the Intelsat rate noted above, TCC's per-minute international transmission costs (US$ 6000/155,000) are no greater than $US 0.039.

The use of such technology would reduce TCC's monthly circuit costs for terminating AT&T's traffic to Tonga by approximately $4,700, thus allowing TCC to repay the full costs of installing this equipment in approximately six months and to enjoy significant cost-savings thereafter. Proper analysis of TCC's international termination costs should be based on the usage of this more efficient technology commonly used throughout the world and reasonably available to TCC.

TCC's international transmission costs are therefore no greater than $US 0.069 per minute based on current equipment and may readily be reduced by almost 50 percent to $US 0.039 per minute by purchasing inexpensive circuit multiplication equipment. This study therefore uses a range of US$ 0.039-0.069 for these costs.

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[2] These prices are for the purchase and installation of used DTX 240 equipment since this equipment is no longer manufactured.

[3] *Benchmarks Order*, Appendix E, Section IV.A. In fact, AT&T assumes that each voice channel normally can accommodate from 10-12,000 minutes each month.

International Switching

International switching functions are very similar to the "tandem" switching functions of domestic toll switches and international switches consist of the same basic hardware used for domestic switching. Most of AT&T's international switching is performed by "joint use" switches that perform both domestic and international switching functions. Most foreign carriers' international switches also are joint-use facilities, providing toll switching for both international and domestic calls. As noted by the *Benchmarks Order* study, "a correspondent's switch is often used for domestic service, both local and long distance calls, and for international service, both originating and terminating calls."[4]

TCC's network appears to function in a similar manner. The ITU reported in 1998 that the Tonga Telecommunications Commission, which was TCC's predecessor in providing domestic services, "provides and operates the telephone switches for both national and international telephone services" and that the "main exchanges are Ericsson AXE10 switches."[5] The AXE10 switch is digital equipment that is widely used throughout the world to perform international gateway and domestic switching functions.

The FCC has established a rate for incumbent LEC tandem switching, as a cost proxy for this network element, of "no greater than 0.15 cents ($0.0015) per minute of use."[6] Because international tandem switches share the same basic hardware as domestic tandem switches, $0.0015 is also an appropriate cost proxy for international tandem switching. Current industry switching costs, however, based on special purpose packet switches known as "soft switches," are now in the range of US$ 0.00010 to US$ 0.00024 per minute.[7]

The FCC CALLS plan for terminating interstate switched access adopted target rates of US$ 0.0055 for the BOCs and GTE and US$ 0.0065 for other price cap LECs for the use of *three* network components – interoffice transmission and local switching in addition to tandem switching.[8] The FCC noted "evidence that the target rates are not below price cap LECs' incremental costs" and found they would "drive average traffic sensitive charges closer to the cost of providing these services."[9]

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[4] *Id*. at Sect. IV.B.

[5] ITU Telecommunication Development Bureau, World Telecommunication Development Conference (WTDC-98), *Current Status of Telecommunications Developments in Pacific Islands Countries*, February 28, 1998, at 12.

[6] 47 CFR Sect. 5l.513(c)(5).

[7] *See, e.g.*, Letter dated October 13, 2008 to Marlene H. Dortch, Secretary, FCC, from Henry Hultquist, AT&T, CC Docket No. 01-92: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520175373.

[8] *Access Charge Reform*, 15 FCC Red. 12962, ¶142 (2000) ("CALLS Order").

[9] *Id*. at ¶170.

Another estimate of the cost of tandem switching is provided by comparing published rates for "single tandem" and "double tandem" switching. The Reference Interconnection Offer (RIO) of British Telecom (BT) shows differences between single and double tandem rates ranging from US$ 0.0037 to US$ 0.0016 per minute, depending on the time of day.[10] Because double tandem switching includes both an additional tandem switching function and inter-office trunking to connect the tandem switches, the difference between rates for single and double tandem switching undoubtedly overstates the cost of tandem switching alone.

Based on these various findings and cost proxies, a rate of US$ 0.005 per minute provides a very conservative cost ceiling for international switching by TCC. ITU Recommendation D.300, cited by the *Benchmarks Order*, used a rate of SDR 0.0129 (about US$ 0.019) per minute for international switches with a proportion of plant capacity composed of digital equipment from 61 percent to 100 percent. However, this recommendation is based on data from the early 1990's and no longer provides a reasonable cost estimate for this network component, since the cost of gateway switching has dropped dramatically since that time. The *Benchmarks Order* similarly noted that "evidence in the market place indicates that the ITU data used to calculate the TCP for international gateway switching component is substantially above cost" and noted that it "erred on the side of allowing a higher price" by using this data.[11] Almost twelve years after the release of the *Benchmarks Order*, the ITU data is now greatly at variance with current switching costs and no longer represents a reasonable cost ceiling for this network element.

Nonetheless, this study very conservatively uses this ITU switching rate as the upper end of the range of international switching costs for TCC, and uses the US$ 0.005 per minute rate described above as the lower end of the range. TCC's international switching costs are therefore very conservatively estimated as being in the range of US$ 0.005-0.019.

National Extension

The National Extension rates provide a cost ceiling for the network elements used, after the international switch, to transport and terminate a call within Tonga. In the absence of any publicly-available wholesale rate for traffic termination on TCC's national network, this study uses local and national retail calling rates offered by TCC and Digicel in Tonga to calculate a conservative cost-ceiling for this network component.

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[10] *See* BT Wholesale, Carrier Price List, Section B1, Part 1.01:

http://www.btwholesale.com/pages/static/service_and_support/service_support_hub/online_pricing_hub/cpl_hub/cpl_pricing_hub.html

[11] *Benchmarks Order*, ¶ 71.

Importantly, however, local and national retail calling rates cover the network components used both to originate and to terminate calls, while the termination of an international call involves only call termination. Because call termination does not require the signaling and billing functions needed for call origination, the cost of call termination is less than half of the cost of call origination. Accordingly, one-half of the rates for end-to-end calling within Tonga provides a reasonable surrogate for the network cost to terminate an international call and provides the lower end of the range of national extension costs used in this study. The upper end of the range is based on the retail prices covering both call origination and call termination.

Retail prices also greatly overstate the cost of the network components used for international call termination because they include cost components such as marketing, advertising, billing, and collection that are required for the provision of retail services but that are not used for international call termination. As noted by the *Benchmarks Order*, "the tariff rates used to calculate TCPs include costs associated with providing retail communications service to consumers which would not be included in cost-based settlement rates. For example, tariff rates include an allowance for uncollectible billings, general overhead expenses associated with retail service, and marketing and commercial expenses that would not be included in the cost of providing international termination services."[12]

This study adjusts for these retail costs that are avoided when international calls are terminated on TCC's network by applying a 16 percent discount to retail prices. This discount is consistent with the approach adopted by the New Zealand regulator, which found that an avoided cost discount "of 16% is appropriate, taking into account both the theoretical merit of the relative factor cost arguments, as well as the Commission's concerns regarding incentives to invest in infrastructure."[13] The Singapore regulator has adopted much greater wholesale discounts by requiring SingTel to offer private lines to competitors at 30 to 50 percent below SingTel's retail prices.[14] The 16 percent avoided cost discount applied here is also lower than the interim wholesale discount for resold local interconnection services adopted by the FCC.[15]

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[12] *Id.*, ¶ 70.

[13] New Zealand Commerce Commission, *Determination on the TelstraClear Application for Determination for 'Wholesale' Designated Access Services*, Decision 497, determined 12 May 2003.

[14] *iDA Enhances Competition in Singapore's Local Leased Circuits (LLC) Markets*, 16 December 2003, http://www.ida.gov.sglidaweb/marketingfinfopage.jsp?infopagecategory&infonagei&=12629&versionid. *See also*, http://www.ida.gov.sg/idaweb/doc/downloadfJ2372fLLC Decision Explanatory Memo-l6Dec03. pdf.

[15] *See* 47 C.F.R. Sect. 51.611 (authorizing wholesale discount of 17-25 percent).

This study distributes U.S.-Tonga traffic Tonga in accordance with the conservative assumptions that 25 percent of traffic terminates to mobile lines in Tonga, that 15 percent of U.S.-Tonga traffic terminates to fixed network numbers in Nuku'alofa, which is Tonga's major urban center where TCC's international earth station is located, and that the remaining traffic terminates elsewhere on TCC's fixed network in Tonga.[16] The study also assumes that half of the traffic terminating on mobile numbers are to mobile subscribers served by TCC and that half are to mobile subscribers served by Tonga's second mobile carrier, Digicel. For all traffic, the study uses the lowest domestic price for peak hour calls to these mobile or fixed numbers in Tonga offered either by TCC or by Digicel. Significantly, Digicel offers lower national calling rates to TCC fixed line and mobile subscribers than those offered by TCC itself.[17]

Accordingly, Digicel or TCC retail calling rates are applied to this traffic as follows. First, for the calls to mobile subscribers served by TCC, Digicel's "Flex" rate of US$ 0.10 for calls to TCC mobile numbers is applied to half of the 25 percent of international calls to Tonga that terminate on mobile networks (0.10*0.25*0.50=0.013).[18] Second, for the calls to mobile subscribers served by Digicel, TCC's fixed line to Tonfon cellular network (national) peak hour rate of US$ 0.17 per minute is applied to the other half of the 25 percent of international calls that terminate on mobile networks in Tonga (0.17*0.25*0.50=0.021).[19] Third, TCC's fixed line to fixed line (local) peak hour rate of US$ 0.027 per minute is applied to the 15 percent of calls that are assumed to terminate on fixed line numbers in Nuku'alofa (0.027*0.15=0.004).[20] Last, Digicel's peak "Flex" rate of US$ 0.10 per minute for calls to fixed line numbers is applied to all other international calls to Tonga (0.10*0.60=0.06).[21] The sum of these rates (0.013+

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[16] The FCC has previously found that a majority (and in many instances more than 70 percent) of U.S. international calls frequently terminate in major metropolitan areas in foreign countries. *Benchmarks Order*, Appendix E, Section IV.C.

[17] Compare, Digicel Flex Tariffs and Rates,: http://www.digiceltonga.com/en/plans/digiflex/flex_tariffs, *with* TCC, Local and National Network Calls: http://www.tcc.to/index.php?option=com_content&task=view&id=33&Itemid=36. The lower rates offered by Digicel for calling to TCC subscribers, even after paying TCC's interconnection charges for those calls, demonstrates the highly inflated nature of TCC's domestic rates for these calls. Since TCC's interconnection charges for traffic it receives from Digicel are not publicly available, this study uses the lower retail rates offered by Digicel as the best available cost surrogate.

[18] *See* Digicel Flex Tariffs and Rates, http://www.digiceltonga.com/en/plans/digiflex/flex_tariffs Currency exchange is calculated using the exchange rate of 1 Tonga Paanga (TOP) = US$ 0.453 posted at http://finance.yahoo.com/currency-converter on February 25, 2009. Consistent with the approach taken by the *Benchmarks Order* study, local taxes are not included in prices.

[19] *See* TCC, Local and National Network Calls (Peak Hours): http://www.tcc.to/index.php?option=com_content&task=view&id=33&Itemid=36.

[20] *Id.*

[21] *See* Digicel Flex Tariffs and Rates, http://www.digiceltonga.com/en/plans/digiflex/flex_tariffs.

0.021+0.004+0.06=0.098) is adjusted by the 16 percent discount for avoided retail costs ($0.084*0.098) resulting in a rate of US$ 0.082.

As noted above, because international call termination does not require the call origination functions included in end-to-end domestic calling rates, one half of this end-to-end rate provides a reasonable surrogate for national extension costs and is used by this study as the lower end of the range of national extension costs, while the end-to-end rate is used as the upper end of the range. Based on this approach, the national extension costs shown by this analysis are in the range of $US 0.041-0.082.

Total Cost Ceiling

The total cost ceiling for terminating U.S. calls on TCC's network is calculated by adding the rates for international transmission US$ 0.039-0.069), international switching (US$ 0.005-0.019) and the national extension ($US 0.041-0.082), which results in a final range of US$ 0.085-0.17.

CERTIFICATE OF SERVICE

I, Lacretia Hill, certify that copies of "AT&T's Reply Comments" were delivered via e-mail on this day, Thursday February 26, 2009, to the following individuals.

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