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Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Attention: John Giusti,  
Chief, International Bureau

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

Dear Ms. Dortch:

This letter is in response to the letter dated March 26, 2008 from counsel to Tonga Communications Corporation (“TCC”) objecting to AT&T’s request for access under a protective order to the information redacted from TCC’s March 16, 2009 ex parte presentation in the above-referenced proceeding.

The redacted information comprises TCC’s domestic interconnection rate with Digicel and the levy paid by TCC to the Tongan government on inbound international calls “to assist in setting up” a universal service obligation. See Attachment to TCC March 16 ex parte. TCC contends that AT&T’s request fails to meet the Commission’s criteria for the release of information subject to FOIA Exemption 4, that any release of this information to AT&T pursuant to a protective order will discourage foreign carriers from providing such information in the future, and that any protective order used here should prohibit release of this information to any person assisting AT&T in developing “business or other strategies for resolving” this dispute, including legal counsel. The Commission should reject these claims and require release of the information as requested by AT&T.<sup>1</sup>

TCC contends that AT&T should be denied access to the redacted information because there is no “‘compelling public interest’ in disclosure” and the requested information “is not ‘a necessary link in a chain of evidence that will resolve an issue before the Commission’.” TCC March 26 Letter at 2, citing *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd. 24816, ¶ 8 (1998) (“*Confidential Information Order*”). Notably, TCC overlooks one significant further circumstance in which the Commission allows the public release of information categorized under FOIA Exemption 4, which is “where a party has placed its financial condition at issue in a Commission proceeding.” *Id.* That is the situation here, where TCC asserts that its termination

<sup>1</sup> AT&T again does not address at this time whether the information for which TCC requests confidential treatment is properly withheld from public disclosure pursuant to Rules 0.457 and 0.459.

rate of US\$ 0.30 “is not unreasonable considering TCC’s costs,” that the above-benchmark level of Pacific island rates “does not necessarily mean that these rates are not cost-based,” and that “[c]arriers in developing countries such as Tonga have higher costs due to many factors.” TCC Opposition at 2, 6. As AT&T has previously indicated, TCC’s interconnection rate with Digicel – a domestic wholesale rate – is likely closer to TCC’s national extension costs than the domestic retail rates that are used in AT&T’s study. AT&T Reply, Att. 1, n.17. After claiming the existence of higher costs in opposing AT&T’s petition, TCC cannot now shield this relevant information from AT&T under a cloak of confidentiality.

For the same reason, TCC also wrongly contends that its information does not qualify as a “necessary link in a chain of evidence that will resolve an issue before the Commission.” TCC March 26 Letter at 2. TCC makes this claim on the grounds that the cost-oriented nature of TCC’s US\$ 0.30 termination rate purportedly is not “*the* issue in this proceeding. *Id.* (Emphasis added.) However, there is no question that the cost-oriented nature of TCC’s rate is “*an* issue before the Commission” – as required by the plain language of the Commission order – when TCC seeks to justify its rate on this very basis. *Confidential Information Order*, 13 FCC Rcd. 24816, ¶ 8. As described above, the redacted information appears likely to provide further clarification of this important issue.

Disclosure of TCC’s redacted information to AT&T is also required under “the balancing of public and private interests” that is also considered by the Commission in determining whether to release information subject to FOIA Exemption 4. *Id.*, ¶ 16. The factors taken into account in this balancing include “whether the requestor is a party to the proceeding” and “whether it is feasible to use a protective order,” both of which support the requested disclosure here. Furthermore, “[f]requently, the basis for requiring submitters to disclose information is to ensure fairness to the parties involved,” *id.*, which further supports disclosure to allow AT&T as the petitioner in this proceeding to review and comment on relevant facts concerning TCC’s claims.

TCC also unreasonably seeks to prevent disclosure of the redacted information to AT&T’s counsel and associated staff pursuant to a protective order. TCC March 26 Letter at 3. The Commission’s model protective order expressly requires that “Confidential information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding.” *Confidential Information Order*, 13 FCC Rcd. 24816, App. C, ¶ 11. Contrary to the claims by TCC, such limited disclosure to persons with a legitimate need for access to the information, and who specifically undertake to the Commission to protect the information in accordance with the requirements of the protective order, provides no valid basis for concern by any foreign carrier or foreign government that sensitive information will be misused.

The Commission similarly should reject TCC’s request for modification of the model protective order to prohibit release of TCC’s information to “any person (including legal counsel) that has been or will be involved in any way, directly or indirectly, in the establishment of termination arrangements on the U.S.-Tonga route or in assisting AT&T in developing business or other strategies for resolving the current dispute with Tonga.” *Id.* The Commission has found that increasing the access limitations in the model protective order “may unreasonably preclude a party from utilizing individuals, consistent with its needs and resources, who can provide the requisite expertise to examine the documents.” *Confidential Information Order*, 13 FCC Rcd. 24816, ¶ 26. The Commission found that the “serious consequences of violating a

Commission protective order” also support the access limitations as set forth in the model protective order. *Id.* While the Commission will consider limiting access to outside counsel and experts “in rare instances, such as where specific future business plans are involved” in order “to minimize the potential for inadvertent misuse of such information,” parties are required to justify any such requests when filing their requests for confidential treatment. *Id.* However, TCC has put forward no justification for the restrictions it is requesting, which are even broader than the additional limitations contemplated by the Commission above, since they would prohibit disclosure to any person assisting AT&T with “strategies for resolving” this dispute, including legal or regulatory proceedings. In any event, TCC’s information fails to qualify as a “rare instance” requiring such treatment, since it lacks any similar “potential for inadvertent misuse” to that raised by the disclosure of specific future business plans to a competitor. As it has found before, the Commission may rely on the undertakings of its protective order, and on the serious consequences of violating such an order, to follow its precedent of permitting review of relevant information by legal counsel, associated staff and experts.

Moreover, the broad and onerous restrictions sought by TCC are grossly disproportionate to the narrow scope of potential competitive harm claimed to arise from disclosure of TCC’s redacted information, which is purportedly “hinder[ing] TCC’s ability to negotiate the best possible rates for terminating traffic in the U.S. and other countries.” TCC March 26 Letter at 2; TCC March 16 Letter at 3. AT&T does not, however, object to including an additional restriction to protect against that specific alleged potential harm to TCC. Specifically, AT&T would agree to the inclusion of a provision in the protective order prohibiting disclosure of TCC’s redacted information to any person, including legal counsel, involved in making or advising on any business decision concerning rates for terminating traffic in the U.S. to be negotiated with TCC, or concerning any such previously-negotiated rate, that is based on any consideration of TCC’s termination costs. Any broader additional restriction is unnecessary to protect TCC’s alleged confidentiality interests and would unreasonably impede AT&T in effectively representing its interests as the petitioner in this proceeding.

For these reasons, the Commission should reject TCC’s misplaced objections and should allow AT&T access to the information redacted from TCC’s March 16 ex parte under a protective order allowing use of the information by AT&T’s counsel (both internal and external), associated staff and experts, solely for the purpose of this proceeding.

Respectfully submitted,

/s/ James Talbot  
James Talbot

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