

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

In the Matter of)	
)	
Petition of AT&T for Settlements Stop)	IB Docket No. 09-10
Payment Order on the U.S.-Tonga Route)	

REPLY COMMENTS OF AT&T INC.

AT&T Inc., on behalf of its affiliates (“AT&T”) submits these reply comments in response to the Bureau’s request for further comment on whether the Commission should enforce the \$0.19 per minute benchmark rate for all traffic on the U.S.-Tonga route, including indirectly routed traffic.¹ AT&T supports such action here to counteract the anticompetitive actions by the Tongan carriers and government, to assist U.S. carriers to negotiate lower rates on this route, and to discourage other foreign carriers from attempting to force unreasonable termination rate increases by disrupting U.S. carrier circuits. There is, moreover, no basis to the claims by the Tonga Communications Corporation (“TCC”) and Digicel Tonga Limited (“Digicel”) – the Tongan carriers that are the beneficiaries of the \$0.30 termination rate ordered by the Tongan government – that such action would exceed FCC authority or contravene FCC rules or policy. As AT&T has shown in its prior comments and as it further demonstrates below, the Bureau has ample authority to adopt this additional remedy in this proceeding in furtherance

¹ *Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route*, IB Docket No. 09-10, Second Order and Request for Further Comment, DA 09-2422, rel. Nov. 16, 2009, ¶ 1 (“*Second U.S.-Tonga Stop Payment Order*”).

of longstanding Commission rules and policies that seek to prevent anticompetitive conduct and to encourage more cost-based international termination rates.

A requirement that U.S. carriers must comply with the benchmark rate is unquestionably within the scope of the enforcement remedies the Bureau may apply to combat the anticompetitive conduct demonstrated by the record in this proceeding. As described by AT&T (pp. 3-4), the Commission has authorized the use of a variety of remedies in response to anticompetitive conduct on routes no longer subject to the International Settlements Policy, including “imposing a ‘best practice’ rate.”² Since any current “best practice” rate is now approximately \$0.03 per minute, based on the lowest settlement rates currently paid by U.S. carriers, such authority necessarily allows the Bureau to require U.S. carriers to adhere to the much higher \$0.19 benchmark rate.³ Thus, contrary to the claim by Digicel (p. 9) that the benchmark may not be imposed here without a rulemaking, the Bureau is authorized to take such action pursuant to its delegated authority.⁴

The Bureau’s authority to apply enforcement remedies in this proceeding necessarily includes the authority to apply a benchmark rate to U.S.-Tonga traffic terminated via indirect routes. Any rate the Bureau may impose solely on directly-routed traffic will have little present

² *International Settlements Policy Reform*, First Report and Order, 19 FCC Rcd. 5709, ¶ 47 (2004) (“*ISP Reform Order*”).

³ See AT&T at 3-4; *International Settlement Rates*, 12 FCC Rcd. 19,806, ¶ 134 (1997) (“*Benchmarks Order*”); FCC Section 43.61 International Traffic Data for 2007 (Table A1) (showing average termination rates below \$0.03 per minute for U.S. traffic to Australia, Hong Kong & India)

⁴ See, e.g., Rules 0.51, 0.261 and 64.1002, 47 C.F.R. Sects. 051, 0.261 & 64.1002. The Bureau’s application of this additional remedy is further supported by the Commission’s longstanding benchmarks policies requiring U.S. carriers to negotiate rates no higher than \$0.19 on the U.S.-Tonga route effective as of January 1, 2002 and allowing the use of benchmark enforcement measures where a U.S. carrier is unable to negotiate rates in compliance with this requirement – which U.S. carriers are unable to do on this route as the result of the anticompetitive conduct the Bureau has found in this proceeding.

effect with all or most U.S. direct circuits to Tonga currently blocked by TCC. Unless the benchmark requirement is also applied to indirectly-routed traffic, U.S. carriers will pay above this level by sending U.S.-Tonga traffic via alternative arrangements, which inevitably reflect the \$0.30 rate currently charged by the Tongan carriers. To provide an effective remedy in this proceeding, the required rate therefore must apply to both directly routed and indirectly routed U.S.-Tonga traffic.

There is no basis for the Tongan carriers' claims that the FCC lacks authority to regulate such traffic. Indeed, language from the *Benchmarks Order* included in Digicel's comments (p. 3) makes clear that the Commission is authorized to regulate all U.S.-Tonga traffic, regardless of how this traffic is routed to its destination. The Commission emphasized that international services subject to settlement rates "clearly fall within the definition of 'foreign communications' used in the Act *because such telecommunications services originate or terminate in the United States.*"⁵ And contrary to Digicel's claim (p. 5) that indirectly routed U.S.-Tonga traffic fails to qualify under this definition, the Commission determines the jurisdictional nature of a service by applying an "end-to-end" analysis based on the end-points of a communication "beginning with the inception of a call to its completion."⁶ For the relevant communications here, those end-points are the U.S and Tonga, no matter how many intermediate countries through which a U.S.-Tonga call may be routed.

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Benchmarks Order, ¶¶ 165, 185-86.

⁵ *Benchmarks Order*, ¶ 278 (emphasis added). *See also, id.* ("'[F]oreign communication,' as that term is defined in the Act, refers to 'communication from or to any place in the United States to or from a foreign country.'") (Citing 47 U.S.C. Sect. 153(17).).

⁶ *See, e.g., Petition for Declaratory Ruling That Pulver.com's Free World Dial-Up is Neither*

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Digicel's further efforts to challenge the application of a benchmark requirement to indirectly routed U.S.-Tonga traffic are also baseless. Such action requires no exercise of Commission jurisdiction "over two (or more) foreign carriers in the chain of indirect traffic delivery," as Digicel alleges (p. 4), because the benchmarks apply only to a U.S. carrier, have no more than "an indirect effect" on any foreign carrier, and therefore "do not constitute the exercise of jurisdiction over foreign carriers."⁷ This Commission finding, and the D.C. Circuit decision upholding this determination, apply regardless of whether the traffic is terminated through a direct routing arrangement with a single foreign carrier or through third country routing arrangements involving additional foreign carriers. Under both arrangements, the benchmarks remain a "direct constraint" only on the U.S. carrier, and not on any foreign carrier, because only the U.S. carrier is subject to the prohibition.⁸

Equally misplaced are Digicel's claims (p. 8) that such enforcement by the Bureau would reduce or remove the public benefits resulting from alternative termination arrangements. Digicel fails to recognize that the public benefits of alternative termination arrangements result from "routing bilateral traffic through a third country to take advantage of a *lower* accounting rate between the third country and the destination market."⁹ These arrangements thus place "downward pressure on termination rates."¹⁰ On the U.S.-Tonga route, however, the use of

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Telecommunications Nor a Telecommunications Service, 19 FCC Rcd. 3307, ¶ 21 (2004).

⁷ *Benchmarks Order*, ¶¶ 279-80.

⁸ *Id.* See also, *Cable & Wireless P.L.C. v. FCC*, 166 F. 3d 1224, 1230 (D.C. Cir. 1999).

⁹ *Benchmarks Order*, ¶ 11 (emphasis added).

¹⁰ *ISP Reform Order*, ¶ 23. Such arrangements thus promote the Commission's longstanding goal of "mov[ing] to a nondiscriminatory and more cost-based rate structure for the termination of global

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alternative termination arrangements is likely to have precisely the opposite effect if traffic terminated through such arrangements is exempted from any benchmark requirement applied by the Bureau. As noted above, unless the benchmark requirement is applied to all U.S.-Tonga traffic, U.S. carriers will pay an unreasonably high *above*-benchmark rate by sending U.S.-Tonga traffic via alternative arrangements. Such an outcome would frustrate the Bureau's enforcement of a benchmark remedy and obstruct progress toward more cost-based termination rates on this route, which would fail to serve the Commission policies encouraging this beneficial result.¹¹

As AT&T has also demonstrated (pp. 6-7), TCC's claims that the FCC lacks authority to enforce a benchmark rate on this route because such enforcement would create an impermissible "conflict" with Tongan law are likewise unfounded. Consistent with D.C. Circuit and other longstanding precedent, the Bureau has properly declined in this proceeding to withhold enforcing important Commission policies serving the U.S. public interest just to give deference to foreign government actions contravening those policies.¹² The Bureau should similarly enforce the benchmark rate here in accordance with Commission rules and policy,

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telecommunications services." *Benchmarks Order*, ¶ 13.

¹¹ Contrary to the further claim by Digicel (pp. 11-12), the issues concerning foreign mobile termination rates addressed in the 2004 Notice of Inquiry, IB Docket No. 04-398, do not prevent the application of the benchmark to all international traffic on the U.S.-Tonga route. The Commission's "broad authority to protect U.S. consumers from harms resulting from anti-competitive behavior" applies to U.S. international traffic terminating on both wireline and wireless networks in foreign countries. *See, e.g., ISP Reform Order*, ¶ 91.

¹² *See Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route*, 24 FCC Rcd. 8006, ¶ 32 (2009) ("*First U.S.-Tonga Stop Payment Order*") (finding that "the benefits of supporting clear and consistent policies that promote competition and cost-based rates for international services are in the public interest and as such outweigh acquiescence to actions by the Tonga Communications Ministry that are inconsistent with these policies.") *See also, Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F. 2d 909, 937 (D.C. Cir. 1984) (no nation is required to enforce "foreign interests which are fundamentally prejudicial to those of the domestic forum").

notwithstanding the requirements of Tongan law. Contrary to TCC's further assertions (p. 2), such action would neither prohibit U.S. consumers from making calls to Tonga nor prohibit U.S. carriers from sending traffic to Tonga. Instead, such action would allow U.S. carriers to continue sending traffic to Tonga, and merely prohibit the payment by U.S. carriers of any amount in excess of the generously high \$0.19 benchmark rate, which would promote the continuation of traffic on this route at or below a rate that both protects U.S. consumer interests and also ensures that the Tongan carriers are fairly compensated.¹³ It would be the decision of the Tongan carriers and Government to reject this traffic, and to insist on receiving the unjustified \$0.30 rate.

TCC also fails to show that a benchmark requirement is unwarranted by reference to U.S. carriers' consumer rates.¹⁴ The record shows an AT&T consumer rate of \$0.25 for U.S.-Tonga calls on pre-paid cards available in AT&T retail stores.¹⁵ There similarly is no basis to TCC's charge that settlement rate reductions on this route have not been passed through to U.S. consumers. As the Bureau found, "there has been a substantial decline in consumer calling prices" on this route with average U.S. carrier prices for facilities-based calls falling from \$2.32 per minute in 1997 to \$0.15 per minute in 2007.¹⁶ These price reductions are the result of the substantial reduction in average U.S. carrier termination rates on this route from \$1.02 per

¹³ Significantly, neither Digicel nor TCC offers any evidence that the US\$ 0.19 benchmark rate would not cover relevant termination costs. As shown by AT&T (pp. 10-11), the record demonstrates that this rate provides more than adequate compensation for those costs, as foreign carriers in other middle income countries throughout the world have recognized in the more than twelve years since the adoption of the *Benchmarks Order* by subsequently negotiating much lower rates than US\$ 0.19 with U.S. carriers.

¹⁴ TCC Reply Comments (dated July 23, 2009), at 4.

¹⁵ AT&T Reply (filed Feb. 26, 2009) at 14, n.36.

¹⁶ *First U.S.-Tonga Stop Payment Order*, ¶ 2, citing FCC 1997 & 2007 Section 43.61 International Telecommunications Data.

minute in 1997 to \$0.11 per minute in 2007, before TCC first agreed to even lower rates with AT&T and then raised these rates at the behest of the Tongan government.¹⁷ But while competitive U.S. market forces ensure that the benefits of termination cost reductions are passed through to U.S. consumers, no such constraint prevents harmful consequences to U.S. consumers from the unreasonable rate increase required here by TCC and the Tongan government.¹⁸ These are the very circumstances that the Commission seeks to address through the benchmarks policy and support further Bureau action to require benchmark compliance by U.S. carriers as a further remedy in this proceeding.¹⁹

For the reasons set forth above and in AT&T's Comments, the Bureau should reject the arguments put forward by Digicel and TCC and issue a further order in this proceeding requiring U.S. carriers to pay no more than the \$0.19 per minute benchmark rate for all U.S.-Tonga traffic.

Respectfully submitted,

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¹⁷ *Id.*

¹⁸ See *ISP Reform Order*, ¶ 71 (“[b]oth statistical data collected by the Commission and economic theory indicate that reductions in settlement rates are being passed on to U.S. consumers”).

¹⁹ See *Benchmarks Order*, ¶ 40 (“We would prefer to let competitive market forces determine settlement rates,” but “competitive market forces do not exist in many countries at this time.”)

CERTIFICATE OF SERVICE

I, Loretia Hill, certify that copies of the foregoing "Reply Comments of AT&T Inc." were delivered via e-mail on this day, Wednesday January 20, 2010, to the following individuals.

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