

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**ORDER AND REQUEST FOR FURTHER COMMENT**

**Adopted: June 15, 2009**

**Released: June 15, 2009**

**Comment Date: July 8, 2009**

**Reply Comment Date: July 23, 2009**

By the Acting Chief, International Bureau:

**I. INTRODUCTION**

1. In this Order, we find that recent actions taken by the Tonga Communications Corporation (TCC) to disrupt the U.S.-international networks of AT&T Inc. (AT&T) and Verizon Communications Inc. (Verizon), for the purpose of trying to force those carriers to agree to higher termination rates, are anticompetitive and require action to protect U.S. consumers in accordance with Commission policy and precedent.<sup>1</sup> We therefore grant the petition filed by AT&T and supported by Verizon seeking protection from and remedies to the disruption of circuits on the U.S.-Tonga route. We order all U.S. carriers with Commission authorizations permitting the provision of facilities-based international switched voice services on the U.S.-Tonga route to suspend immediately all U.S. carrier payments for termination services to TCC. The suspension shall remain in effect pending full restoration of AT&T's and Verizon's circuits and services in accordance with this Order. In addition, on our own motion, we seek further comment on whether we should extend the stop payment order to any U.S. carrier with direct arrangements with Digicel Tonga Limited (Digicel) for international termination services in Tonga.

<sup>1</sup> See *International Settlements Policy Reform: International Settlement Rates*, IB Docket Nos. 02-234 and 96-21, First Report and Order, 19 FCC Rcd 5709 (2004) (*2004 ISP Reform Order*). See also *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of WorldCom, Inc. for Prevention of "Whipsawing" On the U.S.-Philippines Route*, IB Docket No. 03-38, Order on Review, 19 FCC Rcd 9993 (2004) (*Philippines Order on Review*); *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of WorldCom, Inc. for Prevention of "Whipsawing" On the U.S.-Philippines Route*, IB Docket No. 03-38, Order, 18 FCC Rcd 3519 (Int'l Bur. 2003) (*Philippines Order*); *AT&T Corp. Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina*, Order, 11 FCC Rcd 18014, 18014, ¶ 1 (1996) (*Argentina Order*) ("The Commission will not allow foreign monopolists to undermine U.S. law, injure U.S. carriers or disadvantage U.S. consumers."); *Sprint Communications Company, L.P., Request for Modification of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Mexico*, Memorandum, Opinion and Order, 13 FCC Rcd 24,998, 25000-01, ¶ 6 (1998) (*Mexico Order*) ("The Bureau has strictly enforced the Commission's regulations against whipsawing."). See also *Cable & Wireless v. FCC*, 166 F.3d 1224, 1226 (D.C. Cir. 1999) ("The FCC has long sought to protect U.S. carriers and U.S. consumers from the monopoly power wielded by foreign telephone companies in the international telecommunications market.").

## II. BACKGROUND

2. The Kingdom of Tonga consists of approximately 170 small islands located in the South Pacific Ocean.<sup>2</sup> In 2007, which is the most recent data available, the U.S.-Tonga route generated approximately 16.2 million minutes of traffic, which was an increase from 2.7 million minutes in 1997.<sup>3</sup> According to Commission data, revenue per minute for U.S.-billed facilities-based International Message Telephone Service (IMTS) traffic (*i.e.*, the weighted average of U.S.-carrier prices for all facilities-based calls to Tonga) fell from \$2.32 per minute in 1997 to \$0.15 per minute in 2007.<sup>4</sup> U.S. carriers' average termination payment per minute for this traffic fell from \$1.02 per minute in 1997 to \$0.11 per minute in 2007.<sup>5</sup> Although there has been a substantial decline in consumer calling prices and termination rates on the route, the offset from the increase in the number of minutes of traffic on the U.S.-Tonga route means that payments by U.S. carriers, overall, to Tonga from 1997-2006 for termination of traffic have decreased less markedly, from \$2.7 million in 1997 to \$1.8 million in 2007.<sup>6</sup> According to information filed with the Commission, the U.S. facilities-based carriers serving the U.S.-Tonga route are: AT&T Corp., MCI International, Sprint Nextel Corporation, Bharti Airtel Limited, France Telecom Long Distance USA, LLC, IDT Corporation, IT&E Overseas, Inc., KDDI America, Inc., KPN International Network Services, Inc., New Century Infocomm Tech Co. Ltd., Primus Telecommunications, Inc., REACH Services (USA) Inc., Telecom New Zealand USA, Inc., and TeliaSonera AB.<sup>7</sup>

3. TCC, which is wholly owned by the government of Tonga, is a telecommunications carrier providing voice, data, Internet and cellular services in Tonga.<sup>8</sup> TCC provides service pursuant to a telecommunications license issued by the Tonga Communications Minister.<sup>9</sup> Another carrier, Digicel Tonga Ltd. (Digicel), is licensed to provide telecommunications service in Tonga and "operates a GSM cellular network to provide international and domestic telecommunications services, Internet access and broadcast services."<sup>10</sup>

4. For the time period of January 1, 2006 through June 30, 2008, AT&T's states that Tonga traffic was being terminated at the rate of approximately \$0.13 per minute.<sup>11</sup> In July 2008, immediately prior to the events that culminated in AT&T's petition, AT&T states that it had negotiated rates with TCC for termination services for U.S.-outbound international traffic to Tonga of approximately \$0.09 per

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<sup>2</sup> See TCC Opposition at 3.

<sup>3</sup> See 1997 Section 43.61 International Telecommunications Data (CCB 1998); 2007 International Telecommunications Data (SAND/IB rel. June 2009). The Section 43.61 International Telecommunications Data reports are available on the FCC website at <http://www.fcc.gov/ib/sand/mniab/traffic/>.

<sup>4</sup> See 1997 Section 43.61 International Telecommunications Data; 2007 International Telecommunications Data. All monetary amounts throughout this Order are expressed in U.S. dollars.

<sup>5</sup> See 1997 Section 43.61 International Telecommunications Data; 2007 International Telecommunications Data.

<sup>6</sup> See 1997 Section 43.61 International Telecommunications Data; 2007 International Telecommunications Data.

<sup>7</sup> See *Petition for Protection from Whipsawing and Stop Settlement Payment Order on the U.S.-Tonga Route*, Public Notice, DA 09-149, IB Docket No. 09-10, (rel. Jan 29, 2009).

<sup>8</sup> See TCC Opposition at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See AT&T Petition at 2.

minute for termination.<sup>12</sup> Also, Verizon states that, prior to September 1, 2008, it was terminating traffic with TCC well below benchmark, which was set at \$0.19 for the U.S.-Tonga route.<sup>13</sup>

5. On August 12, 2008, TCC notified AT&T and Verizon that termination rates for U.S.-Tonga traffic would be raised to \$0.30 per minute beginning September 1, 2008.<sup>14</sup> In its notification, TCC cited a ruling from the Tongan Department of Communication (dated August 7, 2008) that set a minimum rate for all inbound traffic into Tonga of \$0.30 per minute. According to AT&T, TCC provided no cost justification for the demanded rate increases.<sup>15</sup>

6. On September 9, 2008, Verizon wrote to TCC's managing director stating that it was unable to agree to the new rate of \$0.30 per minute.<sup>16</sup> In response, TCC argued that it was obligated to comply with the Tongan government ruling.<sup>17</sup> On November 14, 2008, TCC sent Verizon an email informing Verizon of TCC's decision to disrupt Verizon's circuits effective November 17, 2008. TCC began blocking Verizon's circuits as of that date.<sup>18</sup>

7. On October 22 and November 10, 2008, AT&T received communication from TCC that suggested the two carriers should temporarily shut down their international circuit link pending agreement on a new rate.<sup>19</sup> AT&T responded to TCC that it was unable to agree to the rate increase.<sup>20</sup> TCC then sent a letter to AT&T stating that the Tonga government ruling required an inbound settlement rate of no less than \$0.30 per minute and notifying AT&T that TCC would block AT&T's circuits November 24, 2008.<sup>21</sup> TCC began blocking AT&T's circuits early on November 24, 2008.<sup>22</sup>

8. AT&T filed its instant petition on December 3, 2008 requesting that the Commission take action to protect U.S.-international carriers from TCC's behavior on the U.S.-Tonga route.<sup>23</sup> AT&T states that TCC's actions violate the Commission's longstanding policies against coercive, anticompetitive actions against U.S. carriers intended to force agreement to rate increases.<sup>24</sup> AT&T requests that the Commission issue an order consistent with previous Commission actions and existing policy directing all

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<sup>12</sup> See, e.g., *AT&T Petition for Protection from Whipsawing and Stop Settlement Payment Order on U.S. Tonga Route*, IB Docket No. 09-10, at 2 (filed December 3, 2008) ("Under AT&T's most recent agreement with TCC, U.S.-Tonga traffic for the period July 1, 2008 through August 31, 2008 was terminated at the rate of approximately 9 cents per minute.") (*AT&T Petition*).

<sup>13</sup> See Verizon Comments at 1. Benchmarks establish caps on the prices that U.S. carriers can pay foreign incumbents to terminate calls. See *infra* at ¶16.

<sup>14</sup> See AT&T Petition at 3; Verizon Petition at 2.

<sup>15</sup> See AT&T Petition at 3-4.

<sup>16</sup> See Verizon Petition at 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See AT&T Petition at 4.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1.

<sup>24</sup> *Id.* at 5-8.

U.S. carriers to stop all payments to TCC carriers for termination services pending full restoration of its circuits.<sup>25</sup>

9. On January 29, 2009, the Bureau placed the AT&T Petition on public notice.<sup>26</sup> On February 6, 2009, TCC filed for an extension of the time to file comments,<sup>27</sup> which was granted in part.<sup>28</sup> On February 19, 2009, the Bureau sent letters of inquiry to thirteen carriers requesting information concerning the U.S.-Tonga route.<sup>29</sup> TCC filed an opposition to the AT&T Petition on February 19, 2009.<sup>30</sup> Verizon filed a comment in support of AT&T's Petition.<sup>31</sup> AT&T submitted a reply to TCC's Opposition.<sup>32</sup> TCC filed a reply.<sup>33</sup> In addition, the Bureau received thirteen replies to its information request.<sup>34</sup>

10. On April 6, 2009, the Office of the U.S. Trade Representative (USTR) announced the results of its 2009 annual review of the operation and effectiveness of telecommunications trade agreements under Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 (1377 Review).<sup>35</sup> With regard to Tonga, the 1377 Review notes that its "GATS commitments on basic telecommunications include the WTO Reference Paper, which contains a commitment to ensure cost-based interconnection with major suppliers."<sup>36</sup> USTR noted that Tonga "provided no information demonstrating that costs have

<sup>25</sup> *Id.* at 1, 5-8, 10.

<sup>26</sup> *See Petition for Protection from Whipsawing and Stop Settlement Payment Order on the U.S.-Tonga Route*, Public Notice, DA 09-149, IB Docket No. 09-10, (rel. Jan 29, 2009).

<sup>27</sup> *See Petition for Protection From Whipsawing and Stop Settlement Payment Order on the U.S.-Tonga Route*, Petition for Extension of Time, IB Docket No. 09-10 (filed Feb. 6, 2009).

<sup>28</sup> *See Petition for Protection From Whipsawing and Stop Settlement Payment Order on the U.S.-Tonga Route*, Order, DA 09-206, IB Docket No. 09-10 (rel. Feb. 9, 2009).

<sup>29</sup> The Bureau sent information requests to carriers that, according to the most recent information filed with the Commission, serve the U.S.-Tonga route other than the petitioner, AT&T. Those carriers were: MCI International, Sprint Nextel Corporation, Bharti Airtel Limited, France Telecom Long Distance USA, LLC, IDT Corporation, IT&E Overseas, Inc., KDDI America, Inc., KPN International Network Services, Inc., New Century InfoComm Tech Co. Ltd., Primus Telecommunications, Inc., REACH Services (USA) Inc., Telecom New Zealand, USA, Inc., and TeliaSonera AB. The information request asked for information concerning: whether the carrier provides facilities-based service on the route; whether the carrier had direct circuits to Tonga; whether any direct circuits on the route were disrupted; and whether the carrier provided service on the route through alternative operating arrangements.

<sup>30</sup> *See Opposition of TCC*, IB Docket No. 09-10 (filed February 19, 2009) (TCC Opposition).

<sup>31</sup> *See Comments of Verizon* (filed Feb. 19, 2009) (Verizon Comments).

<sup>32</sup> *See AT&T Reply*.

<sup>33</sup> *See TCC Reply* (filed Feb. 26, 2009).

<sup>34</sup> Additionally, AT&T filed a petition requesting access, under a protective order, to information redacted from the public version of TCC's March 16, 2009 ex parte presentation. *See Letter from James Talbot, General Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission*, IB Docket No. 09-10 (filed March 20, 2009). TCC filed a response to AT&T's request. *See Letter from Joan M. Griffin, Counsel for TCC, to Marlene H. Dortch, Secretary, Federal Communications Commission*, IB Docket No. 09-10 (filed March 26, 2009). AT&T filed a reply. *See Letter from James Talbot, General Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission*, IB Docket No. 09-10 (filed April 2, 2009). This issue is addressed in companion Order. *See Petition for Protection from Whipsawing and Stop Settlement Payment Order on the U.S.-Tonga Route*, Order, DA 09-1326, IB Docket No. 09-10, (rel. June 15, 2009). In that Order, we deny AT&T request for a protective order.

<sup>35</sup> *See Results of the 2009 Section 1377 Review of Telecommunications Trade Agreements (1377 Report)*.

<sup>36</sup> *See 1377 Report* at 7-8.

increased such that a higher rate would be justified.”<sup>37</sup> Furthermore, the 1377 Review noted that, “[b]y imposing a uniform termination rate of 30 cents, the Tongan government eliminated the price competition that had previously existed between TCC and Digicel. It raised the termination rate both well above the FCC’s benchmark and far in excess of the rate that had prevailed in a competitive market, which provided a more accurate reflection of the costs of providing service.”<sup>38</sup>

### III. DISCUSSION

11. We review below the process established by the Commission to consider claims of anticompetitive conduct and the indicia upon which the Commission will consider such claims, apply the indicia to the information in this record and consider whether the arguments presented by TCC overcome the rebuttable presumption established by the Commission that disruption of U.S. carrier networks by foreign carriers to achieve rate increases harms the public interest. In particular, we consider and reject TCC’s argument that, because the Tonga Communications Minister required TCC to impose a rate increase, this Commission can neither find TCC’s actions in disrupting U.S. carrier networks anticompetitive nor impose the stop payment order requested by AT&T. We also consider and reject other arguments posed by TCC. We grant AT&T’s petition and order U.S. carriers to suspend payments to TCC for termination of traffic pending restoration of AT&T’s and Verizon’s circuits. In addition, we request comment on whether we should extend the stop payment order to any U.S. carrier with direct operating arrangements with Digicel, the other Tonga carrier imposing the rate increase.

#### A. Commission Policy and Process

12. In its *2004 ISP Reform Order*, the Commission reformed its rules to remove the International Settlements Policy (ISP) from benchmark-compliant routes (the *1997 Benchmarks Order* established caps on the prices that U.S. carriers can pay foreign incumbents to terminate calls),<sup>39</sup> giving U.S. carriers greater flexibility to negotiate lower cost arrangements with foreign carriers on international routes.<sup>40</sup> The Commission found that markets on many benchmark-compliant routes were developing competitively and that continued application of the ISP might impede further competitive progress. However, it also observed that, despite increased competition, the settlement rates on most routes continued to be above cost. Additionally, the Commission found that the potential remained for anticompetitive conduct by foreign carriers and other types of market failure. Thus, the Commission maintained several safeguards designed to protect U.S. consumers from the effects of these potential harms.

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<sup>37</sup> See *1377 Report* at 8.

<sup>38</sup> See *1377 Report* at 7, n.4.

<sup>39</sup> *In the Matter of International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280, 12 FCC Rcd 19806, 19806, ¶ 1 (1997) (*Benchmarks Order*); Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999) (*Benchmarks Reconsideration Order*); *aff’d sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

<sup>40</sup> See, generally, *2004 ISP Reform Order*. The Commission established the ISP to prevent foreign carriers with market power from discriminating or using threats of discrimination or other anticompetitive actions, against competing U.S. carriers as a strategy to obtain pricing concessions regarding the exchange of international traffic (“whipsawing”). Specifically, the ISP requires that: (1) all U.S. carriers must be offered the same effective accounting rate and same effective date for the rate (“nondiscrimination”); (2) all U.S. carriers are entitled to a proportionate share of U.S.-inbound, or return traffic based upon their proportion of U.S.-outbound traffic (“proportionate return”); and (3) the accounting rate is divided evenly 50-50 between U.S. and foreign carriers for U.S.-inbound and outbound traffic so that inbound and outbound settlement rates are identical (“symmetrical settlement rates”). 47 C.F.R. § 43.51 (2002). See *International Settlement Policy Reform and International Settlement Rates*, IB Docket Nos. 02-324, 96-261, Notice of Proposed Rulemaking, FCC 02-285, 17 FCC Rcd 19954, 19957, ¶ 3 (2002).

13. Included among the safeguards is a process for filing petitions alleging anticompetitive harm and indicia for considering allegations of harm. In considering such allegations, the Commission noted that, “[i]n the absence of full liberalization, an independent regulator, and fully competitive markets, carriers with market power might be free to act anticompetitively, ultimately harming U.S. customers through artificially inflated costs for call termination.”<sup>41</sup> The Commission stated that it “would regard certain actions as indicia of potential anticompetitive conduct by foreign carriers including, but not limited to: (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.”<sup>42</sup>

14. In the *2004 ISP Reform Order*, the Commission found that “blockage or disruption of U.S. carrier networks by foreign carriers directly harms the public interest, leads to decreases in call quality or completion and to potential increases in calling prices.”<sup>43</sup> The Commission found that “[r]esorting to such retaliatory abuse of market power against U.S. carriers, as opposed to resolving disagreements through commercial negotiations, is unlikely ever appropriate or justified in the public interest and does not benefit the provision of international services to customers in the United States or abroad.”<sup>44</sup> As a result, the Commission found that, “there is a rebuttable presumption of harm to the public interest if U.S. carriers demonstrate in their petitions that they have suffered network disruptions by foreign carriers with market power in conjunction with their allegations of anticompetitive behavior, or ‘whipsawing.’”<sup>45</sup>

#### **B. Application of Indicia of Anticompetitive Behavior to the Instant Case**

15. As an initial matter, we find that all three indicia of anticompetitive conduct listed in the Commission’s *2004 ISP Reform Order*<sup>46</sup> are present in TCC’s actions. There was: (1) a substantial increase in rates above benchmarks; (2) a rate floor was set; and (3) TCC disrupted AT&T’s and Verizon’s circuits when its rate demands were not met.

##### **1. Substantial Rate Increase Above Benchmarks**

16. The record reflects that TCC demanded a substantial increase in termination rates from \$0.09 to \$0.30.<sup>47</sup> The new rate is more than triple the rate negotiated between AT&T and TCC in July 2008. TCC does not contest this. Further, the record reflects that the demanded rate increase is well

<sup>41</sup> See *2004 ISP Reform Order*, 19 FCC Rcd at 5729, ¶ 40.

<sup>42</sup> See *2004 ISP Reform Order*, 19 FCC Rcd at 5733, ¶ 51.

<sup>43</sup> See *2004 ISP Reform Order*, 19 FCC Rcd 5731, ¶ 45. See also AT&T Reply at 5, n.16 (stating “pending the restoration of circuits, AT&T incurs significant additional costs to complete traffic to Tonga through third countries”).

<sup>44</sup> See *2004 ISP Reform Order*, 19 FCC Rcd 5731, ¶ 45.

<sup>45</sup> See *2004 ISP Reform Order*, 19 FCC Rcd 5731, ¶ 45, n.115 (noting that “NTIA argues that automatic examination of a route has merit when a foreign government mandates a price floor that increases rates above competitively negotiated levels, regardless of whether the increase is below current benchmarks. See NTIA Aug. 5, 2003 *Ex Parte* Letter at 2. Consistent with NTIA’s concerns, the U.S.-carrier initiated process we note in this Order, will 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.”).

<sup>46</sup> See *2004 ISP Reform Order*, 19 FCC Rcd at 5733, ¶ 51.

<sup>47</sup> See, e.g., AT&T Petition at 2-3; Verizon Comments at 1-2.



above benchmarks.<sup>48</sup> The Commission established its benchmarks policy with the goal of reducing above-cost settlement rates paid by U.S. carriers to foreign carriers for the termination of international traffic, where market forces had not led to that result.<sup>49</sup> The benchmarks policy requires U.S. carriers to negotiate settlement rates at or below benchmark levels set by the Commission in its 1997 *Benchmarks Order*.<sup>50</sup> The benchmark rate on the U.S. Tonga route is \$0.19 per minute.<sup>51</sup> The demanded \$0.30 rate is more than 50 percent higher than the Commission's benchmark rate for the U.S.-Tonga route, which TCC does not dispute. While the *Benchmarks Order* specifically allows for any carrier to make a showing that the benchmark rate does not allow recovery of a carrier's incremental cost,<sup>52</sup> we find that TCC has not provided any such showing.

## 2. Rate Floor

17. The record reflects that the \$0.30 termination rate is the minimum settlement rate for all inbound international telephone traffic to Tonga. Consequently, the \$0.30 termination rate is a rate floor. Moreover, the \$0.30 rate floor does not permit additional commercial negotiation below that level.

## 3. Circuit Blockage

18. The record shows that TCC disrupted circuits when their rate demands were not met.<sup>53</sup> TCC began blocking Verizon's circuits on November 17, 2008 after Verizon informed TCC that it was unable to agree to the rate increase.<sup>54</sup> TCC began blocking AT&T's circuits early on November 24, 2008 after AT&T informed TCC that it was unable to agree to the increased rate.<sup>55</sup>

## C. TCC Arguments to Overcome Rebuttable Presumption

19. As discussed above, "there is a rebuttable presumption of harm to the public interest if U.S. carriers demonstrate in their petitions that they have suffered network disruptions by foreign carriers with market power in conjunction with their allegations of anticompetitive behavior, or 'whipsawing.'"<sup>56</sup>

<sup>48</sup> See *In the Matter of International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280, 12 FCC Rcd 19806, 19806, ¶ 1 (1997) (*Benchmarks Order*); Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999) (*Benchmarks Reconsideration Order*); *aff'd sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). See also AT&T Reply at 2-3; Verizon Comments at 2.

<sup>49</sup> *Benchmarks Order*, 12 FCC Rcd at 19862-63, ¶ 115. The Commission concluded that the benchmark rates are necessary because the settlement rates U.S. carriers paid foreign carriers terminate U.S.-originated traffic were, in most cases, substantially above the costs foreign carriers incur to terminate that traffic. *International Settlement Rates*, IB Docket No. 96-261, Report and Order on Reconsideration and Order Lifting Stay, FCC 99-124, 14 FCC Rcd 9256 at 9256, ¶ 3 (1999) (*Benchmarks Reconsideration Order*).

<sup>50</sup> *Benchmarks Order*, 12 FCC Rcd at 19806, ¶ 1; *Benchmarks Reconsideration Order*, 14 FCC Rcd 9256.

<sup>51</sup> See *Benchmarks Order*, 12 FCC Rcd at 19860 and 19965-6, Appendix C.

<sup>52</sup> *Id.* at 19849-50, ¶ 88-89.

<sup>53</sup> See, e.g., AT&T Petition at 2-5; Verizon Comments at 1-2; TCC Opposition at 1, 3-4; AT&T Reply at 2-3.

<sup>54</sup> See Verizon Comments at 2.

<sup>55</sup> See AT&T Petition at 5.

<sup>56</sup> See *2004 ISP Reform Order*, 19 FCC Rcd 5731, ¶ 45. TCC is: (1) the incumbent provider of fixed and mobile services in Tonga; (2) 100 percent government owned; and (3) "terminates all AT&T's traffic to both fixed and mobile numbers in Tonga." See AT&T Reply at 1-2; TCC Opposition at 2. TCC possesses sufficient market power on the foreign end of the U.S.-Tonga route to affect competition adversely in the U.S. international services market. See, e.g., *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891, 23899, 23952-3 ¶¶ 17, 144-45 (1997) (*Foreign Participation Order*); *Americatel Corporation and Telecom Italia of*

(continued...)

We find that TCC has not presented persuasive arguments as to why its actions are not anticompetitive, and thus has not overcome the rebuttable presumption that its actions harm the U.S. public interest.

### 1. Action of the Tonga Government

20. TCC first argues that, because it was required by the Tonga Communications Minister to increase the termination rates to \$0.30, it has not engaged in any anti-competitive conduct.<sup>57</sup> TCC states that it has no power or ability to change the termination rate mandated by the Communications Minister.<sup>58</sup> Thus, TCC argues that it was not in commercial negotiations with AT&T over the termination rate.<sup>59</sup> Rather, TCC argues it was attempting to comply with the rules and regulations imposed on it by the Communications Minister.<sup>60</sup> In addition, in view of the action of the Tonga Communications Minister, TCC argues that the Commission lacks the authority to issue a stop payment order on the U.S.-Tonga route because the increased rates are government mandated. TCC argues that the Commission, instead, must raise its concerns about the termination rates with the Tonga government.<sup>61</sup>

21. AT&T argues that Commission action is necessary to address TCC's disruption of circuits.<sup>62</sup> AT&T states that "[l]ongstanding 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."<sup>63</sup> AT&T argues that in Tonga, "U.S. carriers have been denied the ability to continue service unless they comply with the unreasonable terms and conditions imposed by entities controlling the foreign end of the international route."<sup>64</sup>

22. We reject TCC's contentions. First, we find that TCC's disruption of U.S. carrier circuits to enforce the rate increase was anticompetitive notwithstanding the action of the Tonga Communications Minister. The Commission has recognized the sovereign rights of countries to regulate their telecommunications, but has made it clear that it cannot agree to allow U.S. carriers to settle their traffic at just any rate imposed by entities controlling the foreign end of an international route without regard to the impact on the U.S. public interest.<sup>65</sup> Here, the effect of acquiescing to TCC's actions would be to agree to a nearly threefold increase in termination rates with no negotiation or cost justification, which

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*North America, Inc., Application to Modify Regulatory Classification from Dominant to Non-Dominant on the U.S.-Argentina Route*, DA 03-4115, 2003 WL 23095477 (2003).

<sup>57</sup> See TCC Opposition at 3.

<sup>58</sup> See Letter from Joan M. Griffin, Counsel for TCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 09-10, and Attachment (filed March 11, 2009).

<sup>59</sup> See TCC Opposition at 3-4. However, as AT&T notes, that there is no evidence that there was an order from the Tongan government to disrupt U.S. carrier circuits. See AT&T Reply at 7, n.22.

<sup>60</sup> See TCC Opposition at 3-4.

<sup>61</sup> *Id.* at 7-8.

<sup>62</sup> See AT&T Reply at 3-5.

<sup>63</sup> See AT&T Reply at 4, and n.11 (citing to *Implementation and Scope of the International Settlements Policy for Parallel International Communications Routes*, 3 FCC Rcd 1614, n.1 (1988) and *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)).

<sup>64</sup> See AT&T Reply at 5.

<sup>65</sup> See *Benchmarks Order*, 12 FCC Rcd 19806 at 19950 (discussing the ITU International Telecommunication Regulations (ITR) with regard to Benchmarks).



could harm U.S. consumers and have negative precedential effect for other U.S.-international routes. TCC's claim that its actions were taken pursuant to a mandate from the Communications Minister makes them no less coercive or anticompetitive than they would have been if TCC acted on its own. We note that there is nothing in the record to suggest that the Communications Minister required TCC to block U.S. carrier circuits. TCC tried to force the significant rate increase by disrupting U.S. carrier circuits. As a result, AT&T and Verizon are at a competitive disadvantage to foreign carriers continuing to have direct operating agreements with TCC.

23. Second, we find that the Commission has the authority to issue the stop payment order as requested in AT&T's petition. The Commission has the authority to regulate rates U.S. carriers agree to pay foreign carriers to the extent those rates affect U.S. competition and consumers, despite the indirect effect on a foreign market.<sup>66</sup> As noted above, increasing rates above benchmarks and disrupting circuits are indicia of anticompetitive behavior.<sup>67</sup> It is well-settled that our authority over U.S.-international settlement rates and practices is not an assertion of extraterritorial regulation of foreign carriers; rather, it is a constraint over U.S. carriers to protect the public interest.<sup>68</sup> The Commission has broad authority to protect U.S. customers from harms resulting from anticompetitive behavior.<sup>69</sup> In 1997, the Commission prohibited U.S. carriers from paying inappropriately high rates to foreign companies to the detriment of U.S. consumers.<sup>70</sup> Specifically, the Commission established its benchmarks policy that requires U.S. carriers to negotiate settlement rates at or below benchmark levels set by the Commission in the *Benchmarks Order*.<sup>71</sup> The Commission has a statutory mandate to insure that U.S. consumers receive telecommunications services at reasonable rates.<sup>72</sup> As discussed below, there is no persuasive showing in the record that the \$0.30 rate is reasonable.

24. In upholding the *Benchmarks Order*, the D.C. Circuit recognized in *Cable & Wireless P.L.C. v. FCC*<sup>73</sup> that the Communications Act of 1934 (the Act) gives the Commission jurisdiction over "all interstate and foreign communication by wire or radio ... which originates and/or is received within the United States...."<sup>74</sup> The Act states that Congress created the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication."<sup>75</sup> The Act defines "foreign communication" as "communication from or to any place in the United States to or from a foreign country."<sup>76</sup> In addition to the general regulatory oversight of international communications set forth in Section 2(a), Section 201 of the Act gives the Commission authority to ensure that "all charges, practices, classifications, and regulations for and in connection with" the provision of "interstate or foreign communications by wire or radio" be "just and reasonable."<sup>77</sup> The Act also gives the Commission authority to prescribe just and

<sup>66</sup> See *Philippines Order*, 18 FCC Rcd at 3531-2, ¶ 15; *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

<sup>67</sup> See *supra* Section B.

<sup>68</sup> *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). See also *2004 ISP Reform Order* at ¶ 74.

<sup>69</sup> See *Benchmarks Order*, 12 FCC Rcd at 19817, ¶ 24.

<sup>70</sup> See, e.g., *Benchmarks Order*, 12 FCC Rcd at 19806, ¶ 1.

<sup>71</sup> See *Benchmarks Order*.

<sup>72</sup> *Id.* at 19951.

<sup>73</sup> *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

<sup>74</sup> 47 U.S.C. § 152(a).

<sup>75</sup> 47 U.S.C. § 151 (emphasis added).

<sup>76</sup> 47 U.S.C. § 153(17).

<sup>77</sup> 47 U.S.C. § 201(a) & (b). The D.C. Circuit, in *Cable & Wireless v. FCC*, found that accounting rates constitute a "practice" or a "charge" that is "in connection with" the provision of international communications within the meaning of Section 201. See *Cable and Wireless v. FCC*, 166 F.3d at 1231.

reasonable charges when it finds that a charge or practice associated with a U.S. carrier providing foreign communications is unlawful.<sup>78</sup> Furthermore, Section 154(i) of the Act states that the FCC may “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of [the FCC’s] functions.”<sup>79</sup> As a result, the Commission has authority to enact and enforce regulations, including the ISP and its related safeguards, to ensure that the accounting rates paid by U.S. carriers are just and reasonable.<sup>80</sup>

25. We find that granting the stop payment order falls well within Commission authority and precedent. The Commission’s broad authority to act in the public interest includes the ability to respond to carrier-initiated petitions and notifications when addressing anticompetitive harms on individual routes, which we have done in several cases.<sup>81</sup> In the *Philippines Order*, the International Bureau ordered U.S. carriers providing direct facilities-based service to the Philippines to suspend settlement payments to six Philippine carriers.<sup>82</sup> The Bureau took this action after finding that Philippines Long Distance Telephone Company (PLDT) had threatened and then followed through on that threat to block U.S. carriers’ circuits in order to force a rate increase on U.S. carriers, even though the new rates in that case were below benchmarks.<sup>83</sup> The Bureau further found that the five other Philippine carriers, together with PLDT, “whipsawed” U.S. carriers into a rate increase.<sup>84</sup> In the *Philippines Order on Review*, the Commission affirmed the Bureau’s action in ordering a suspension of payments for termination services on the U.S.-Philippines route.<sup>85</sup> In the *Argentina Order*, the Bureau ordered U.S. carriers providing direct facilities-based service to Argentina in correspondence with the Argentine carrier, Telinstar, to suspend settlement payments to Telinstar. The Bureau took this action upon finding that Telinstar had engaged in discriminatory and retaliatory behavior against AT&T that constituted “whipsawing” and violated the Commission’s ISP. That behavior involved blocking AT&T circuits to Argentina and disabling AT&T’s

<sup>78</sup> 47 U.S.C. § 205.

<sup>79</sup> 47 U.S.C. § 154(i).

<sup>80</sup> See *id.* See also *Regulation of International Accounting Rates*, Order on Reconsideration, 7 FCC Rcd 8049, 8052 n.18 (1992)(stating that the Commission may enforce the ISP requirements using whatever mechanisms that are within the Commission’s authority to ensure nondiscriminatory accounting rate arrangements).

<sup>81</sup> See, e.g., *Argentina Order*, 11 FCC Rcd 18014, 18014, ¶ 1 (“The Commission will not allow foreign monopolists to undermine U.S. law, injure U.S. carriers or disadvantage U.S. consumers.”); *Mexico Order*, 13 FCC Rcd 24998 at 25000-01, ¶ 6 (“The Bureau has strictly enforced the Commission’s regulations against whipsawing.”). See also *Cable & Wireless v. FCC*, 166 F.3d 1224, 1226 (D.C. Cir. 1999) (“The FCC has long sought to protect U.S. carriers and U.S. consumers from the monopoly power wielded by foreign telephone companies in the international telecommunications market.”). See also *Philippines Order*, 18 FCC Rcd at 3525-27, ¶ 10. See, e.g., *AT&T Corp., MCI Telecommunications Corp., Sprint, LDDS, WorldCom, Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Peru Re: Applications on Review*, Order on Review, FCC 99-89, 14 FCC Rcd 8318 (1999); *Petition of AT&T Corp for Approval of a Waiver of the International Settlements Policy Regarding Arrangements for Service between the United States and Venezuela*, Report and Order, DA 00-1255, 15 FCC Rcd 9684 (Int’l Bur. 2000); *Sprint Communications Company L.P., Petition for Waiver of the International Settlements Policy to change the Accounting Rate for Switched Voice Service with Chile (Bell South)*, Order, DA 01-2120, 16 FCC Rcd 16387 (Int’l Bur. 2001); *GTE Hawaiian Tel International Inc., Petition for Waiver of the International Settlements Policy to change the Accounting Rate for Switched Voice Service with Vietnam*, Order, DA 01-713, 15 FCC Rcd 6838 (Int’l Bur. 2001).

<sup>82</sup> See *Philippines Order*, 18 FCC Rcd 3519.

<sup>83</sup> *Id.* at 3527-8, ¶ 11.

<sup>84</sup> *Id.* at 3528, 3523, ¶¶ 12 & 17. See also Memorandum Order, Republic of the Philippines, Department of Transportation and Communications, National Telecommunications Commission (March 12, 2003).

<sup>85</sup> See *Philippines Order on Review*, 19 FCC Rcd 9993.

USADirect service to Argentina in retaliation for AT&T's efforts to negotiate lower accounting rates consistent with Commission policy goals and direction to U.S. carriers.<sup>86</sup>

26. Finally, we do agree with TCC in one important respect – that the respective governments should consult and work toward an ultimate resolution of this matter. Government-to-government communication played a role in facilitating resolution in similar instances in the past. But, government-to-government communications in those cases were preceded and facilitated by Commission action to address its responsibilities to safeguard competition in the U.S. international telecommunications market. In this case, we believe that our action today is timely, appropriate and necessary.

27. USTR has informed the Commission that it has sent two letters to the Government of Tonga since the termination rate was increased.<sup>87</sup> In the first, dated September 29, 2008, USTR asked the Government of Tonga, *inter alia*, to explain how the increased rate is consistent with Tonga's commitments under World Trade Organization agreements to ensure cost-based interconnection with major suppliers (such as TCC). In the second, dated May 5, 2009, USTR asked, *inter alia*, for further information regarding the process used to determine the new rate and also requested information supporting the Government of Tonga's determination that a \$0.30 per minute termination rate was necessary to cover the costs of Tongan operators. USTR has not yet received complete responses to the questions it has posed, in particular, information about the methodology for determining the reasonableness of the \$0.30 per minute rate.

## 2. Conflicting Foreign Law

28. TCC argues that the Commission does not have the authority to prescribe rates that would create a conflict with the laws of a foreign country.<sup>88</sup> Specifically, TCC contends that courts have refused to construe U.S. laws in a way that would bring them in conflict with foreign laws.<sup>89</sup> TCC cites the D.C. Circuit court's opinion in *Cable & Wireless* as support for its position. TCC argues that, in that case, the D.C. Circuit Court declined to uphold the Commission's authority to impose benchmarks in the situation

<sup>86</sup> See *Argentina Order*, 11 FCC Rcd at 18016-18017. See also *Argentina Order on Review*.

<sup>87</sup> See Letter from Barbara Weisel, Assistant U.S. Trade Representative For Southeast Asia and the Pacific, to His Excellency Dr. Feleti Sevele, Prime Minister, Minister for Communications, Kingdom of Tonga (dated September 29, 2008); Letter from Christine Bliss, Assistant U.S. Trade Representative, Services and Investment, to Mr. Busby Kautoke, Chief Secretary, Prime Minister's Office, Kingdom of Tonga (dated May 5, 2009).

<sup>88</sup> See TCC Opposition at 8.

<sup>89</sup> See TCC Opposition at 7-8 (citing *Ali v. Ashcroft*, 346 F.3d 873, 885 (9<sup>th</sup> Cir. 2003) (finding that the district court "relied on the principle of construing the statute in a manner that avoids violating international law merely as further support for the construction it adopted"); *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 426 (2<sup>nd</sup> Cir. 1987) (concluding that the FSIA does not preempt the jurisdiction grant of the Alien Tort Statute since Congress did not express a clear intent to contradict the immunity rules of international law and left the Alien Tort Statute in force); *CFTC v. Nahas*, 738 F.2d 487, 493 (D.C. Cir. 1984) (discussing "canon of statutory construction that requires courts, wherever possible, to construe federal statutes to ensure their application will not violate international law"). We note that all three cases relied upon by TCC are cited for the proposition that there is a canon of statutory construction that domestic U.S. statutes must be construed, where possible, to ensure that their application will not violate international law. However, TCC's fundamental argument here does not concern possible violation of an international law by the Commission by any action it may take. Rather, TCC's argument relates to the possible application of a U.S. domestic law or policy that may affect a domestic law or policy of a foreign government. Hence, the three cases relied upon and cited by TCC are inapposite to its argument. If, however, TCC intended to raise in its argument the principle of international comity, whereby one country may generally be expected to recognize the laws and interests of another country, then the facts, statutes and cases discussed herein support the action in this order and it is otherwise consistent with the law on international comity.

where a foreign carrier's government sets minimum settlement rates that exceed the benchmarks set by the FCC.<sup>90</sup>

29. In response to TCC's argument that the Commission does not have authority to prescribe termination rates paid by U.S. carriers where such rates conflict with foreign country law, AT&T argues that there is "no such limitation on Commission authority to establish the termination rates paid by U.S. carriers."<sup>91</sup> Moreover, as AT&T notes, there is a 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.'"<sup>92</sup>

30. We find that the Commission is not precluded from issuing the stop payment order requested by AT&T in the instant case. The stop payment order that AT&T requests is expressly designed to regulate the actions of U.S. carriers, not TCC. A stop payment order requires U.S. carriers to take a unified bargaining position, preventing each carrier from acting in its own self interest. This removes the opportunity for TCC to establish direct operating arrangements with other U.S. carriers in order to play one off against the other in an effort to get the demanded higher rate.<sup>93</sup> We seek to serve the public interest by preventing such a situation, where other U.S. carriers that compete with AT&T and Verizon enter into a direct operating agreement with TCC for the demanded higher rate, thereby harming U.S. consumers and diluting U.S. carrier's bargaining power to avoid paying significantly increased rates that are not cost-based.

31. As TCC points out, AT&T is not subject to conflicting laws and regulations. TCC states that, "if AT&T cannot accept the Communications Minister's order regarding termination rates in Tonga, then AT&T should terminate its direct relations with the Tonga carriers, free itself from the mandates of the Communications Minister, and terminate its traffic in Tonga through other means."<sup>94</sup> Similarly, TCC states it has the right to decline to accept telephone calls from the U.S. and be free of the Commission entirely.<sup>95</sup> Indeed, this scenario already has occurred. Thus, neither carrier is subject to conflicting laws or regulations. AT&T and other U.S. carriers are subject to Commission rules; TCC is not.

32. Furthermore, in the *Callback Order*,<sup>96</sup> the Commission found that, "foreign governments may not, simply by enacting domestic legal, regulatory, or procedural measures, require the United States

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<sup>90</sup> See TCC Opposition at 8.

<sup>91</sup> See AT&T Reply at 6.

<sup>92</sup> See AT&T Reply at 6, and n.18 (citing *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."); *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").

<sup>93</sup> See *Cable & Wireless v. FCC*, 166 F.3d at 1229-30.

<sup>94</sup> See TCC Opposition at 9.

<sup>95</sup> See TCC Opposition at 9 (citing *Cable & Wireless plc. v. FCC*, No. 97-1612, Brief for Respondents at 27 (May 6, 1998)).

<sup>96</sup> See *Enforcement of Other Nations' Prohibitions Against the Uncompleted Call Signaling Configuration of International Call-Back Service*, IB Docket No. 02-18, RM-9249, Order, 18 FCC Rcd 6077 (2003) (eliminating the comity-based prohibitions on call-back and the policy on call-back services that allows a foreign government or entity to make use of the enforcement mechanisms of the Commission to enforce foreign government prohibitions against U.S. carriers from offering uncompleted call-signaling abroad.) (*Callback Order*).

to implement such measures as a matter of international law.<sup>97</sup> Similar to the Commission's decision regarding callback, here we find 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 those policies.

33. Finally, we reject TCC's contention that the *Cable & Wireless* decision supports its argument that the Commission does not have authority to issue a stop payment order. Indeed, the D.C. Circuit did not reach the issue of the Commission's authority to enforce benchmarks where a foreign carrier's government set a minimum settlement rate above the established benchmark because "no foreign carrier in this litigation has complained that it actually faced such a predicament."<sup>98</sup> Furthermore, the court noted that, "during the [benchmarks] rulemaking process, both the U.S. Department of State and the U.S. Trade Representative filed comments supporting the Order."<sup>99</sup> In the instant case, as noted above, the U.S. Trade Representative's 1377 Review found that, "[b]y imposing a uniform termination rate of 30 cents, the Tongan government eliminated the price competition that had previously existed between TCC and Digicel."<sup>100</sup> The 1377 Review further found that the Tongan government "raised the termination rate both well above the FCC's benchmark and far in excess of the rate that had prevailed in a competitive market, which provided a more accurate reflection of the costs of providing service."<sup>101</sup>

### 3. Reasonableness of Rate Increase

34. TCC makes a generalized argument that the newly imposed \$0.30 rate is not unreasonably high. TCC argues that "[c]arriers in developing countries such as Tonga have higher costs due to many factors, including adverse terrain and climatic conditions, smaller and less dense populations, less efficient and lower density network configurations, higher equipment purchase, installation and maintenance costs, and fewer economies of scale/scope."<sup>102</sup> TCC argues that "Tonga's inbound termination rate of \$0.30/minute is among the lowest rates charged by Pacific island countries."<sup>103</sup> Tonga references several inbound termination rates in other countries without attributing the source information.<sup>104</sup>

35. Data available to the Commission, however, suggests that Tonga's inbound termination rate of \$0.30 per minute is not among the lowest rates charged by Pacific Island countries. Indeed, even excluding Australia, New Zealand and the U.S. territories, data for 2007 filed with the Commission pursuant to Section 43.61 of the Commission's Rules show that several Pacific Island countries have much lower inbound termination rates: Fiji (\$0.18); French Polynesia (\$0.15); Marshall Islands (\$0.18);

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<sup>97</sup> See *Id.* at 6082, ¶ 13.

<sup>98</sup> See *Cable & Wireless v. FCC*, 166 F.3d, 1230.

<sup>99</sup> *Id.*

<sup>100</sup> See *1377 Report* at 7, n.4.

<sup>101</sup> *Id.* See also Letter from Barbara Weisel, Assistant U.S. Trade Representative For Southeast Asia and the Pacific, to His Excellency Dr. Feleti Sevele, Prime Minister, Minister for Communications, Kingdom of Tonga (dated September 29, 2008); Letter from Christine Bliss, Assistant U.S. Trade Representative, Services and Investment, to Mr. Busby Kautoke, Chief Secretary, Prime Minister's Office, Kingdom of Tonga (dated May 5, 2009).

<sup>102</sup> See TCC Opposition at 6.

<sup>103</sup> *Id.*

<sup>104</sup> TCC claims that "the inbound termination rates in Western Samoa is US\$0.365/minute; Niue, US\$0.545/minute; Papua New Guinea, US\$0.66/minute; and Wallis & Futuna, US\$1.5984/minute." See TCC Opposition at 6, n.11.



and Federated States of Micronesia (\$0.16).<sup>105</sup> More recent Arbinet data, to which the Commission subscribes, confirm that termination rates to these countries currently are at approximately these levels.<sup>106</sup>

36. Further, in its response to TCC's argument that its rate increases are reasonable, AT&T submitted a cost study that brings into question whether TCC's significantly increased rate is cost-based.<sup>107</sup> AT&T conducted a cost study that concluded that the total cost of terminating U.S. calls in Tonga is in the range of \$0.085 to \$0.17 per minute.<sup>108</sup> AT&T argues that the data sources and assumptions used in its study were conservative and that TCC's actual termination costs are likely at or below the low end of the range given.<sup>109</sup> After evaluating AT&T's method of estimation and checking the source data that AT&T used to estimate the domestic termination component of Tonga's international settlement costs, it appears that AT&T's method of estimation is reasonable and that AT&T identified and used the correct source data.

37. The Commission has a statutory mandate to insure that U.S. consumers receive telecommunications services at reasonable rates.<sup>110</sup> We do not find TCC's argument that the new rate is reasonable to be persuasive. While we do not compel any foreign carrier to provide cost data, we provide an opportunity to seek revision of a settlement rate benchmark with which U.S. carriers are to adhere by providing cost data.<sup>111</sup> TCC has not provided such cost data here and we are not convinced by its generalized argument. We also note that TCC did not provide cost data to refute the AT&T study.

#### 4. High-Cost Numbering Plan Areas

38. TCC points out that AT&T's rate for terminating traffic into high-cost Numbering Plan Areas (NPAs) in the United States is greater than the benchmark rate of \$0.19 per minute.<sup>112</sup> TCC argues that the fact that AT&T charges TCC above benchmark rates for delivery of traffic to certain parts of the United States is evidence that the \$0.30 rate is reasonable.

39. AT&T argues that because termination rates to the U.S. are so low, it has included in its agreement with TCC "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."<sup>113</sup> AT&T notes that its termination rates to high access charge areas "have had no effect on

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<sup>105</sup> 47 C.F.R. § 43.61.

<sup>106</sup> Arbinet is a company that administers an electronic exchange in which member carriers can buy and sell international termination services anonymously in real-time. See <http://www.arbinet.com/>. According to its website, "Arbinet operates the world's largest electronic marketplace for communications trading. Arbinet's online trading platform enables 908 fixed and mobile service providers to buy, sell, deliver and settle 12+ billion minutes per year."

<sup>107</sup> See AT&T Reply at 12-13 and Attachment 1.

<sup>108</sup> *Id.* at 12.

<sup>109</sup> *Id.* at 12-13 and Attachment 1.

<sup>110</sup> See *Benchmarks Order*, 12 FCC Rcd at 19951.

<sup>111</sup> *Id.* at 1842-3, ¶ 74 (stating that "[w]e emphasize that any carrier may ask us to reconsider, in a specific case, the benchmarks on the grounds that they do not permit the carrier to recover the incremental costs of providing international termination service.").

<sup>112</sup> See TCC Opposition at 6-7.

<sup>113</sup> See AT&T Reply at 13-14.



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 of 2008."<sup>114</sup>

40. Whether AT&T's mechanism for discouraging TCC from sending large volumes of traffic through particular areas in the United States is reasonable, and we reach no conclusion here, does not change the fact that TCC has acted in a manner that harms competition on the U.S.-Tonga route. We note, however, that the Commission does have an open proceeding considering comprehensive reform of intercarrier compensation, including access charges.<sup>115</sup>

##### 5. Alleged Expiration of AT&T and Verizon Contract

41. Finally, TCC claims that its agreement with AT&T had expired by virtue of the action of the Communications Minister in setting the higher rate. It argues that there are no Commission policies or precedents that require a foreign telecommunications carrier to terminate traffic with a U.S. carrier without an agreement specifying the rate to be paid.

42. AT&T disagrees with TCC,<sup>116</sup> arguing that the "agreement setting rates for the July 1 through August 31, 2008 period expressly states that if new rates are not agreed upon by the expiration of this period 'the parties shall continue to provide Service hereunder' unless the parties terminate the agreement, which did not occur."<sup>117</sup> AT&T states that, "there is no basis for TCC's claim that this provision was automatically overridden by the Tongan government order."<sup>118</sup> Verizon notes that, under its agreement with TCC, TCC terminated Verizon's U.S.-Tonga traffic at a rate well below the benchmark and that the agreement also provided that its term would "extend indefinitely thereafter until terminated by either party with thirty (30) days prior written notice or until amended by the parties upon their mutual agreement."<sup>119</sup>

43. Settlement arrangements agreed to by U.S. international carriers and memorialized in inter-carrier contracts are subject to Commission review based on Commission authority to regulate the charges.<sup>120</sup> The Commission has the authority to regulate the charges of U.S. carriers even where those charges are established by agreements with foreign correspondents.<sup>121</sup> As noted above, the record shows that AT&T does have an underlying operating agreement with TCC that establishes a legal contract

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<sup>114</sup> *Id.* at 13.

<sup>115</sup> *High Cost Universal Service Reform; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008).

<sup>116</sup> See AT&T Reply at 5, n. 15.

<sup>117</sup> *Id.* See also Letter from James J.R. Talbot, General Attorney, AT&T, to James L. Ball, Chief, Policy Division, International Bureau, Federal Communications Commission, attached International Telecommunications Service Agreement at 8 (stating that the "Agreement shall continue in force until terminated by either party. The agreement shall be terminable by either party by not less than one years notice in writing to the other party.") (dated April 3, 2009).

<sup>118</sup> *Id.*

<sup>119</sup> See Verizon Comments at 1-2.

<sup>120</sup> See *Benchmarks Order*, 12 FCC Rcd at 199948-49, ¶¶ 306-308.

<sup>121</sup> *Id.* at 199948-49, ¶¶ 306-308. See also *Cable & Wireless v. FCC*, 166 F.3d at 1231.

requiring continued provision of service pending negotiation of new rate annexes.<sup>122</sup> As noted in the *Philippines Order*, U.S. carriers typically negotiate rate agreements that act as rider contracts upon the underlying operating or service agreement.<sup>123</sup> In such cases, despite the fact that a rate agreement in a separate annex expires, the underlying operating agreement remains during the negotiation.<sup>124</sup> The facts in this case support a similar conclusion.

#### **D. Suspension of Payments to TCC**

44. We find that TCC's actions in demanding a substantial rate increase amounting to a rate floor without engaging in meaningful negotiations and then threatening and carrying out threats to disrupt AT&T and Verizon networks for their failure to accede to those increases was anticompetitive. We further find that TCC has not presented persuasive arguments as to why its actions should not be considered anticompetitive under Commission policy and precedent and thus has not overcome the rebuttable presumption that its actions harm the U.S. public interest. While TCC's actions may have been required by action of the Tonga Communications Minister mandating the rate increase, they do not have any less anticompetitive effect on U.S. carriers or consumers. And, notwithstanding action by the Tonga Communications Minister, the Commission has the authority to issue a stop-payment order to U.S. carriers to protect U.S. consumers from anticompetitive behavior pending restoration of circuits and resumption of commercial negotiations between TCC and AT&T and Verizon.

45. We grant AT&T's petition. We order all U.S. carriers providing facilities-based services to suspend payments to the TCC for termination services pending restoration of AT&T's and Verizon's circuits. This requirement applies to any U.S. carrier providing direct facilities-based service to Tonga through an operating agreement with TCC as well as to AT&T and Verizon. Additionally, we require AT&T and Verizon to submit a status report to the International Bureau every thirty days after the release of this Order, and to notify the Commission immediately when service is restored and inform the Commission at what rate service was restored.

#### **E. Application to Digicel Tonga Limited**

46. In addition, on our own motion, we request comment on whether the Commission should issue a stop payment order to cease U.S. carrier payments to Digicel. As discussed above, Digicel provides telecommunications service in Tonga and operates a GSM cellular network. We note that the Tonga Communications Minister order for the increased rate applies to both TCC and Digicel. We understand that some U.S. carriers have direct operating arrangements with Digicel and apparently are paying the \$0.30 rate to Digicel. We seek comment on whether we should extend our stop payment order to any U.S. carrier with direct arrangements with Digicel.

#### **F. Alternative Routing Arrangements**

47. Finally, we note that there are U.S. carriers that have alternative arrangements with third parties (i.e., not a Tonga licensee) to provide service on the U.S.-Tonga route. Such arrangements involve re-originating U.S. traffic through a third country for ultimate termination in Tonga. The action we take in this order will not affect such arrangements. AT&T states that an "appropriate remedy, to reduce the adverse effects on the U.S. market from the circuit disruption and rate increase, would be to order U.S.

<sup>122</sup> See Letter from James J.R. Talbot, General Attorney, AT&T, to James L. Ball, Chief, Policy Division, International Bureau, Federal Communications Commission and attached International Telecommunications Service Agreement (dated April 3, 2009); AT&T Petition, Confidential Attachment 1. See also, *Philippines Order*, 18 FCC Red at 3531.

<sup>123</sup> See *Philippines Order*, 18 FCC Red at 3531, ¶ 15, n.69.

<sup>124</sup> *Id.*

carriers to pay no more than the FCC benchmark rate of \$0.19 to terminate calls to Tonga, including calls routed via third countries.”<sup>125</sup> A remedy of this nature might be considered by the Commission in a separate proceeding if circuits on the U.S.-Tonga route remain disrupted for an extended period of time to the detriment of U.S. consumers. We note that the Commission has a proceeding pending considering ways to improve the process available to the Commission to protect U.S. consumers from the effects of anticompetitive conduct by foreign carriers.<sup>126</sup>

### G. Conclusion

48. We find that actions taken by TCC to disrupt the U.S.-international networks of AT&T and other U.S. carriers, for the purpose of trying to force U.S. carriers to agree to higher termination rates, constitute anticompetitive behavior thereby harming U.S. consumers. We grant AT&T’s petition to suspend immediately all U.S. carrier payments for termination services to TCC. The suspension shall remain in effect pending full restoration of AT&T’s and Verizon’s circuits and services, and Commission action lifting the suspension. Furthermore, we seek comment on whether we should impose a stop payment order on all payments to Digicel.

## IV. ADMINISTRATIVE MATTERS

### A. Ex Parte Rules

49. This proceeding will be governed by permit-but-disclose *ex parte* procedures that are applicable to non-restricted proceedings under section 1.1206 of the Commission’s rules.<sup>127</sup> We direct parties making oral *ex parte* presentations to the Commission’s statement re-emphasizing the public’s responsibility in permit-but-disclose proceedings and are reminded that memoranda summarizing the presentation must contain the presentation’s substance and not merely list the subjects discussed.<sup>128</sup> More than a one- or two-sentence description of the views and arguments presented is generally required.<sup>129</sup> Other rules pertaining to oral and written presentations are set forth in section 1.1206(b) as well.<sup>130</sup> We urge parties to use the Electronic Comment Filing System (ECFS) to file *ex parte* submissions.<sup>131</sup>

### B. Comment Filing Procedures

50. Interested parties must file comments no later than **July 8, 2009**. Replies to such comments must be filed no later than **July 23, 2009**. All filings concerning the Request for Further Comment should refer to **DA 09-1325, IB Docket No. 09-10**.

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<sup>125</sup> See Letter from Amy L. Alvarez, Director, International External and Regulatory Affairs, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 09-10, and Attachment (filed March 31, 2009).

<sup>126</sup> See *Modifying the Commission’s Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct*, IB Docket No. 05-254, Notice of Inquiry, 20 FCC Rcd 14096 (2005).

<sup>127</sup> *Id.* § 1.1206.

<sup>128</sup> See Commission Emphasizes the Public’s Responsibilities in Permit-But-Disclose Proceedings, Public Notice, 15 FCC Rcd 19945 (2000).

<sup>129</sup> See 47 C.F.R. § 1.1206(b)(2) (2007).

<sup>130</sup> *Id.* § 1.1206(b).

<sup>131</sup> See discussion *infra* Part VI.

51. Under the Commission's procedures for the submission of filings and other documents,<sup>132</sup> submissions in this matter may be filed electronically (*i.e.*, through ECFS) or by hand delivery to the Commission's Massachusetts Avenue location.

- **Electronic Filers:**<sup>133</sup> Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/>. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number. Parties also may submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554.

52. In addition, one copy of each pleading must be delivered electronically, by e-mail or facsimile, or if delivered as paper copy, by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (according to the procedures set forth above for paper filings), to the Commission's duplicating contractor, Best Copy and Printing, Inc., at [fcc@bcpweb.com](mailto:fcc@bcpweb.com) or (202) 488-5563 (facsimile).

53. Additionally, filers may deliver courtesy copies by email or facsimile to the following Commission staff:

(1) James Ball, Chief, Policy Division, International Bureau, at [James.Ball@fcc.gov](mailto:James.Ball@fcc.gov) or (202) 418-2824 (facsimile);

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<sup>132</sup> See *Implementation of Interim Electronic Filing Procedures for Certain Commission Filings*, Order, 16 FCC Rcd 21483 (2001); see also *FCC Announces a New Filing Location for Paper Documents and a New Fax Number for General Correspondence*, Public Notice, 16 FCC Rcd 22165 (2001); *Reminder: Filing Locations for Paper Documents and Instructions for Mailing Electronic Media*, Public Notice, 18 FCC Rcd 16705 (2003).

<sup>133</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

- (2) David Krech, Associate Chief, Policy Division, International Bureau, at David.Krech@fcc.gov or (202) 418-2824 (facsimile);
- (3) Kimberly Cook, Policy Division, International Bureau, a Kimberly.Cook@fcc.gov or (202) 418-2824 (facsimile);
- (4) Cara Grayer, Policy Division, International Bureau, at Cara.Grayer@fcc.gov or (202) 418-2824 (facsimile);
- (5) Emily Talaga, Strategic Analysis & Negotiations Division, International Bureau, at Emily.Talaga@fcc.gov or (202) 418-0398 (facsimile).

54. Copies of this Order and Request for Further Comment and any subsequently-filed documents in this matter may be obtained from Best Copy and Printing, Inc., in person at 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, via telephone at (202) 488-5300, via facsimile at (202) 488-5563, or via e-mail at fcc@bcpiweb.com. The Order and Request for Further Comment and any associated documents are also available for public inspection and copying during normal reference room hours at the following Commission office: FCC Reference Information Center, 445 12th Street, S.W., Room CY-A257, Washington, D.C. 20554. The Order and Request for Further Comment and any subsequently-filed documents in this matter are also available electronically through the Commission's ECFS, which may be accessed on the Commission's Internet website at <http://www.fcc.gov>.

55. People with Disabilities: To request materials in accessible formats (computer diskette, large print, audio recording, and Braille) send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

56. For further information, contact James Ball, Policy Division, International Bureau, at 202-418-1460 or David Krech, Policy Division, International Bureau, at 202-418-1460.

## V. ORDERING CLAUSES

57. Accordingly, IT IS ORDERED that the AT&T Petition is hereby GRANTED;

58. IT IS FURTHER ORDERED that the Opposition of TCC to AT&T's Petition is HEREBY DENIED;

59. IT IS FURTHER ORDERED that all facilities-based carriers subject to Commission jurisdiction having a correspondent agreement with TCC for direct termination of U.S. traffic on the U.S.-Tonga route SHALL SUSPEND all termination payments to TCC for switched voice service effective upon release of this Order until such time as the Commission issues a Public Notice that AT&T's and Verizon's circuits on the U.S.-Tonga route are fully restored;

60. IT IS FURTHER ORDERED that AT&T and Verizon shall immediately inform the Commission when their circuits have been fully restored, and, otherwise, they shall file a report every 30 days after release of this Order explaining the status of their attempts to have their circuits on the U.S.-Tonga route fully restored;

61. This Order is issued pursuant to Sections 1, 2, 4(i)-(j), 5, 201-205, 211, 214, and 303(r), and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 155, 201-205, 211, 214, 303(r), 309 and Sections 0.51, 0.261, 43.51, 63.14, 63.16, 64.1001 and 1.115 of the Commission's rules, 47 C.F.R. §§ 0.51, 0.261, 43.51, 63.14, 63.16, 64.1001, and is EFFECTIVE UPON RELEASE.

FEDERAL COMMUNICATIONS COMMISSION

John V. Giusti  
Acting Chief, International Bureau