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

In the Matter of

Interconnection Arrangements Between and Among the Domestic and International Record Carriers — **CC DOCKET NO. 82-122**

THE WESTERN UNION TELEGRAPH COMPANY — **CC DOCKET NO. 78-97, Phase II**

Revisions to Tariff F.C.C. Nos. 240 and 258 Filed with Transmittal No. 7346;

Revisions to Tariff F.C.C. Nos. 268 and 269 Filed with Transmittal Nos. 7347 and 7348;

Revisions to Tariff F.C.C. Nos. 229, 240, 254, 258, 260, 263, and 268 Filed with Transmittal No. 7417

MEMORANDUM OPINION AND ORDER ON FURTHER RECONSIDERATION

Adopted: April 7, 1988; Released: May 6, 1988

By the Commission:

I. INTRODUCTION

1. On May 2, 1986, we released an Order[1] directing the interconnected carrier parties (ICPs)[2] to reimburse Western Union Telegraph Company (WU) for discounts that the ICPs received pursuant to an interim prescription. We modified the reimbursement formula in our *Reconsideration Order*. [3] WU has filed a petition for further reconsideration which asks us to reinstate the original reimbursement formula. We deny that petition for further reconsideration, but clarify that the modification applies only to telex traffic carried after the effective date of Transmittal No. 7974.

II. BACKGROUND

2. The *Reimbursement Order* resulted from two intertwined Commission proceedings: CC Docket No. 78-97 and CC Docket No. 82-122. This Commission initiated Docket 78-97 in 1978 to investigate claims that WU's telex/TWX services were earning excessive returns and that those returns were used to subsidize other services.[4] The Docket 78-97 investigation originally focused on the reasonableness of WU's public rates and rate structure, but was expanded to include the rates charged to the ICPs. The investigation was later bifurcated into Phases I and II,[5] to reflect a change in WU's rate structure. The ICPs contested WU's decision to discontinue the ICP discounts from the public telex/TWX rates. The ICPs alleged, *inter alia*, that it was significantly less expensive for WU to provide telex/TWX service to ICPs than to the general public. The ICPs argued that the different cost characteristics of providing service to the two classes of customers required that the ICPs be given a discount from the public rate. The administrative law judges conducting the hearings specifically scrutinized this issue.

3. In December 1981, while the Docket 78-97 investigation was still pending, the Record Carrier Competition Act of 1981 (RCCA), 47 U.S.C. § 222, was enacted. This Commission established Docket 82-122[6] to implement its directives. The RCCA permitted WU to compete in the international record market and permitted the ICPs to compete in domestic markets. The RCCA also required that terms for full interconnection of WU and ICP facilities be established and directed WU and the ICPs to reach agreement on interconnection terms within 60 days of its enactment. If those negotiations failed, the RCCA mandated that this Commission prescribe terms of interconnection within 45 days. The carriers were unable to reach an agreement, and we faced an extremely short deadline for the prescription of interconnection terms, including a prescription of rates for interconnected telex/TWX service.

4. In our April 1982 *Interim Order* [7] in Docket 82-122, we complied with the RCCA mandate and prescribed interconnection terms for the carriers. We required WU and the ICPs to provide domestic service to each other and to provide the domestic portion of inbound or outbound international service at rates discounted 15 percent from the effective public rates. This discount was established as an interim prescription only, and the carriers were ordered to keep full records of payments and telex/TWX traffic so that a "full accounting" could be made in the future if, after completion of the parallel rate investigation in Docket 78-97, we determined that the Docket 82-122 interim prescription required adjustment.

5. On October 28, 1983, this Commission released the *FinalOrder* in Docket 78-97,, Phase I.[8] That *Final Order* found that WU did not realize any significant cost savings in providing telex/TWX service to the ICPs during the Phase I period, and that WU's rates and rate averaging practices were reasonable. We also stated that, because the 15 percent discount prescribed in Docket 82-122 was premised in large part on the presumption that significant cost savings existed, "we shall reassess Docket No. 82-122 accordingly." *Final Order*, 95 FCC 2d at 920. The ICPs appealed the *Phase I Final Order* to the United States Court of Appeals for the Second Circuit. That court upheld our *Final Order* in all respects.[9] On August 10, 1984, we released an Order that eliminated the discount prospectively.[10]

6. On May 20, 1985, we released the *Phase II Termination Order*, which terminated Docket 78-97, Phase II, and found that, during the Phase II period, WU did not realize any significant cost savings in providing service to the ICPs.[11] We subsequently denied an ICP petition for reconsideration of that Order.[12]

7. On July 10, 1985, WU petitioned this Commission to enter final Order terminating the Docket 82-122 proceeding and requiring the ICPs to reimburse WU for the 15 percent discount from the public rates for interconnected service provided to ICPs from June 1982 to August 1984. On May 2, 1986, we granted this petition in part in the *Reimbursement Order*. In view of the findings in the Docket 78-97 investigation that no cost savings existed, we

concluded that the interim 15 percent discount for the ICPs was not justified. We also found that the RCCA did not mandate non-cost based discounts. We therefore ordered the ICPs to reimburse WU for the amount of the discounts taken pursuant to the *Interim Order's* prescription. We rejected the ICP arguments that we lacked authority to order such reimbursements.

8. The *Reimbursement Order* concluded, however, that equitable considerations preclude ordering the ICPs to reimburse WU for the total amount of the discounts. Instead, we excepted from the reimbursement computation the domestic segment of international outbound telex/TWX traffic. We found that we had previously prescribed billing and payout practices for this traffic that essentially required the ICPs to pass through directly to their customers the discounted rates of the carrier providing the domestic segment. The ICPs therefore never actually received the discount on this traffic; rather, it was realized directly by the customers. We also found that the ICPs were liable for the other traffic because any flowthrough of those discounts resulted from discretionary actions of the ICPs, rather than Commission direction. Because the ICPs knew that WU was pursuing a claim for reimbursement of such amounts, we further concluded that the ICPs would not be allowed to defeat such a claim by voluntarily passing the discount through to their customers. Finally, we found that WU was also entitled to interest on the reimbursed amounts, to be computed at the rate set by the Internal Revenue Service. We therefore ordered WU to recompute its claim for reimbursement to reflect our instructions.[13]

9. The ICPs filed petitions for reconsideration of the *Reimbursement Order*.[14] We concluded that most of the ICP arguments were not meritorious, but we decided to modify the reimbursement formula because WU had implemented a higher baseline rate in January 1983 to recover the revenues lost due to the discount.[15] The rate increase effectively reduced the impact of the discount during the period that the rate increase applied. Accordingly, we reduced the reimbursement amount by 49 percent to reflect that portion of the 15 percent discount which the ICPs had already paid in the form of higher tariffed rates.

10. On June 22, 1987, WU filed a petition for further reconsideration of the *Reconsideration Order*. WU claims that although the *Reconsideration Order* purports to deny petitions for reconsideration of the *Reimbursement Order*, the *Reconsideration Order* actually amends the *Reimbursement Order* significantly in favor of the ICPs. CCI, WUI, Graphnet, RCA, and TRT filed oppositions to the petition for further reconsideration and WU replied.

III. CONTENTIONS OF THE PARTIES

11. The WU further reconsideration petition disputes this Commission's conclusion that WU had already been reimbursed in part for amounts found to be owed by the ICPs in the *Reimbursement Order*. Petition at 3. WU claims that the rate increase of January 1983 was neither designed to produce, nor did it produce, WU's fully authorized return. WU argues that its January 1983 rate increase was not designed to recoup the ICP discount. WU admits that the documentation accompanying the rate increase cited the discount as one of two factors responsible for the deteriorating telex return. However, WU states, the rate increase was actually predicated on WU's total cost of providing service. *Id.* at 4. WU further argues that the January 1983 rate increase would not have been excessive even if WU were later reimbursed for every penny of the discount. But for the prescribed discount, WU alleges, it would have been fully entitled to charge the higher January 1983 public rate for all telex traffic -- public as well as ICP traffic. *Id.* at 6, 8. According to WU, its actual earnings results further support its position. *Id.* at 6.

12. WU further argues that the ICPs received a 15 percent discount both before and after the January 1983 rate increase, which subjected WU to a revenue loss during the entire prescription period. WU maintains that, if anything, it is entitled to a larger reimbursement for the period after January 1983, because the value of the discount during that later period was greater.[16] *Id.* at 4, 7-8. WU contends that its position is fully consistent with the fact that this Commission had prescribed only a percentage discount to be given to the ICPs, not an absolute rate to be paid by the ICPs. *Id.* at 8-9. Finally, WU asks this Commission to clarify that the reduced reimbursement ordered in the *Reconsideration Order* applies neither to Telex II (TWX) traffic nor to telex traffic prior to January 1983. WU notes that the January 1983 transmittal did not change Telex II (TWX) rates. *Id.* at n. 8.

13. The ICPs respond that the reduction in WU's reimbursement is more than justified by WU's January 1983 telex rate increase. The ICPs claim that the stated purpose of that increase was to recover revenue losses resulting from the ICP discount. TRT Opposition at 3-5, 11-12; CCI Opposition at 2-3; Graphnet Opposition at 2-4; WUI Opposition at 1; RCA Opposition at 4. TRT and Graphnet further allege that because WU was not ever ordered to reduce its public rates after the ICP discount was discontinued, WU has in fact recovered all of the reimbursement amount and the ICPs should not be subject to any further liability. TRT Opposition at 3-5, 11-12; Graphnet Opposition at 4-5.

14. The ICPs also argue that WU's failure to target or to achieve its authorized rate of return is neither proven in the record nor relevant. TRT Opposition at 6-9; CCI Opposition at 3-6; WUI Opposition at 2-3; RCA Opposition at 4. According to RCA, WU is really arguing that the original reimbursement amount should not be reduced unless WU's actual rate of return exceeded the authorized rate of return of 18.92 percent. RCA then asserts that a rate of return is a ceiling, not a floor. RCA Opposition at 2-4. WUI asserts that it was WU's duty to minimize its losses by filing a rate increase to improve its earnings, and for that reason no reimbursement should be allowed for traffic after January 1983 regardless of WU's actual realized return. WUI Opposition at 3-4. Finally, TRT and Graphnet argue that the reduced reimbursement should apply to all of the telex and TWX traffic, not only the telex traffic transmitted after the January 1983 rate increase. TRT Opposition at 10-12; Graphnet Opposition at 4-5. According to TRT, it would be particularly unfair to require the ICPs to reimburse a higher amount for traffic after January 1983. TRT Opposition at 9.

15. In its reply, WU observes that the opposing parties did not deny that they continued to receive the 15 percent discount after January 1983. WU further states that there is no dispute that its earnings were deficient. WU Reply at 2-3; Supplement to Reply at 3. WU then accuses the opposing parties of merely rearguing issues already decided and repeats its explanation of the January 1983 rate increase. *Id.* at 4. According to WU, it was under no

obligation to increase its rates to recoup the revenue loss occasioned by the interim prescription. *Id.* at 5. Its ability to increase its rates, argues WU, did not compromise its right to reimbursement. *Id.* at 7. WU justifies its failure to reduce its rates after the elimination of the discount by pointing to WU's continued earnings deficiency. *Id.* at 9. Finally, WU renews its request that the reduced reimbursement ordered in the *Reconsideration Order* apply neither to Telex II (TWX) traffic nor to telex traffic prior to January 1983. *Id.* at 8-10.

IV. DISCUSSION

16. WU's arguments are not persuasive. WU merely restates arguments that were considered and rejected in the *Reconsideration Order*. Indeed, its opposition to petitions for reconsideration argued that the January 1983 increase "(1) would have been justified even if there had been no discount and (2) left Western Union with a revenue deficiency greater than the amount of the discount." WU argued that its rate increase was due to "increased costs" and was "not designed to produce -- nor did it produce -- an adequate return on Western Union's telex/TWX services."[17] This Commission concluded in the *Reconsideration Order* that:

> the rates charged by WU to the ICPs pursuant to Transmittal No. 7974 were higher than the rates that would have been in effect had WU not sought to recover via a higher baseline rate the revenues lost due to the discount. The effect of the rate increase was to reduce the impact of the discount.[18]

We reaffirm our decision to reduce the reimbursement ordered in the *Reimbursement Order* by requiring the ICPs to pay 51 percent of that amount because WU has not presented any new arguments.

17. The sole issue raised by WU that has not already been fully and repeatedly addressed is whether this Commission intended to apply the reimbursement reduction percentage to TWX traffic and pre-January 1983 telex traffic that was not the subject of the January 1983 rate increase. We intended to reduce the reimbursement amount only to reflect the portion of the 15 percent discount that the ICPs had already paid in the form of higher rates under Transmittal No. 7974. We recognized that Transmittal No. 7974 adjusted *only* WU's telex rates and not its TWX rates,[19] and we acknowledged that an accurate calculation would have to account for the relative amount of ICP usage that had been subject to the rate increase. Because it is apparent that some parties have misunderstood our meaning, we take this opportunity to restate our decision. The amount of the reimbursement ordered in the *Reimbursement Order* must first be separated into the amount associated with telex traffic carried after the effective date of Transmittal No. 7974 and the amount associated with other traffic. Then, the amount associated with telex traffic carried after the effective date of Transmittal No. 7974 should be reduced by 49 percent. The amount associated with other traffic should not be reduced.

V. CONCLUSION AND ORDERING CLAUSE

18. For the reasons discussed above, we conclude that the arguments in WU's petition for further reconsideration are without merit, but clarify our Order as set forth herein.

19. THEREFORE, IT IS ORDERED, That pursuant to 47 U.S.C. §§154(i) and 154(j), 201-205, 222, 403 and 405, the petition for further reconsideration filed by The Western Union Telegraph Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

1 The Western Union Telegraph Co., FCC 86-190, released May 2, 1986 (*Reimbursement Order*).

2 The acronym "ICP" includes Consortium Communications International (CCI), ITT World Communications Inc. (ITT), Graphnet, Inc. (Graphnet), RCA Global Communications,Inc. (RCA), TRT Telecommunications,Inc. (TRT), FTC Communications, Inc. (FTC), International Relay, Inc. (IRI) and Western Union International, Inc. (WUI). We note, however, that ITT and RCA have each entered into settlement agreements with Western Union dismissing all claims arising out of this proceeding.

3 The Western Union Telegraph Co., 2 FCC Rcd 2999 (1987) (*Reconsideration Order*).

4 The Western Union Telegraph Co., 67 FCC 2d 1420 (1978).

5 WU employed a distance-sensitive rate schedule during the Phase I period (January 1978 to April 1981). The Phase II period began on April 24, 1981, when WU converted to a postalized, or distance-insensitive rate structure, and extended to May 1985, when the Docket 78-97 investigation was completed.

6 Interconnection Arrangements Between and Among the Domestic and International Record Carriers, 89 FCC 2d 194 (1982).

7 Interconnection Arrangements Between and Among the Domestic and International Record Carriers, 89 FCC 2d 928 (1982) (*Docket 82 - 122 Interim Order* or *Interim Order), modified on reconsideration*, 93 FCC 2d 845 (1983) (*Interim Order Reconsideration)*. The interim rate prescription was not modified in the reconsideration Order.

8 The Western Union Telegraph Co., 95 FCC 2d 881 (1983)(*Phase I Final Order* or *Final Order)*.

9 FTC Communications, Inc. v. FCC, 750 F.2d 226 (2d Cir. 1984)(*FTC v. FCC)*.

10 The Western Union Telegraph Co., FCC 84-399, released Aug. 10, 1984 (*Phase II Investigation Order)*. This Order also reopened the Docket 78-97, Phase II, investigation and solicited comments from interested parties.

11 The Western Union Telegraph Co., CC Docket No. 78-97, Phase II, FCC 85-265, released May 20, 1985 (*Phase* II Termination Order or Termination Order.)

12 The Western Union Telegraph Co., FCC 86-189, released May 1, 1986 (Termination Order econsideration).

13 WU submitted a report showing its computations for the reimbursement. Report of WU, filed Sept. 18, 1985. Several of the ICPs filed statements questioning the accuracy of the WU computations. See, e.g., RCA Motion for Establishment of a Procedural Schedule and Other Relief, filed Oct. 22, 1985.

14 Petitions for reconsideration were filed by CCI, ITT, Graphnet, RCA, and TRT.

15 Western Union Transmittal No. 7974, filed Oct. 15, 1982.

16 Before January 1983, the public paid a telex rate of 34.75 cents per minute, while the ICPs paid 26.54 cents. After January 1983, the public paid 37.75 cents per minute, while ICPs paid 32.09 cents. Thus, the ICP discount increased from 5.21 cents per minute to 5.66 cents per minute after January 1983.

17 Western Union Opposition to Petitions for Reconsideration, CC Docket Nos. 82-122 and 78-97, Phase II, filed July 30, 1986.

18 Econsideration Order, 2 FCC Rcd at 3002.

19 *Id.*