FCC Maintains Suspension of U.S. Carrier Payments on U.S.-Tonga Route

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Earlier this week, the Federal Communications Commission released an order affirming the International Bureau's 2009 order directing all U.S. facilities-based carriers within the FCC's jurisdiction to stop payments to Tonga Communications Corporation ("TCC") for termination of switched voice service ("Stop Payment Order") on the U.S.-Tonga route. The April 7 Memorandum Opinion and Order affirmed the Bureau's conclusion that TCC's significant increase in its rates for terminating traffic on the U.S.-Tonga route – even if ordered by the Tongan government – and its disruption of AT&T's and Verizon's circuits to Tonga each constituted anticompetitive conduct that harmed U.S. consumers and were contrary to the public interest. The FCC also rejected TCC's contention that the *Stop Payment Order* constituted unauthorized extraterritorial regulation of TCC on the grounds that only U.S. international carriers were subject to the order.

The FCC ruled that TCC's termination rates satisfied each of three established (and non-exhaustive) indicia of anticompetitive behavior by foreign carriers: (i) settlement rates above the FCC's benchmark rates; (ii) establishment of a rate floor above previously negotiated rates; or (iii) a threatening or carrying out of disruptions to the other carrier's circuits as a means of forcing rate increases or changes in service terms. Specifically, the $0.30 per minute rate far exceeded the FCC's existing $0.19 per minute benchmark for the U.S.-Tonga route. In addition, there had been an increase in the rate from the previously (with AT&T) negotiated $0.09 per minute to a minimum of $0.30 per minute without the opportunity for meaningful negotiations. Finally, TCC terminated AT&T's and Verizon's circuits to Tonga when they refused to accept the $0.30 rate. TCC essentially admitted all three indicia were satisfied but still argued that satisfaction of the three criteria does not warrant a conclusion that TCC's behavior was anticompetitive.

Rejecting TCC's argument that TCC was merely following Tongan law when implementing the rate increases, the FCC stated that its policies addressing anticompetitive conduct apply regardless of whether the carrier acts on its own or at the direction of a foreign government. The FCC emphasized that its primary consideration was the impact of those rates on the U.S. public and that it was not penalizing TCC for following Tongan law. Rather, the Commission explained that it was not asserting jurisdiction over TCC at all, but the interests of U.S. consumers prompted the FCC to prohibit U.S. carriers from settling traffic at rates set by an entity controlling the foreign end of a route where anticompetitive behavior was indicated. After acknowledging the principal of international comity, the FCC observed that the principle does not relieve the FCC of its duty to protect the U.S. public interest and emphasized that international comity does not permit a foreign government, by enacting legal, regulatory or procedural measures, to force the United States to implement those measures, as a matter of international law. Moreover, the purpose of a stop payment order such as the instant one, the Commission explained, is to prevent foreign carriers that have established a rate floor from being able to play U.S. carriers against each other in rate negotiations and to enable U.S. carriers to provide a unified position in those negotiations. The Commission said the basis for the order was the ability to "whipsaw," not necessarily a present intention by the foreign carrier to do so. Finally, the FCC explained that its authority over international settlement rates between U.S. and foreign carriers constitutes direct regulation of the US. Carrier alone, not extraterritorial regulation of the foreign carriers; thus, any stop payment orders apply only to the U.S. carriers. As such, the Commission rejected the TCC argument that the *Stop Payment Order* created a conflict with the Tongan government’s requirements which applied only to TCC.

TCC had also argued that the Commission should focus its attention on the alleged unreasonably high end user rates of U.S. carriers AT&T and Verizon for calls on the U.S.-Tonga route. The Commission declined to consider the issue in the order, effectively ruling that whether a foreign carrier was acting anticompetitively, triggering Commission action against U.S. carriers in response was not excused depending upon the rates the U.S. carriers charged on the route.

The FCC’s decision to uphold the Bureau’s *Stop Payment Order* and continue the payment suspension is not surprising, especially given the recent order affirming the U.S. settlements policy on which we blogged. This latest decision is, in some ways, the mirror-image of that March 7 decision to enforce the benchmark rate on the U.S.-to-Fiji route. Despite the Tongan government’s intervening "rescission" of the minimum termination rate in 2010, the current termination rates are still above benchmark and include a $0.051 per minute tax. Moreover, TCC continues to block AT&T’s and Verizon’s circuits to Tonga. We expect that the FCC will continue, as the major U.S. carriers bring concerns to the agency's attention,to emphasize the impact of international settlement rates on U.S. consumers and the public interest where foreign carriers seek to, or are required to, impose rates above benchmarks or rate floors above previously negotiated rates and so exert foreign carrier market power.