

] Billing and collection: legal obstacles for the telecom opening

] Chacao challenges case law by the Supreme Court of Justice

Billing and collection

On September 23, 2002, expired the term for interested parties to file their comments regarding the "Draft Regulations on the Provision of Billing and Collection Facilities for Account of and Upon Request of Long Distance Operators" (the Draft), posted by the Venezuelan National Telecommunications Commission (CONATEL) for public consultation. The Draft's purpose appears to be the creation of the obligation – or maybe, according to some interpretations, just to make such obligation explicit – of local exchanges (LEs) and mobile operators (MOs) to undertake the billing and collection of charges corresponding to the services rendered by long distance operators (LDOs), when the latter demand such service and offer to pay sufficient consideration for it. The first question raised by the Draft is whether a regulation to be issued by the Executive Branch can impose such an obligation on LEs and OMs? The questionings that challenge the content of the Draft, as proposed, are not scarce, but its authors obviously anticipated them. Evidence of the authors awareness is that the text of the Draft tries to overcome the two main legal obstacles threatening the new regulatory initiative: (i) the need for a **solid legal ground** making the billing and collection obligations demandable, and (ii) **compliance with the formal obligation** of issuing invoices established by the Venezuelan Value Added Tax Act and by the Venezuelan Organic Tax Code. **To address the solid legal ground issue**, the Draft characterizes billing and collection services as "essential facilities" associated to interconnection, thus including them amongst the essential resources for interconnection provided by article 12 of the Interconnection Regulations (IR); and consequently, regarding the interconnection legal regime applicable to the LEs and OMs, as encompassing the obligation of providing billing and collection services to the OLDs, when so requested as part of interconnection.

On the other hand, apparently, **to address the matter of compliance with the formal obligation of issuing invoices**, the Draft emphasizes that billing and collection would be carried out "for account of" the LDOs; thus assuming that the Value Added Tax Act formal requirement of issuing invoice would be fulfilled by LEs and MOs, on behalf of LDOs, by including in their respective invoices the charges for long distance calls. In the light of the above considerations, the Draft is far from being unquestionable. In our opinion, three are the main issues challenging the Draft as proposed:

Whether billing and collection facilities do constitute essential resources for interconnection?

Particularly, it is important to highlight that the Venezuelan legal framework is not profuse in qualifying billing and collection services as essential facilities associated to interconnection. Actually, the Venezuelan Organic Telecommunications Act (OTA) does not offer much detail regarding such essential facilities. By means of a short definition, interconnection is conceived by the OTA as an essential obligation of every telecommunications public network operator, which accomplishment shall be guaranteed by CONATEL on a "strictly needed" basis. Moreover, the IR only qualify as an "essential resource for interconnection", "the information necessary for offsetting accounts, billing and collecting from users". The billing and collection tasks themselves are not mentioned. Ultimately, the Regulations for the Opening of Basic Telephone Services (ROBTS) clearly establish in article 52 that billing and collection services could be hired from LEs, thus implying that it is not mandatory for such LEs to provide such services. The only normative text from which such essential character could derive is from article 21, letter "g" of Resolution number 432 of the

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Andean Community General Secretary. Without intending to dig deeper in the interpretation of such Andean provision and its value as authority in Venezuela, in absence of internal law adopting such Resolution, it can be questioned whether billing and collection can be deemed, in the Venezuelan telecommunications market, as an “essential facility” for interconnection. Legal literature, understandably, has not been uniform regarding this matter. In fact, the essentiality of an element is generally associated to its indispensability and to the availability of substitutive alternatives in the market. Even article 2 of the RI is consistent with such interpretation when defining the term “essential resource”. Thus, if we compare the resources listed in article 12 of the IR with billing and collection facilities, it is obvious that the latter are not of the same nature as the former. Origination and termination of communications, switching, signalling, transmission, help desk, collocation, and even the information necessary for offsetting accounts, billing and collecting from users, are absolutely essential for interconnection; without such elements, physical and logical network interconnection, as well as access from users of one network to users of another network, would be impossible. Additionally, it can be interpreted that billing and collection are not that essential in Venezuela, when LDOs can carry out such tasks by themselves in efficient economic and operational conditions (assuming that the necessary information has been furnished to them, which information is with no doubt essential), and when such services could be provided by specialized collection agencies today available in the Venezuelan market. All the above allows one to think that should the question be raised at the judicial level, the outcome would be unpredictable, regardless of the opinion that each operator may have about the matter.

Whether the Government may unexpectedly impose on LEs and MOs an economic burden such as the obligation to provide billing and collection services?

The OTA was enacted in June 2000 after strong efforts towards national consensus. In order to avoid possible adverse effects in the marketplace and considering the complexity of the liberalization process being inaugurated by the new regulatory framework, the OTA provided for a transition period during which the operators already established by the time of entering into effect of the new law, had to adapt their networks and systems. Particularly, the adaptation of the signalling systems was due within six

months following the issuing of the IR. Additionally, the ROBTS provided for implementation periods regarding all the systems making possible the selection of competitive LDOs by users, the last of such periods elapsing on April 5, 2002; that is, almost two years after the entering into effect of the OTA. Therefore, the Draft emerges unexpectedly given that the transition period already expired, the IR do not include the billing and collection facilities amongst the essential resources for interconnection, and provided that article 52 of the ROBTS clearly regards the provision of billing and collection services as optional for LEs. Nevertheless, should the Draft be approved as proposed by the Executive Branch, LEs and MOs would be obligated, in the eyes of the regulator and competitive LDOs, to adapt their billing and collection systems in order to be able to provide the related services to all LDOs requesting it, starting on November 27, 2002. As could be observed, the unexpected imposition of such an economic burden – which among other things is tied up to the destiny of an expendable service tending to turn unnecessary to the extent that LDOs become self-sufficient or decide to switch vendors – may constitute an executive measure which could be regarded as discriminatory or as attempting against the principle of legitimate trust.

Whether the formal obligation of issuing invoices, established by the Venezuelan Value Added Tax Act, may be fulfilled by a third party on behalf of and for account of the obligated tax payer?

Article 10 of the Venezuelan Value Added Tax Act refers to “intermediaries” as those “providing services for account of third parties”. It has been interpreted that such article, consistently with article 4 of the regulations issued under such Act, mandates that intermediaries rendering services for account of third parties also bill for account of and on behalf of such third parties. However, without regard to the accurateness or convenience of such interpretation, we are of the opinion that LEs and MOs cannot be regarded as intermediaries (agents) providing and billing telephone services for account of principals. In the case at bar and as proposed in the Draft, LEs and MOs would bill users for telephone services actually rendered by competitive LDOs, not by LEs and MOs as agents. Therefore, according to such point of view, LEs MOs could not be regarded as intermediaries and, the legal regime applicable to intermediaries with respect to

invoicing obligations would not be applicable to LEs and MOs. Hence, in the light of the above discussion, it seems unavoidable to conclude that the formal duty of issuing invoices, legally mandatory for all value added tax payers (including LDOs), would not be fulfilled by the inclusion of long distance charges corresponding to competitive LDOs services in LEs and MOs invoices. That is, despite such inclusion, the formal duty of issuing invoices could be regarded as remaining with LDOs.

On the other hand, the Value Added Tax Act provides that the Venezuelan Tax Administration (SENIAT) may appoint telecommunications operators as perception agents. Should the SENIAT make use of such faculty, every telecommunications operator being appointed as perception agent, shall have to bill its services with a value added tax surcharge of 8%, that is, with a valued added tax of 24% (16% standard rate + 8%), unless users sufficiently demonstrate their capacity as regular value added tax payers or minimum tax payers. Accordingly, LDOs could be appointed by the SENIAT as perception agents, and therefore, also be obligated to bill their services with a valued added tax of 24%, unless users sufficiently demonstrate their condition as regular value added tax payers or payers of the minimum tax. By viewing the above situation through the lens of the Draft, the following issue shows conspicuously: should LDOs be designated by the SENIAT as value added tax perception agents, could LDOs transfer such responsibility to LEs and MOs when the latter bill and collect for account of LDOs? Well, it is extremely difficult to argue in favour of such transfer. Being hard to affirm, in the light of the legal *status quo* in Venezuela, that the formal duty of issuing invoices may be fulfilled by LEs and MOs on behalf of LDOs, it is even harder to argue in favour of the possibility to legally transfer LDOs' responsibility as perception agents (which may only be designated by statute or by competent authorities acting upon statutory authorization). Should LDOs not fulfill their duties as value added tax perception agents if they are appointed as such by the SENIAT, most probably, the penalties provided by the Venezuelan Organic Tax Code will find their way through. Consequently, it is of the utmost importance that CONATEL deals with the Draft in close coordination with the SENIAT.

Chacao ordinance in jeopardy

On October 29, 2002 the new Municipal Ordinance on Economic Activities enacted by the Municipality of Chacao, Miranda State, Venezuela, will come into force. The purpose of this new municipal law is to create a tax on industrial, commercial and other similar activities and services performed within or from the jurisdiction of the Municipality of Chacao. The local ordinance also regulates the municipal business license required to carry out such activities.

According to the rule, the regular performance of one or more industrial, commercial or similar activities and services is considered a taxable event and the annual gross income attributable to each specific taxable event defines the related tax base. Applicable tax rates vary according to the specific classification of each economic activity included in the Activities Schedule, which is an integral part of the new ordinance. **Group XXIX** of such Activities Schedule expressly identifies telecommunications and interconnection as taxable events, hence levying a 1.5% tax on gross income derived from such activities.

Additionally, the local law mandates that the Executive Branch of the Municipality shall issue special rules to regulate the allocation of gross income derived from telecommunications and from the exploitation of any communications system.

More over, the new law even grants a credit of 50% of the municipal tax to be levied on telecommunication activities being carried out by new taxpayers establishing – within a 3 year period ending on October 29, 2005 – their principal place of business in Chacao.

Thus, among other things, the Municipality of Chacao boldly defies the Venezuelan Organic Telecommunications Act and consistent jurisprudence by the extinct Supreme Court of Justice and by today's Supreme Tribunal of Justice, according to which, it is clearly understood that telecommunications may be taxed only at the national level; considering also that the exclusive legal reserve granted to national authorities by the 1961 and 1999 Venezuelan Constitutions –with respect to telecommunications– refers to the regulatory power as well as to the taxation power. Such criteria has been consistently established by the Venezuelan highest judicial instances in cases involving TELCEL CELULAR, C.A. (6/13/1994, 7/16/1996); RADIO INDUSTRIAL 1160, C.A. (11/11/1999); and CANTV (11/29/2000, 5/23/2002 and 6/19/2002).