

】 **Chacao avoids litigation with telecom operators**

】 **Interconnection: LRIC model placed in limbo**

】 **Municipal tax on electricity service at stake**

**The Municipality of Chacao postpones the application of telecommunications tax**

On November 8, 2002, the new Chacao Ordinance on Economic Activities was modified (despite it had recently entered into effect on October 29, 2002). The Municipality of Chacao opted for suspending the application of its newly created telecommunications tax until the National Legislature, pursuant to number 13 of article 156 of the Constitution, enacts the guidelines which shall coordinate and harmonize the taxing power of the National and Municipal levels of government. Hence, Chacao deferred the debate which was about to start at the Supreme Tribunal of Justice regarding the unconstitutionality of telecommunications taxes created by Municipalities. However, Chacao's desire to tax telecommunications remains. That is, the new Ordinance on Economic Activities empowered the Municipal Executive Branch to design the methodology for the calculation of its telecommunications tax basis, and its recent reformation is merely aimed at preventing the Municipal Executive Branch from issuing such methodology until the National Legislature defines the scope and limitations of the same. Accordingly, it is reasonable to assert that the Municipality of Chacao has not ceased to believe in the existence of its taxing power over telecommunications. Additionally, the reformation expressly states that telecommunications operators shall not be bound by any of the provisions of the new Ordinance on Economic Activities until the National Legislature issues harmonization rules and the Municipal Executive Branch acts accordingly. Thus, Chacao neutralized the strong reaction caused by its new Ordinance amongst telecommunications operators, by delaying a possible judicial action and transferring the debate to the National Legislature where the taxing power of the different levels of Government is to be harmonized. Now, may the National Legislature allow Municipalities to tax telecommunications by imposing an economic activities tax on telecommunications operators? According to the criterion expressed, repeatedly, on the matter by the Supreme Tribunal of Justice, article 156 of the Telecommunications

Organic Act - according to which States and Municipalities may not tax telecommunications - merely reiterates a constitutional principle which cannot be changed via statute.

**Are electricity services taxable with the municipal tax on economic activities?**

The Fourteenth Transitory Provision of the 1999 Venezuelan Constitution grants stability to the municipal ordinances enacted under the Constitution of 1961 and relating to municipal taxes. Such ordinances shall remain in full force and effect until the National Legislature develops, via statute, the new constitutional principles governing municipalities. That is, the constitutional principles governing municipalities and introduced by the Venezuelan Constitution of 1999 shall not enter into effect until the National Legislature develops and interprets such principles via statutes. Certainly, the 1999 Constitution came with important municipal regime changes: the taxing power of municipalities over activities of an industrial, commercial or service nature has been totally redefined. Therefore, it is still to be determined whether a tax on activities of an industrial or commercial nature - named "patente de industria y comercio" by the 1961 Constitution - traditionally paid by electricity companies to Municipalities, may be imposed on such companies under the same terms as those provided by the 1961 Constitution, in the light of the new constitutional principles governing municipal entities. Accordingly, the likeness between the constitutional treatments provided to electricity services and telecommunications services must be highlighted. Actually, the criterion developed by the Supreme Tribunal of Justice regarding the unconstitutionality of telecommunications municipal taxes should also be applied to the municipal taxation of electricity services. Accordingly, it seems accurate to assert that electricity services may only be taxed at the National level because the development of the general regime of electricity services is constitutionally reserved to the National level of government. Additionally, it has to be kept in mind that the new Electricity Services Organic Act reserves the right to provide such services to the National level of government, because such legal mandate allows one to argue that electricity companies are immune to the municipal taxing power. Moreover, regarding electricity generation, such activity implies production of electricity,

and production may only be taxed at the National level. This issue, with no doubt, will bring heated discussions to the table, but necessarily it will have to be dealt with at the National legislature when creating legislation on the harmonization and coordination of the taxing power of the different levels of government. Such legislation may signify the end of the taxation of electricity services by Municipalities.

### **Draft Reformation of the Venezuelan Interconnection Regulations posted for public consultation**

CONATEL called for a public consultation - starting on November 7 and ending on November 26, 2002 - to receive comments from interested parties on the Draft Reformation of the Venezuelan Interconnection Regulations (the "Draft"). The reformation aims at (i) filling up the regulatory vacuum produced, on November 24, 2002, by the expiration of the term for the application by CONATEL of benchmarked based interconnection charges when ordering interconnection; (ii) to empower CONATEL to fix referential interconnection use charges without regard to the Long Run Incremental Costs ("LRIC") model required by the currently in effect Interconnection Regulations, when the regulatory body believes that such model is not applicable to the specific case then at bar; (iii) to expressly consider billing and collection services as resources essential for interconnection; and (iv) to eliminate the regulatory prohibition currently preventing operators to agree on terms and conditions for interconnection when CONATEL has already intervened in the process and the corresponding interconnection order has not been issued by the regulator. Such Draft demands that we make some comments on it.

#### LRIC model placed in limbo

The proposal contained in the Draft to indefinitely extend the duration term of the benchmark-based interconnection charges being used by CONATEL until November 26, implies an indefinite extension of the term prior to the application of a LRIC model, and also, comes together with the empowerment of CONATEL to substitute the values of a new benchmark survey, or the information about costs submitted by operators, for such benchmarked-based values being used by CONATEL until November 26. In the light of such proposal, one must consider the legality and convenience of granting to CONATEL such discretionary power. At first sight, it does not appear appropriate to confer to the regulator freedom to decide when a LRIC model shall be applied, given that such model was conceived as an unavoidable legal requirement because it constitutes the most efficient way for the orientation of interconnection

charges towards costs. Therefore, the legal objective of fostering competition and economic efficiency would be compromised, and the fixing of high interconnection charges would be eased. That would negatively impact the development of the so called "critical resources" associated to Universal Service. Additionally, the ability of the regulator to discretionarily modify benchmark-based interconnection charges by replacing them with costs information provided by operators, would jeopardize the confidence in the law of the Venezuelan telecom market players - already affected by the world recession - and would create transparency problems and favour discriminatory treatments by a regulator whose autonomy must be preserved above all. One of the acknowledged virtues of the Venezuelan Telecommunications Organic Act and its Regulations, has been the reduction of the discretionary power of the regulator in order to favour its autonomy and legal certainty. Today, such virtue appears dubious.

#### More discretionary powers for CONATEL

Moreover, the Draft proposes that the LRIC model to be approved by CONATEL at some point in the future shall not be of mandatory observance by the regulator when ordering interconnection. So, what is proposed is that CONATEL, on a case-by-case basis, may opt for ignoring the LRIC model, and fix interconnection charges on the ground of values obtained from international benchmarks or information about costs provided by the operator to be ordered interconnection. If the currently-in-effect Interconnection Regulations are modified as proposed, such reformation will constitute a new source of discretionary power for the regulator causing the undesirable consequences mentioned above.

#### Billing and collection services are qualified, again, as "essential" resources for interconnection.

Ultimately, the Draft makes its own the purpose of the "Draft Regulations on the Provision of Billing and Collection Facilities for Account of and Upon Request of Long Distance Operators", which approval is still pending after the public consultation carried out during last September (see our Newsletter # 6, September Issue). Accordingly, pursuant to the Draft, the term "essential resource" refers not only to network elements, but also to functions and capabilities; thus making it clearer that billing and collection facilities may, by definition, constitute essential resources. Additionally, such facilities are included in the enumeration of interconnection essential resources contained in article 12 of the Draft. Certainly, this proposal consistently complements the Draft Regulations on the Provision of Billing and Collection Facilities for Account of and Upon

Request of Long Distance Operators. However, the legal obstacle represented by the fact that billing and collection facilities do not appear as essential resources for interconnection, is still present. Actually, the essentiality of an element is generally associated to its indispensability and to the availability of technical and economically affordable alternatives in the market. Therefore, as we commented in our September Newsletter, it can be interpreted that billing and collection facilities are not that essential in Venezuela, specially when the party requesting interconnection can carry out such tasks by itself in efficient economic and operational conditions, and when such services can be provided by specialized collection agencies today widely available in the Venezuelan market.

**The Venezuelan Tax Administration (SENIAT) issued precise rules on the procedure to be followed by power generating companies in order to be exempted from Value Added Tax.**

The Venezuelan Executive Branch, by means of Presidential Decree # 1,717 of March 22, 2002 - published in Official Gazette # 37,411 of March 25, 2002 - in order to attend the natural and critical situation of the electricity sector, exempted the importations of goods, equipment, materials and resources by electric power generating companies from paying Value Added Tax, as long as such importations are necessary to diminish the national risk of insufficiency of electricity. The effectiveness of such fiscal benefit depends on the completion of a procedure established in the SENIAT's Resolution # SNAT/2002/1.090 published in Official Gazette in last October 28. The Resolution requires the filing before the Tax Administration of a motivated exemption authorization for each importation, together with, among other requisites: (i) a certificate by the Energy and Mines Department evidencing that the goods to be imported are necessary for the provision of electricity given the risk of insufficiency of electrical power; and (ii) a certificate by the Production and Commerce Department evidencing that unavailability in Venezuela of the goods to be imported or that the domestic supply of the same is insufficient. Likewise, it is established that the administrative decision granting or denying the fiscal benefit, shall be issued within the 15 days following the filing of the corresponding petition, and that the goods can be nationalized only after such decision has been notified to the petitioner.