

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Petitions for Protection from Whipsawing) IB Docket No. 03-38
on the U.S.-Philippines Route)

REPLY OF WORLDCOM

WorldCom, Inc. (“WorldCom”) hereby submits this Reply to the Oppositions filed by the Philippine Long Distance Telephone Company (“PLDT”) and Globe Telecom (“Globe”) in the above-referenced proceeding. PLDT and Globe oppose the Petitions filed by WorldCom and AT&T requesting that the Commission take action to prevent whipsawing on the U.S.-Philippines route. As WorldCom and AT&T explain in their separate Petitions, PLDT and other Filipino carriers have blocked the traffic of WorldCom and AT&T terminating in the Philippines.¹

As set forth herein, PLDT and Globe have not raised any new relevant issues in their Oppositions. Indeed, their Oppositions reflect a fundamental misunderstanding of the Commission’s public interest mandates and policies. The simple fact remains that PLDT is blocking the traffic of two U.S. carriers, while not blocking other U.S. carriers, in an attempt to

¹ See Public Notice, DA 03-390, IB Docket No. 03-38 (Feb. 10, 2003). In an *Ex Parte* letter filed on February 21, 2003, WorldCom informed the Commission that Smart Telecommunications had begun blocking WorldCom’s traffic terminating on Smart’s network in the Philippines. On February 21, 2003, Smart resumed accepting WorldCom’s traffic.

unilaterally increase its international settlement rates in the Philippines. The Commission should issue an order for non-payment immediately to prevent further harm to U.S. carriers and consumers from this disruption of service on the U.S.-Philippines route.

I. THE ACTIONS OF PLDT CONSTITUTE A CLASSIC “WHIPSAW” REQUIRING SWIFT ENFORCEMENT ACTION BY THE COMMISSION

As WorldCom demonstrates in its Petition, PLDT’s decision to block all traffic sent from WorldCom to PLDT’s network in the Philippines in retaliation for WorldCom’s refusal to agree to a 50 percent increase in the international settlement rate is a classic case of “whipsawing.”² In its Opposition, PLDT confirms that it is blocking WorldCom’s traffic.³ Rather than deny that it has whipsawed U.S. carriers by blocking their traffic, PLDT asserts that, “in markets where the ISP ceases to be applicable, there is no basis for a whipsaw claim.”⁴ PLDT’s assertion is incorrect.

A. The Commission’s whipsawing policy is enforceable on routes where ISR has been authorized or the ISP has been removed

The Commission has never suggested that, where ISR has been authorized or the ISP has been removed, it would not intervene to protect U.S. consumers and carriers from blatant abuses of market power by foreign carriers. The Commission has made clear that its adoption of the

² Petition of WorldCom, Inc. for Prevention “Whipsawing” on the U.S.-Philippines Route, filed Feb. 7, 2003 (“WorldCom Petition”), at 4.

³ PLDT’s Consolidated Opposition to AT&T and WorldCom Petitions, IB Docket No. 03-38, filed Feb. 21, 2003 (“PLDT Opposition”), at 16.

⁴ *Id.* at 15-17. PLDT acknowledges that the ISP in fact has *not* been eliminated on the U.S.-Philippines route, but makes the surprising argument that the Commission’s procedural requirements for ISP removal on the route are “irrelevant.” *Id.* at 6, n.14.

ISR policy and the ISP-removal standard were based on its goal of furthering competition for international services. Commission stated that, “allowing ISR would promote the public interest in increased competition and reduced prices for international telecommunications services.”⁵ The Commission recognized, however, that ISR could present competitive concerns in the U.S. market by encouraging “one-way bypass,” which the Commission describes as “any practice by which a foreign carrier terminates U.S.-inbound traffic at low rates and exercises its market power to require that U.S. carriers pay much higher rates to terminate traffic in the foreign market.”⁶ Similarly, the Commission indicates that removal of the ISP is warranted only where there is a competitive market on the foreign end, reasoning that in such situations “the foreign carrier lacks [the] ability unilaterally to set the terms and conditions for the termination of international traffic.”⁷

Contrary to PLDT’s assertion that the Commission’s policies against whipsawing are unenforceable on non-ISP routes, however, the Commission’s policy in fact is that even on such routes it might need to intervene to prevent competitive distortion in the U.S. international services market. Thus, the Commission explicitly recognized that, “in certain unusual circumstances a foreign carrier ... might possess some ability unilaterally to set rates for terminating U.S. traffic due to ... collusive behavior in the foreign market. In such cases, the

⁵ *Regulation of International Accounting Rates*, Phase II, 7 FCC Rcd 559, at 560, ¶ 8 (1991).

⁶ *1998 Biennial Regulatory Review, Reform of the International Settlements Policy and Associated Filing Requirements*, 14 FCC Rcd 7963, at 7968, ¶ 13 (1999) (“*ISP Reform Order*”).

⁷ *Id.* at 7971, ¶ 22.

Commission may be required to take appropriate remedial action.”⁸ This is precisely the situation that U.S. carriers are faced with by their Philippines correspondents. Moreover, the Commission has “reserv[ed] the right to take appropriate action to remedy the situation” where a U.S. carrier that is affiliated with a foreign carrier that possesses market power in the foreign market enters into an arrangement that may present a “significant adverse impact on competition.”⁹

Taken to its logical conclusion, PLDT is arguing that the Commission has no ability to intervene on routes where it has authorized ISR or removed the ISP, even in the face of collusive behavior and abuse of market power on the foreign end that harms competition and U.S. carriers and consumers. This assertion clearly is wrong, as the Commission never eliminated its obligation to act to protect the public interest. The Commission should dismiss PLDT’s assertion out of hand.

B. The *Telintar Order* provides support for the relief that WorldCom has requested

PLDT further asserts that the *Telintar Order*¹⁰ cited in the WorldCom and AT&T Petitions does not support the granting of the relief sought because it is not analogous to the

⁸ *Id.* at 7973, ¶ 30.

⁹ *Id.* at 7990, ¶ 72. PLDT US’ arrangement to terminate traffic with its affiliate PLDT – an arrangement denied to WorldCom and AT&T -- obviously violates this rule. The Commission should take action against PLDT US to remedy the situation.

¹⁰ *Proposed Extension of Accounting Rate Agreement for Switched Voice Service to Argentina*, 14 FCC Rcd 8306 (1999) (“*Telintar Order*”).

instant situation.¹¹ First, PLDT tries to differentiate that decision by claiming that Telintar was a monopoly while PLDT is not. This argument is irrelevant. The Commission has never concluded that it would act to prevent whipsawing by monopoly carriers but not by carriers that are not pure monopolies but that have market power. To the contrary, the Commission has long recognized the “need to ensure that foreign carriers do not abuse their market power in negotiations with U.S. carriers,” not just those carriers with monopoly power.¹²

Nor are the other fact differences highlighted by PLDT -- that the rates in question in the *Telintar Order* were above the benchmark rates, that AT&T had an existing and interim agreement with Telintar, and that AT&T was demanding a rate decrease rather than resisting an increase – relevant. In fact, the Commission’s sole concern was the fact that Telintar had blocked one U.S. carrier’s circuits as a result of that carrier’s attempts to more aggressively negotiate than other U.S. carriers. Thus the Commission concluded that “Telintar’s *actions to disrupt U.S. international service* and to continue such disruption” (emphasis added) alone warranted the Commission’s order to suspend settlement payments to Telintar.¹³ As AT&T noted in its Petition, there is simply no difference between retaliatory action taken in response to an attempt to negotiate a lower rate, as was the action of Telintar, and retaliatory action taken in response to a refusal to accept a rate increase, as PLDT and other Philippines carriers have

¹¹ PLDT Opposition at 19.

¹² *Policy Statement on International Accounting Rate Reform*, 11 FCC Rcd 3146, at 3149, ¶ 19 (1996).

¹³ *Telintar Order*, at 8314, ¶ 11.

undertaken here.¹⁴ Indeed, the Commission acknowledged that blocking of circuits by Philippines carriers would amount to whipsawing in its January 31st letter to the NTC.¹⁵

Put simply, through abuse of its market power, PLDT has retaliated against WorldCom for its refusal to agree to a unilateral settlement rate increase. This discriminatory and retaliatory behavior is classic whipsawing, nearly identical to the actions taken by Telintar, and must be addressed by the Commission.

II. THE COMMISSION SHOULD APPLY U.S. LAW AND REGULATION TO PREVENT WHIPSAWING

PLDT and Globe both argue that the Commission should give deference to the Philippine administration – applying the principle of international comity – to allow PLDT and other Philippines carriers to disrupt service on the U.S.-Philippines route.¹⁶ The Commission, however, is not being asked to interfere with the NTC’s decisions. Rather, the Commission must address a clear violation of U.S. law. In upholding the *Benchmarks Order*, the U.S. Court of Appeals for the D.C. Circuit stated that the Commission may lawfully exercise its statutory authority to regulate U.S. carriers’ provision of international services, even if such regulation has extraterritorial consequences.¹⁷

Moreover, the Commission has made clear that it will exercise international comity only

¹⁴ See AT&T Petition at 8.

¹⁵ See Letter from Donald Abelson, Chief, International Bureau, FCC to Hon. Armi Jane Borje, Commissioner, National Telecommunications Commission, January 31, 2003 (stating that the “FCC has previously deemed the disruption of select U.S. carrier networks in the course of rate negotiations to be ‘whipsawing’....”)

¹⁶ PLDT Opposition at 22-23. Globe Opposition at 10-12.

¹⁷ *Cable & Wireless v. FCC*, 166 F.3d 1224, 1229-30 (D.C. Cir. 1999).

in exceptional circumstances where certain foreign governments that had explicitly prohibited callback faced unusual difficulties in enforcing its domestic laws and regulations.¹⁸ Thus, the Commission rejected a request for international comity by a foreign carrier that argued that granting of an alternative settlement rate arrangement in the United States would conflict with the regulations of its home market. The Commission concluded in that decision that by approving the alternative settlement arrangements, “we are finding solely that the petitions comply with Commission regulations ... and that Commission approval ... would not be condoning” efforts to circumvent foreign laws.¹⁹ The Commission now must act to enforce U.S. law and regulation, regardless of the limited practical effect such action might have on the Philippines.²⁰ In sum, international comity is neither necessary nor appropriate in this circumstance.

III. THE COMMISSION MUST RESPOND TO WHIPSAWING EVEN WHERE SETTLEMENT RATES ARE BELOW BENCHMARK LEVELS

PLDT argues that the Commission does not have the authority or jurisdiction to intervene here because settlement rates have decreased on the U.S.-Philippines route to levels that are

¹⁸ See *Petition of AT&T Corp. and MCI WorldCom, Inc. For Declaratory Ruling Regarding Alternative Accounting Rate Arrangements for Service between the United States and Mexico*, 14 FCC Rcd 6358, at 6361-62, ¶ 7 (1999), citing *VIA USA Order*, 10 FCC Rcd 9549 (1995).

¹⁹ *Id.*

²⁰ WorldCom notes that the assertions by PLDT and Globe that the NTC has approved their unilateral settlement rate increases are incorrect. In its February 7th Order, the NTC simply refers to the Commission’s Benchmark and ITU rates, but does not explicitly approve the proposed settlement rates. In fact, PLDT admits that the international “termination rates are not mandated by the Honorable Commission or any other Philippine governmental agency.” See PLDT Opposition, Exhibit 11 at 1. Nor is it clear that any action taken by the Commission would be inconsistent with any NTC action, including the NTC’s February 7th Order which requires Filipino carriers to “keep[] open your communications circuits to promote the PUBLIC SERVICE AND NATIONAL WELFARE.” See Memorandum Order, NTC, February 7, 2003.

below that set forth in the Commission's *Benchmark Order*.²¹ PLDT's claim is not only irrelevant, but is wrong.

First, WorldCom has requested that the Commission address PLDT's drastic and discriminatory decision to block WorldCom's traffic. PLDT, however, is in effect arguing that it should be free to blatantly whipsaw selected U.S. carriers without response from the Commission simply because settlement rates in the Philippines have moved below Benchmark levels. Surely the Commission would not agree. PLDT's attempt to shift the Commission's focus from its blocking of traffic to the appropriate decreases in its settlement rates over the past few years should be dismissed.

Second, PLDT ignores the Commission's repeated and longstanding statements that its goal is cost-oriented international termination rates.²² Indeed, when it adopted the *Benchmarks Order*, the Commission clearly intended the benchmark rates to represent a ceiling for settlement rates, and not an indication of the actual cost of terminating international traffic. Thus the Commission has repeatedly recognized that the benchmark rates are considerably above actual cost-based levels.²³ PLDT's assertion, therefore, that the Commission never has authority or jurisdiction to intervene where settlement rates are below Benchmark levels is obviously wrong.

²¹ PLDT Opposition, at 12-13.

²² See, e.g., *Benchmarks Order*, 12 FCC Rcd 19,806, at 19, 855, n.176 ("We reiterate that our goal is ultimately to achieve settlement rates that are cost-based"); *AT&T Corp., Petition for Waiver of the International Settlements Policy to Change the Accounting Rate Arrangement for Switched Voice Service with Japan*, 12 FCC Rcd 18,287, ¶ 8 (1997) ("*Japan Flexibility Order*") ("The Commission's longstanding goal for international settlement rates is cost-based rates...").

²³ *International Settlements Policy Reform*, IB Docket No. 02-234, Notice of Proposed Rulemaking, rel. Oct. 11, 2002, ¶ 44. See also *Benchmarks Order*, 12 FCC Rcd at 19, 855-56, ¶ 102.

Third, PLDT and Globe do not demonstrate that their unilateral 50 percent settlement rate increase demands are cost-justified. Instead, PLDT merely states that it has a “need to increase revenues” because volume increases promised by AT&T and WorldCom did not materially occur.²⁴ PLDT then asserts that the 8-cent settlement rate previously in effect suddenly is “not properly compensatory.”²⁵ Not surprisingly, WorldCom has been unwilling to simply agree to pay higher rates without more cost-justification than the conclusory statements that PLDT needs to increase revenues because the previous rate was not properly compensatory. Every company has a need to increase its revenues, but it is inappropriate to do so through the abuse of market power in violation of U.S. law and regulation, to the detriment of U.S. carriers and consumers.

Finally, PLDT suggests that it had numerous negotiation sessions with WorldCom and that WorldCom simply refused to agree to a new termination agreement. PLDT attempts to characterize these purported negotiations, and its subsequent blocking of traffic, as typical where no agreement is reached prior to the end-date of an existing rate schedule.²⁶ Contrary to PLDT’s assertions, its actions were anything but typical.

In fact, there were no bilateral or mutual “negotiations” to speak of. For example, in a

²⁴ PLDT Opposition at 6-7. PLDT’s claim that “volumes have not materially increased” on the U.S.-Philippines route is surprising. According to Telegeography and the Commission’s Section 43.61 Reports, traffic terminating in the Philippines from the United States increased 184 percent, from 573 million minutes to 1.627 billion minutes, between 1998 and 2001. See *Telegeography* 2000, 2001, 2002, and 2003. See also Section 43.61 Reports for 1998, 1999, 2000, and 2001. Moreover, PLDT has stated that its own inbound traffic from the United States increased from 433 million minutes to 1.1 billion minutes between 1999 and 2000, hardly an immaterial increase. See PLDT’s SEC Form 20-F, “Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the fiscal year ended December 31, 2000,” at 29.

²⁵ PLDT Opposition at 7-8.

²⁶ *Id.* at 8.

faxed letter on December 13, 2003, PLDT simply informed WorldCom that “PLDT *will apply*” (emphasis added) the increased rates effective February 1, 2003, without characterizing its letter as a proposal.²⁷ Similarly, in its January 9, 2003, letter PLDT simply referred to its “pending rate alignment,”²⁸ and finally on January 31, 2003, PLDT rejected a WorldCom counterproposal by stating that the increased rates will come into effect “for all relations without exception.”²⁹ Put simply, PLDT was never willing to truly negotiate, rather than impose, a new settlement rate. PLDT implies that it is standard to block traffic because the “operative agreements have now lapsed.” This does not reflect industry practice.³⁰ To the contrary, WorldCom has a long, well-documented history of bilaterally and retroactively agreeing to rates with PLDT -- and every one of WorldCom’s international correspondents -- after previously agreed rates were no longer “operative.” In such circumstances, it is WorldCom’s standard practice to continue to exchange traffic at the previously agreed rate until a new arrangement is in place, at which time payments can be adjusted retroactively.

In sum, PLDT has simply attempted to impose its settlement rate increases on WorldCom. When WorldCom continued to insist on bilateral negotiations, PLDT blocked its traffic. Such discrimination should be addressed regardless of the level of the settlement rates in question.

²⁷ See *Id.*, Exhibit 3.

²⁸ *Id.*, Exhibit 5.

²⁹ *Id.*, Exhibit 8.

³⁰ *Id.* at 8.

IV. CONCLUSION

Neither PLDT nor any other Philippines carrier raises new issues in response to the Petitions of WorldCom and AT&T. The simple fact remains that PLDT is blocking WorldCom's traffic in retaliation for WorldCom's refusal to accept a unilateral settlement rate increase. PLDT has not blocked the traffic of most other U.S. carriers. PLDT's discriminatory action is a classic case of whipsawing. The Commission, therefore, should grant WorldCom's request that it take immediate action to order all U.S. carriers to suspend payments to PLDT until traffic is fully restored. The Commission must send a clear message that it will not permit foreign carriers with market power to whipsaw U.S. carriers.

Respectfully submitted,

WORLDCOM, INC.

By: /s/ Scott A. Shefferman

Scott A. Shefferman
1133 19th Street, NW
Washington, DC 20036
(202) 736-6064

Its Attorney

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CERTIFICATE OF SERVICE

I, Maria Ialacci, hereby certify that on this 26th day of February, 2003, a copy of this “WorldCom Reply” was delivered by first class mail to the persons listed below.

Don Abelson*
Chief, International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Patricia Cooper*
Chief, Regional and Industry Analysis Branch
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Jackie Ruff*
Assistant Bureau Chief
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Anita Dey*
Regional Specialist, Regional
and Industry Analysis Branch
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

James Ball*
Chief, Policy Division
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Margaret K. Pfeiffer
Thomas R. Leuba
Sullivan & Cromwell LLP
1701 Pennsylvania Avenue, NW
Washington, DC 20006

Kathryn O'Brien*
Chief, Strategic Analysis and
Negotiations Division
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Henry Goldberg
Jonathan Wiener
Joseph Godles
Goldberg, Godles, Wiener & Wright
1229 19th Street, NW
Washington, DC 20036

Lisa Choi*
Senior Legal Advisor, Policy Division
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Patricia J. Paoletta
Suzanne Yelen
Jennifer D. Hindin
Heather O. Dixon
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, DC 20006
(Counsel for Verizon & Globe Telecom)

Claudia Fox*
Deputy Chief, Policy Division
Federal Communications Commission

445 12th Street, SW
Washington, DC 20554

Mark C. Rosenblum
Lawrence J. Lafaro
James J.R. Talbot
One AT&T Way
Bedminster, New Jersey 07921

Michael J. Mendelson
Jones Day
51 Louisiana Avenue
Washington, DC 20001
(*Counsel for Digicel Limited*)

William S. Parmintuan
Ricardo M. Dira
Digital Telecommunications Phils., Inc. (DIGITEL)
110 E. Rodriguez, Jr. Avenue
Bagumbayan, Quezon City
Philippines 1100

/s/ Maria Ialacci
Maria Ialacci

* Delivered by hand