

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

In the Matter of)	
)	IB Docket No. 03-38
Bayan Telecommunications Company)	
Digital Telecommunications Philippines, Inc.)	
Globe Telecom, Inc.)	
Philippines Long Distance Telephone Company)	
Smart Communications, Inc.)	
Subic Telecom)	
)	
AT&T Emergency Petition for Settlements)	
Stop Payment Order and Request for)	
Immediate Interim Relief)	

**AT&T REPLY TO OPPOSITIONS TO EMERGENCY PETITION
FOR SETTLEMENTS STOP PAYMENT ORDER
AND REQUEST FOR IMMEDIATE INTERIM RELIEF**

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Dated: February 27, 2003.

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SUMMARY

The Philippines Long Distance Telephone Company (“PLDT”), Globe Telecom, Inc. (“Globe”) and the other carriers listed in AT&T’s Emergency Petition filed on February 7, 2003 have now continued to block the large majority of AT&T’s customers’ calls to the Philippines for almost one month to force an unjustified 50 percent rate increase -- in blatant violation of the Commission’s longstanding prohibition on whipsawing and its policies encouraging the negotiation of cost-based rates.

PLDT and Globe’s Oppositions admit that they are blocking some or all of AT&T’s traffic because of AT&T’s refusal to pay increased rates. Digital Telecommunications Philippines, Inc. (“Digitel”) denies any blocking, but its completion rates have still not returned to pre-February 1 levels. PLDT and Globe contend their actions are justified by the absence of agreed termination rates -- although the underlying service agreements continue in full force and effect, and their conduct violates the industry practice of *continuing* service while negotiations continue, not blocking traffic. They also contend that the Commission’s anti-whipsaw policy does not apply below benchmarks, on ISR routes or to nondominant carriers -- although the Commission is authorized to take action on all routes, irrespective of the type of traffic arrangement or the level of rates, to prevent harm to the public interest from the abuse of foreign market power and to promote the public interest in cost-based rates.

PLDT, Globe and Digitel also make no attempt to show their 50 percent rate increase is cost-based and can show no legal or regulatory requirement for Philippines carriers to charge the same rates to U.S. carriers. Indeed, PLDT has strenuously maintained to its own regulator that international termination rates are “not mandated” by law or regulation in the Philippines. Nor are the Philippines carriers required to block traffic, as the February 26, 2003

letter from two Philippines regulators confirms. Therefore, PLDT and Globe are also wrong in claiming that considerations of international comity should control, because there is no conflict here even if such considerations were relevant to the Commission's anti-whipsaw and settlement rate policies, which they are not.

The Commission immediately should order all U.S. carriers to stop all settlements payments to the carriers listed in AT&T's petition until all circuits are restored, as it has responded to similar foreign carrier whipsaw conduct in the past. The Commission also should require the withdrawal of the service termination letters AT&T has received from three Philippine carriers in support of this whipsaw, and should make clear that it will stand ready to take further action if any Philippine carrier engages in further retaliatory action following the issuance of a stop payment order, as Globe threatens in its Opposition.

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AND REQUEST FOR IMMEDIATE INTERIM RELIEF.**

AT&T Corp. (“AT&T”) hereby submits this Reply to the Consolidated Opposition by the Philippine Long Distance Company (“PLDT”) and the Opposition by Globe Telecom (“Globe”) filed on February 21, 2003 and the Comment by Digital Telecommunications Philippines, Inc. (“Digitel”) in response to the AT&T Emergency Petition For Settlements Stop Payment Order and Request For Immediate Relief filed on February 7, 2003, the similar petition by WorldCom, Inc. (“WorldCom”), and the Commission’s public notice released on February 10, 2003.¹ PLDT, Globe and Digitel fail to rebut AT&T’s evidence that these and other foreign carriers in the Philippines, Bayan Telecommunications Company (“Bayantel”), Smart Communications, Inc. (“Smart”) and Subic Telecom (“Subic”), are blocking AT&T traffic to the

¹ Public Notice, *Petitions For Protection From Whipsawing on the U.S.-Philippines Route*, IB Docket No. 03-38, DA 03-390, rel. Feb. 10, 2003.

Philippines to force an unjustified 50 percent increase in termination rates, in blatant violation of the Commission's longstanding prohibition on whipsawing.

The Commission immediately should prohibit all U.S. carriers from making any payments to these foreign carriers until all circuits are restored. The Commission also should require the withdrawal of the service termination letters AT&T has received from three Philippine carriers in support of this whipsaw, and make clear that it will take further action if any Philippine carrier engages in the further retaliatory action threatened by Globe or any other subsequent disruption of service in support of these unjustified demands for higher rates.

I. PHILIPPINE CARRIERS ARE BLOCKING AT&T TRAFFIC IN RETALIATION FOR AT&T'S REFUSAL TO AGREE TO HIGHER RATES.

PLDT and Globe admit that they are blocking some or all of AT&T's traffic to the Philippines because of AT&T's refusal to pay increased rates. Digital denies blocking, but its traffic completion rates are still below pre-February 1 levels. The other Philippine carriers named in AT&T's petition have not responded to the Commission's notice. PLDT and Globe claim their conduct is warranted by the absence of an agreed termination rate with AT&T, but AT&T's service agreements with these carriers remain in effect, and blocking traffic in these circumstances is contrary to the industry practice of continuing service while rate negotiations continue.

As AT&T described in its petition (p. 8), and to which PLDT offers no rebuttal, PLDT's U.S. affiliate has sought to increase PLDT's whipsaw pressure on AT&T by notifying U.S. carriers accepting the increase that PLDT was refusing to accept traffic from non-agreeing U.S. carriers, and encouraging them to exploit this opportunity to increase their traffic to the Philippines by offering additional circuits and discounted rates.

1. The Philippine Carriers Are Blocking AT&T's Traffic.

AT&T's network data shows that since February 1, 2003, Philippine carriers have blocked almost all of the traffic sent to them by AT&T. The chart at Attachment A shows that AT&T's total answer seizure ratio ("ASR") with the Philippines carriers, which is normally around 35-40 percent was under 10 percent from February 1 through February 7, 2003, and under 5 per cent after then.²

PLDT states (p. 2) that AT&T "is not being permitted to directly terminate its traffic using PLDT's facilities," because (p. 9) AT&T "will not agree to appropriate rates for PLDT's services." Similarly, PLDT concedes (*id.*) that AT&T has merely refused to pay its proposed "rate increase" of 4 cents per minute.³ AT&T's network data shows that PLDT has terminated almost none of the traffic sent by AT&T since February 1, 2003.⁴ Indeed, PLDT is now blocking all operator-handled calls in addition to all direct dialed calls.

² See ITU-T Recommendation E.425, Nov. 1998, Section 1.3 ("ASR gives the relationship between the number of seizures that result in an answer signal and the total number of seizures."). *See also*, ITU-T Recommendation E.437, May 1999, Section 3.1 ("The ability to complete calls is perhaps one of the most important measures of network performance, and ASR has long been used to indicate such.") The declaration by Mark Miller of AT&T (Attachment B hereto) affirms that all facts stated in this Reply are true and correct.

³ PLDT wrongly suggests that AT&T is refusing to pay *at all* for termination of its traffic with PLDT. *See* PLDT at 2 ("each company is not being permitted to directly terminate its traffic using PLDT facilities for the simpler reason that *they have refused to pay* for the service they are demanding") (emphasis added); *id.* at 8 ("AT&T and WorldCom made clear *they would not pay* for termination of their traffic") (emphasis added).

⁴ The chart at Attachment C shows separate ASR information for each Philippines carrier. The ASR for AT&T traffic sent to PLDT, normally around 40 percent, has been close to zero since February 1, 2003.

Because of the traffic blockage by the Philippine carriers and higher alternative routing costs to the Philippines since February 1, 2003, AT&T today is now losing about two thirds of its normal traffic volumes to the Philippines as the result of this action.⁵ Moreover, PLDT's competitors in the Philippines have acted in concert by demanding the same rate increase and refusing to terminate traffic destined for their own or their competitors' networks, and therefore any past statements by AT&T that it could "terminate traffic in the Philippines without PLDT" (PLDT Opposition, p. 3) that were made on the reasonable assumption that in a competitive market AT&T could use the other Philippines carriers to by-pass PLDT obviously are no longer relevant.

Globe admits (pp. 3-4) that it "requested AT&T to stop sending Globe traffic" when AT&T refused to pay the increased rate, and that it is refusing to terminate traffic destined for other carriers' networks.⁶ AT&T disputes the claims by Globe (p. 3) that it continues to

⁵ As described in the attached Declaration by Mark Miller of AT&T (¶ 2), during February 2 through 6, 2003, AT&T was actively searching for and testing alternative routes for its traffic to the Philippines. The instability of these routes during that period suggested that AT&T would not be able to complete more than a small proportion of its calls to the Philippines, either directly or through alternative routes. AT&T's subsequent analysis indicates that about 20 percent of AT&T's overall traffic failed to terminate in the Philippines during that period. The remaining 80 percent of AT&T's traffic that did get through chiefly through use of alternative routes, however, suffered from higher costs and, in some cases, lesser quality. The small proportion of the traffic that got through on a direct basis also suffered from poor quality and required repeated dialing attempts by consumers. Due to the increased cost for alternative routes, AT&T also subsequently lost significant traffic volumes to the Philippines. Since February 11, AT&T has lost roughly two-thirds of its former traffic volumes on this route and is required to use alternative routes for this traffic at increased cost and frequently reduced quality.

⁶ The Philippine carriers, or their affiliates, are local exchange carriers in the Philippines. Inbound international calls may be terminated on a Philippine carrier's own local network ("on-net traffic") or handed off and terminated on another Philippine carrier's local network ("off-net traffic"). International traffic may be blocked at the international

terminate AT&T's traffic destined for its own network. AT&T's network data shows that Globe has terminated virtually none of the traffic AT&T has sent this carrier since February 1, 2003.⁷ Globe also threatens (p. 10) further retaliation against any FCC stop payment order, contending that "Globe Telecom's enforcement of its contract rights and the subsequent notice and termination of circuits will be reasonable behavior towards a carrier from which Globe Telecom has no reasonable expectation of concluding a service agreement nor reasonable expectation of being paid."

PLDT, Globe, and Smart, together normally account for more than 80 percent of AT&T's traffic to the Philippines, and are blocking all or virtually all traffic, and Bayantel, which normally accounts for 3 percent of AT&T's traffic to the Philippines, continues to block the large majority of traffic.⁸ Subic, which carries VoIP traffic normally accounting for under 3 percent of AT&T's traffic to the Philippines, has engaged in periodic blocking since February 1, 2003.⁹

AT&T's network data belies Digital's denial of any blocking (p. 5) and shows that

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gateway, elsewhere on the Philippine carrier's own network, or to prevent hand-off to another Philippines carrier.

⁷ The ASR for AT&T traffic sent to Globe, which is normally around 40 percent, has been close to zero since February 1, 2003. *See* Attachment C.

⁸ The ASR for AT&T traffic sent to Smart, normally around 40 percent, has been close to zero since February 8, 2003, and that the ASR for AT&T's traffic to Bayantel, which is normally around 60 percent, has been at around 10 percent since February 6, 2003. *See* Attachment C.

⁹ *See* Attachment C.

this carrier was blocking about a third of AT&T's traffic before AT&T filed its petition.¹⁰ Digitel, which normally accounts for about 6 percent of AT&T's traffic to the Philippines, is now terminating greater numbers of AT&T's calls on its network, but its completion levels have not completely returned to former levels.¹¹

2. **The Philippine Carriers Have No Legitimate Justification For Their Actions.**

PLDT and Globe wrongly contend that their whipsaw conduct is justified by the absence of an agreed termination rate with AT&T. PLDT seeks excuse (p. 8) in the fact that "operative agreements have now lapsed despite many months of negotiation," but the underlying International Telecommunications Service Agreement that AT&T and PLDT signed in 1986 remains in effect and does not allow the disruption of service merely because particular rates, contained in a separate annex, may expire.¹² Globe's similar argument (p. 4) is equally flawed.¹³

¹⁰ The ASR for AT&T traffic sent to Digitel, which is also normally around 60 percent, fell to under 40 percent from February 2 through 6, 2003, and has been between 50 and 60 percent since February 7. See Attachment C. Digitel's Annex C, apparently showing completed call minutes, shows that such minutes were reduced by more than 50 percent from February 1 through February 6, which is consistent with AT&T's data.

¹¹ Under Section 1 of the International Telecommunications Services Agreement between AT&T and Digital, AT&T and Digital agreed "to provide and *maintain* direct telecommunications service between the Philippines and the United States." (Emphasis added.) Section 7 (e) of the agreement requires each party to "*maintain* interconnection of the international circuits with the national network within its country or territory." (Emphasis added.)

¹² See, e.g., PLDT Exhibit 9 at 2-5 (amended Annex A to the International Telecommunications Services Agreement as proposed by PLDT). Under Section 1 of the International Telecommunications Services Agreement, AT&T and PLDT agreed "to the establishment and *continuance* of telecommunications services between the Philippines and the United States." (Emphasis added.) Section 8 (c) of the agreement requires each party to "*maintain* interconnection of the international circuits with the national network within its country or territory." (Emphasis added.)

¹³ Under Section 1 of the International Telecommunications Service Agreement between

The expiration of rate agreements between U.S. and foreign carriers is a frequent occurrence, and the industry practice is to continue service while negotiations continue, not to block traffic.

Three of the Philippine carriers that are demanding higher rates and have blocked traffic have also recently sought to terminate their underlying service agreements with AT&T by giving 180 days notice of such termination. AT&T has received such letters from Bayantel (dated February 10, 2003), Digitel (dated January 30, 2003), and Smart (dated February 11, 2003). These carriers' efforts to terminate service with AT&T in support of their demands for higher rates would have the same effect as their blockage of AT&T's traffic and circuits, and also contravene the Commission's anti-whipsaw policy. The Commission accordingly should require the withdrawal of these termination letters before lifting any stop payment order issued here.

PLDT's so-called "interim" arrangements offered to AT&T on January 31, 2003, and February 13, 2003, required AT&T to pay the very increases that PLDT was already seeking -- 12 cents (for fixed network termination with PLDT and 17.5 cents for mobile termination.¹⁴ In response to this attempt on February 13 to condition the renewal of service on increased rates, AT&T on February 14, 2003 proposed an interim rate of 6.5 cents for traffic terminating on fixed networks and 10 cents for traffic terminating on mobile networks, which is more than sufficient

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AT&T and Globe, signed in 1994, the parties similarly agreed "to provide and *maintain* direct telecommunications service between the Philippines and the United States." (Emphasis added.) Section 7(e) of the agreement requires each party to "*maintain* interconnection of the international circuits with the national network within its country or territory." (Emphasis added.)

¹⁴ PLDT Exhibits 9 at 3 & 14.

to cover PLDT's termination costs.¹⁵

The absence of any legitimate reason for Globe's disruption of AT&T's traffic is further demonstrated by this carrier's reliance (pp. 7-8) on an alleged outstanding payment due from AT&T on February 4, 2003.¹⁶ AT&T's network data shows that Globe began blocking AT&T's traffic *four days before* this date, on February 1, 2003. Globe also admits (p. 8) that it has no basis to deny service to AT&T for this reason, because it has failed to provide the 30 days notice required by its agreement with AT&T.

II. THE COMMISSION'S ANTI-WHIPSAW POLICY APPLIES TO THE PHILIPPINES ROUTE.

PLDT, Globe and the other Philippine carriers are engaged in a classic whipsaw: using their control of termination facilities in the Philippines to exploit the competitive U.S. market and "play one carrier against others to gain concessions and benefits from the other U.S. carriers."¹⁷ PLDT and Globe also are unsuccessful in their efforts to show that the Commission's anti-whipsaw policy does not apply on the grounds that PLDT is not a monopoly carrier, that Globe and the other Philippine carriers lack market power, that the Philippines is purportedly a competitive market, or that the Philippines is an ISR route with below benchmark route that qualifies for removal of the ISP. As demonstrated below and by AT&T's petition, the

¹⁵ See PLDT Exhibit 16 (Letter dated February 14, 2003 from Mark Miller, AT&T to Ramon Obias, PLDT). As shown in Section II below, this interim rate is more than 50 percent higher than AT&T's rates to Australia, Hong Kong, Japan, Malaysia, New Zealand, South Korea and Taiwan.

¹⁶ Globe concedes (p. 7) that it "accepted" this payment being moved to this date. Any amounts due from AT&T would also be offset by the substantial amounts that Globe owes AT&T for hubbing and other services provided by AT&T.

¹⁷ *Uniform Settlement Rates on Parallel International Communications Routes*, 84 FCC 2d. 121, n.3 (1980).

Commission is authorized to take action on all routes, regardless of the type of traffic arrangement, to prevent the abuse of foreign market power and to promote the public interest in cost-based rates. And that is so regardless of whether market power is abused by a single company or a number of companies engaging in concerted action. Therefore, PLDT's efforts to distinguish the *Argentina Order* are unavailing.¹⁸

1. None of the Philippine Carriers Are Exempt From the Commission's Anti-Whipsaw Policy.

Because the concern addressed by the Commission's anti-whipsaw policy is the abuse of market power, whether by a monopolist or by a dominant carrier, the fact that PLDT is not a monopolist is irrelevant, and PLDT fails to show otherwise (p. 19). Thus, in the *Sprint Order*, the Bureau denied certain interim rates "to prevent whipsawing" by Telmex, which is the dominant carrier in Mexico, not a monopolist.¹⁹ The mere presence of competitors in the Philippines market does not make whipsawing impossible, as PLDT contends (p. 18). PLDT possesses market power because of its local exchange bottleneck and dominant share of the Philippines international market, and therefore can unilaterally set the prices, terms and conditions under which U.S. carriers may terminate traffic, irrespective of the actions of its competitors.

¹⁸ PLDT incorrectly contends (pp. 20-21) that the *Argentina Order* only allows the Commission to require payment of the lowest rate presently paid by any U.S. carrier. In fact, the Bureau also ordered all U.S. carriers to stop making payments until all circuits were fully restored, which is the action requested here. *AT&T Corp., Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina*, 11 FCC Rcd. 18,014, ¶ 2 (1996) ("*Argentina Order*"). In any event, as demonstrated below, the Bureau also is fully authorized to deny any non-cost-based increases in termination rates, including those sought here by PLDT and the other Philippine carriers.

¹⁹ *Sprint Communications Company*, 13 FCC Rcd. 24,998, ¶ 7 (1998) ("*Sprint Order*").

Moreover, the presence of competitive carriers in the Philippines cannot limit PLDT's anticompetitive actions here, because all of PLDT's competitors are seeking the exact same rate increase and engaging in the same whipsaw conduct. Globe's assertion (p. 9) that as "a competitive carrier" it "cannot whipsaw a U.S. carrier" fails to recognize that non-dominant carriers may exercise market power when they participate in concerted action, and certainly do so when they participate in concerted action with a dominant carrier.²⁰

The other Philippine carriers are also subject to the anti-whipsaw policy, notwithstanding their nondominant carrier status. As noted by AT&T's petition (p. 11), the Commission has expressly provided for "appropriate remedial action" where "a foreign carrier that otherwise might appear to lack market power might possess some ability unilaterally to set rates for terminating U.S. traffic due to government policies or collusive behavior in the foreign market."²¹ Thus, whether the whipsaw is the result of "collusive behavior" among otherwise non-dominant Philippine carriers or the result of "government policies" in the Philippines, the Commission has made clear that it may act to protect the public interest in such circumstances, even though U.S. carrier arrangements with foreign non-dominant carriers are not subject to the International Settlements Policy.²²

2. No Foreign Law or Regulation Requires Philippine Carriers to Charge the Same Termination Rate.

Contrary to the claims by Globe (p. 6), the Philippines has no legal or regulatory

²⁰ See *DeLoach v. Phillip Morris Cos.*, 2001 Trad. Cas. ¶ 73,409 (M.D.N.C. July 24, 2001) (liability under Section 2 of the Sherman Act based on collusion with dominant entity).

²¹ *ISP Reform Order*, 14 FCC Rcd. 7963, ¶ 30 (1999).

²² *Id.*, ¶ 29.

requirement that each international or local exchange carrier must charge the same termination rate for international traffic. The Philippine interconnection regulations cited by Globe (*id.* & n.3) merely require a local exchange carrier to charge non-discriminatory interconnection rates for access to its local network when “the same infrastructure and functionality” is used. Critically, that is not a requirement that all carriers must charge the same rate, as Globe would have the Commission believe. Furthermore, PLDT has made clear that international termination rates are “not mandated” by law or regulation in the Philippines. Specifically, PLDT stated in a filing with the Philippines National Telecommunications Commission on February 3, 2003 (PLDT’s Exhibit 11):

“These access charges or termination rates [for traffic exchanged between PLDT and foreign carriers] are *not mandated* by the Honorable Commission or any other Philippine governmental agency. *Neither the Honorable Commission nor any other Philippine governmental agency has the power or authority to impose these termination rates on PLDT* (and any other Philippine telecommunication carrier) as this would constitute an undue interference on the freedom of contract.” (Emphasis added.)

This is confirmed by the Commissioner and Deputy Commissioner of the Philippines National Telecommunications Commission (“NTC”) in a February 26, 2003 letter to the Commission (filed on February 26, 2003 by Globe) stating that these “*termination rates are private commercial arrangements entered into by carriers of their own free will.*”²³

Therefore, the concerted conduct among the Philippine carriers to increase termination rates from AT&T and other U.S. carriers and to retaliate against AT&T and other U.S. carriers which refuse to pay the increase by blocking circuits and traffic can claim no protection from any foreign legal or regulatory requirement, because no such requirement exists.

²³ Letter dated February 26, 2003 from Armi Jane R. Borje, Commissioner, and Kathleen G. Heceta, Deputy Commissioner, NTC to the Federal Communications Commission, filed

3. The Commission's Anti-Whipsaw Policy is Not Limited by Benchmarks.

PLDT wrongly claims (pp. 13-15) that the benchmarks constitute the lower limits of the Commission's whipsaw authority, and that even rate increases below benchmarks are "presumptively just and reasonable." The Commission's longstanding policy is to encourage the negotiation of *cost-based* rates, which are far below benchmarks, and it accordingly denies *any* "non-cost-based increases in, or surcharges to, the accounting rate," unless these are shown to be in the public interest.²⁴

Both the Commission and the Bureau have emphasized the importance of achieving cost-based settlement rates below the benchmarks. The Bureau emphasized in the *Sprint Order* that the Commission recognized "in the *Benchmarks Order* that the benchmark rates are still above cost" and that the Commission reiterated in the *Benchmarks Order* "that its goal remains 'settlement rates that reflect incremental costs.'"²⁵ The Bureau stated: "We note that even [the] \$0.19 [benchmark] rate remains far above cost *and encourage carriers to*

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Feb. 26, 2003, at 1 (emphasis added).

²⁴ *Regulation of International Accounting Rates*, 6 FCC Rcd. 3552, ¶¶ 1-3, 16 & n. 30 (1991). *See also, id.*, ¶ 19 (emphasizing that it would be "difficult for carriers to meet" this burden of proof). Thus, for example, the International Bureau emphasized in 1998 that a U.S. carrier is required to show that a proposed surcharge "is cost-based or that the surcharge is accompanied by a reduction in the accounting rate and results in a lower overall accounting rate" with the foreign carrier. *AT&T Corp., Petition for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Haiti*, 13 FCC Rcd. 18,739, ¶ 5 (1998). *See also, e.g., RSL Com U.S.A., Petition for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with the Dominican Republic*, 14 FCC Rcd. 1010, ¶ 4 (1999).

²⁵ *Id.*, quoting *International Settlement Rates*, 12 FCC Rcd. 19806, 19827 (1997) ("*Benchmarks Order*").

*negotiate lower rates.*²⁶ The Bureau also highlighted the Commission’s longstanding direction to U.S. carriers that they should “negotiate with their foreign correspondents accounting rates that are consistent with relevant cost trends.”²⁷ That direction is fully applicable here, and requires the continued reduction, not the increase, of U.S. termination rates in the Philippines.

None of the Philippine carriers attempt to demonstrate that the rate increase they seek to impose on U.S. carriers is cost-based. PLDT’s conclusory allegations (pp. 9 & 13, n.43) that current rates are “not properly compensatory” and that the increased rate would be below “the rate that would be justified under its Cost Manual” does not even begin to make the necessary showing. Digital (p. 8) does not pretend the increase is required by termination costs and baldly admits the Philippine carriers sought to raise termination rates to provide “alternative sources of revenue” because “said rates are the only dollar denominated income . . . that would compensate for the more than 100% depreciation of the peso since 1997.”

The current rate of 8 cents per minute was freely negotiated by AT&T in separate negotiations with Philippine carriers and is much higher than warranted by relevant cost trends. AT&T pays under 3 cents per minute to terminate U.S. traffic in Australia, Malaysia, New Zealand and Singapore, and under 4 cents per minute to terminate U.S. traffic in Hong Kong, Japan, South Korea and Taiwan.²⁸ Additionally, the current 8-cent rate is more than double the

²⁶ *Sprint Order*, 13 FCC Rcd at 24998, n.34 (emphasis added.).

²⁷ *Regulation of International Accounting Rates*, 6 FCC Rcd. at 3556.

²⁸ The ITU benchmark cited by Globe (pp. 13-14) does not show otherwise because ITU Recommendation D.140 Annex E specifically states, at paragraph E.3.2, that the rates it references are not to be “taken as cost-orientated levels.”

rates paid by Philippines carriers to terminate their Philippines-U.S. traffic with AT&T.²⁹

PLDT's claims (p. 7) of harm from "losses of revenue attributable to lower rates at volumes that have not materially increased" in recent years are refuted by the facts. FCC data shows that rate reductions on this route have resulted in even greater U.S. price reductions and a massive increase in U.S. traffic to the Philippines. Specifically, U.S. average settlement cost reductions of 35 cents (from 46 cents per minute in 2001 to 11 cents per minute in 2001), and even greater U.S. average price reductions of 77 cents (from \$1.08 per minute in 1996 to 31 cents per minute in 2001), have resulted in a *five-fold increase* in U.S. outbound traffic to the Philippines (from 356 million minutes in 1996 to 1.7 billion minutes in 2001).³⁰

During those years, U.S. carriers paid Philippine carriers more than \$1 billion in settlements outpayments. Indeed, Philippine carriers received higher settlements outpayments from U.S. carriers in 2001, when they were paid more than \$190 million, than in 1996, when they were paid \$164 million.³¹

²⁹ PLDT incorrectly claims (p. 13) that the *Benchmarks Order* approves the use of "foreign carrier settlement charges" to collect above-cost subsidies for "continued development of in-country telecommunications infrastructure" in lower and middle-income countries. In fact, the *Benchmarks Order* specifically *rejected* arguments "that foreign carriers should have the ability to impose hidden, discriminatory universal service obligations on termination services for foreign-originated calls." 12 FCC Rcd. 19806, ¶ 86. The Commission further emphasized that such subsidies are contrary to the requirements of the WTO Reference Paper for "transparent, non-discriminatory and competitively neutral" universal service subsidies. *Id* at ¶ 148. This language is included in the WTO commitments on basic telecommunications made by the Philippines, although the Philippines has failed to ratify those commitments.

³⁰ See FCC Section 43.61 Reports for 1996-2001, <http://www.fcc.gov/wcb/iatd/intl.html>.

³¹ PLDT is expected shortly to announce record profits for 2002. See "PLDT 2002 Profit To Soar On Mobile Mania", Reuters, Feb. 21, 2002.

4. The Commission's Anti-Whipsaw Policy is Fully Applicable to ISR Routes.

PLDT fails to rebut AT&T's showing (pp. 9-11) that the Commission's anti-whipsaw policy is unaffected by the authorization of the Philippines route for ISR. PLDT's claim (pp. 15-16) that it would make "no sense" to apply the anti-whipsaw policy where ISP requirements for nondiscriminatory accounting rates, equal division of accounting rates and proportionate return do not apply, because those ISP requirements were intended to guard against whipsawing, misconceives the Commission's purpose for authorizing ISR. As AT&T demonstrated, that purpose is to encourage the *reduction* of termination rates further toward cost -- not to allow whipsaws and price increases, as PLDT asserts by contending that there should be *no* "one-way ratchet" (p. 17).³²

Consistent with that purpose, the Commission remains strongly concerned on ISR routes by "any practice by which a foreign carrier terminates U.S.-bound traffic at low rates and exercises market power to require that U.S. carriers pay much higher rates to terminate traffic in the foreign market."³³ Merely by authorizing ISR arrangements where it found the ISP requirements for nondiscriminatory accounting rates, equal division of accounting rates and proportionate return to be unnecessary to prevent the abuse of foreign market power, the Commission is not precluded from taking remedial action if whipsawing nonetheless occurs.

The concerted conduct of PLDT and the other carriers in the Philippines in blocking the

³² Contrary to the claim by Globe (p. 18), Commission policy encouraging U.S. carriers to seek cost-based rates places no limits on "arbitrage activities where the independent regulator has found the rates to be reasonable." The Commission emphasized in the *Benchmarks Order* that "[I]east-cost traffic routing is an economically rational response to inflated settlement rates, and will continue as long as carriers maintain excessive settlement rates." 12 FCC Rcd. 19806, ¶ 11.

³³ *ISP Reform Order*, 14 FCC Rcd. 7963, ¶ 14.

traffic of U.S. carriers that resist their unjustified demands for increased rates demonstrates the error of PLDT's argument (p. 16) that because "the Philippine market is competitive . . . the public interest is better served without the implementation of ISP policies." It is precisely because the Philippines market is *not* functioning competitively, because of the concerted action by the Philippine carriers to seek and enforce increased rates, that Commission intervention is necessary to protect the public interest in maintaining communications and encouraging cost-based rates on this route.

It is also irrelevant that the Philippines route meets the standard for removal of the ISP, notwithstanding PLDT's claims to the contrary (p. 16), because the ISP has not been removed from this route.³⁴

III. INTERNATIONAL COMITY DOES NOT REQUIRE DEFERENCE TO THE NTC.

There also is no basis to the claims by PLDT (pp. 22-23) and Globe (pp. 10-12) that considerations of international comity compel the acceptance of this whipsaw. The D.C. Circuit has made clear that the Commission is authorized to regulate the rates U.S. carriers pay to foreign carriers, that it may do so specifically to prevent whipsawing, and that the Commission "does not exceed its authority simply because a regulatory action has extraterritorial consequences."³⁵

³⁴ Even if the Philippines route was in that category, Commission action would not be precluded, as the Commission made clear in stating that if necessary it would take "appropriate remedial action" against non-dominant carriers not subject to the ISP. For the same reason that remedial action may be necessary against nondominant carriers where the ISP does not apply, remedial action may also be necessary to address conduct by dominant carriers that seek to frustrate the Commission's objectives in removing the ISP.

³⁵ *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1229-30 (D.C. Cir. 1999).

The Commission decisions cited by Globe (pp. 10-11) also make clear that no deference is required. The Commission has taken such considerations into account only concerning foreign prohibitions on call-back services -- which are marketed to consumers in a foreign country, unlike the U.S.-outbound calls involved here. The Commission has recently proposed to eliminate even this limited policy regarding call-back services because, among other reasons, it “may be construed as diminishing the Commission’s support for competitive forces.”³⁶ Moreover, this limited policy is applicable only where there is a “clear[] and explicit[]” foreign country prohibition “by statute or regulatory decision.”³⁷

There is no potential conflict here with any clear and explicit foreign legal or regulatory prohibition or other requirement that might involve considerations of international comity, even if such considerations were relevant to the Commission’s policies in this area, which they are not. PLDT and Globe do not contend that they are blocking U.S. traffic pursuant to any law or regulatory requirement, and there is no such requirement. The February 26, 2003 letter from two NTC commissioners confirms that there is no Philippine statute or regulatory decision requiring Philippine carriers to block U.S. traffic, by merely stating that it is “*understood* that absent any provisional or interim arrangement or agreement, there would be termination of service between the parties”³⁸ -- which is contrary both to the facts and the law.

³⁶ *Enforcement of Other Nations’ Prohibitions Against The Uncompleted Call Signaling Configuration of International Call-Back Service*, 17 FCC Rcd. 2794, ¶ 15 (2002) (Notice of Proposed Rulemaking).

³⁷ *Via USA, Ltd., Telegroup, Inc.*, 10 FCC Rcd. 9540, ¶ 51 (1995)

³⁸ Letter dated February 26, 2003 from Armi Jane R. Borje, Commissioner, and Kathleen G. Heceta, Deputy Commissioner, NTC to the Federal Communications Commission, filed Feb. 26, 2003, at 1-2 (emphasis added).

As described above and in AT&T's petition, the parties are obligated under their underlying service agreements with AT&T to continue services and maintain circuits, and all U.S. carriers are subject to the regulatory authority of the FCC, and are governed by its prohibition on whipsawing.

Similarly, the most recent order issued by the NTC on February 7, 2003, like the prior NTC order issued on January 31, 2003, rather emphasizes these carriers' "responsibilities as a public service provider, to include that of keeping open your communication circuits to promote PUBLIC SERVICE AND NATIONAL WELFARE and maintain level playing field in the conduct of your operations."³⁹ As noted by AT&T's petition (p. 12), the Commission action AT&T has requested would support that concern.

There is also no contention here that the Philippine carriers are seeking rate increases from U.S. carriers pursuant to any foreign law or regulatory requirement. The NTC made clear that any such claim would not be accurate, by stating in its January 31 order addressed to PLDT, Globe and Bayantel that the cause of the circuit disruptions was "your decision to increase rates."⁴⁰ As noted above, the February 26 letter from two NTC Commissioners acknowledges that these "termination rates are private commercial arrangements entered into by carriers of their own free will."⁴¹ PLDT underscores this conclusion by stating in its February 3 filing with the NTC that these rates are "not mandated

³⁹ NTC Memorandum Order, February 7, 2003 at 2 (PLDT Exhibit 12).

⁴⁰ AT&T Petition, Miller Decl at ¶ 12.

⁴¹ Letter dated February 26, 2003 from Armi Jane R. Borje, Commissioner, and Kathleen G. Heceta, Deputy Commissioner, NTC to the Federal Communications Commission, filed Feb. 26, 2003, at 1.

by” the NTC or by any other government agency and are beyond their “power and authority to impose.”⁴² Thus, considerations of comity have no relevance here.

IV. INTERIM RELIEF IS FULLY WARRANTED TO PREVENT THIS ABUSE OF MARKET POWER.

AT&T has shown (pp. 13-14) that the *Virginia Petroleum Jobbers Ass’n* criteria for interim relief are fully satisfied here, with a strong likelihood of success on the merits because the challenged conduct is indisputably whipsawing, causing substantial harm to AT&T and its customers, because of the Commission’s a paramount need to protect the public interest by maintaining communications with the Philippines and in furthering cost-based rates on this route, and because any adverse effect of the grant of relief applies only on those who instigated the wrongdoing, i.e., the Philippine carriers, by denying them settlements payments pending final action.⁴³

As described above, AT&T has terminated virtually no traffic with PLDT since February 1 as the result of PLDT’s whipsaw, was unable to terminate about twenty percent of its calls to the Philippines in the early days of the disruption, and has now lost about two-thirds of its former traffic on this route. Therefore, PLDT fails to distinguish *AT&T Corp. v. Ameritech*, where the Commission found that the loss of customers to a competitor supported a finding of irreparable harm. Contrary to PLDT’s contention (p. 27) that “[u]nder no circumstances would a

⁴² See PLDT Exhibit 11.

⁴³ Contrary to the claim by Globe (p. 10) that Globe would have no “reasonable expectation of being paid” upon issuance of a stop payment order, U.S. carrier payments would resume once all circuits were fully restored. However, Globe is wrong in claiming (p. 20) that AT&T has already raised consumer rates to the Philippines in response to the increased termination rates. AT&T thus far has not raised consumer rates on this route in response either to the increased alternative routing costs or to the rate increases demanded by the Philippine carriers, but AT&T may not be able to continue this position.

U.S. customer need to revoke an existing agreement and switch carriers,” this whipsaw is causing material harm to AT&T by leading its customers to switch to other U.S. carriers that have accepted the rate increase.

Respectfully submitted,

AT&T CORP.

By /s/ James J. R. Talbot

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Dated: February 27, 2003.

CERTIFICATE OF SERVICE

I, Theresa Donatiello Neidich, hereby certify that on this 27th day of February, 2003, a copy of the "AT&T Reply to Oppositions to Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief" was by first class mail to the persons listed below.

/s/ Theresa Donatiello Neidich
Theresa Donatiello Neidich

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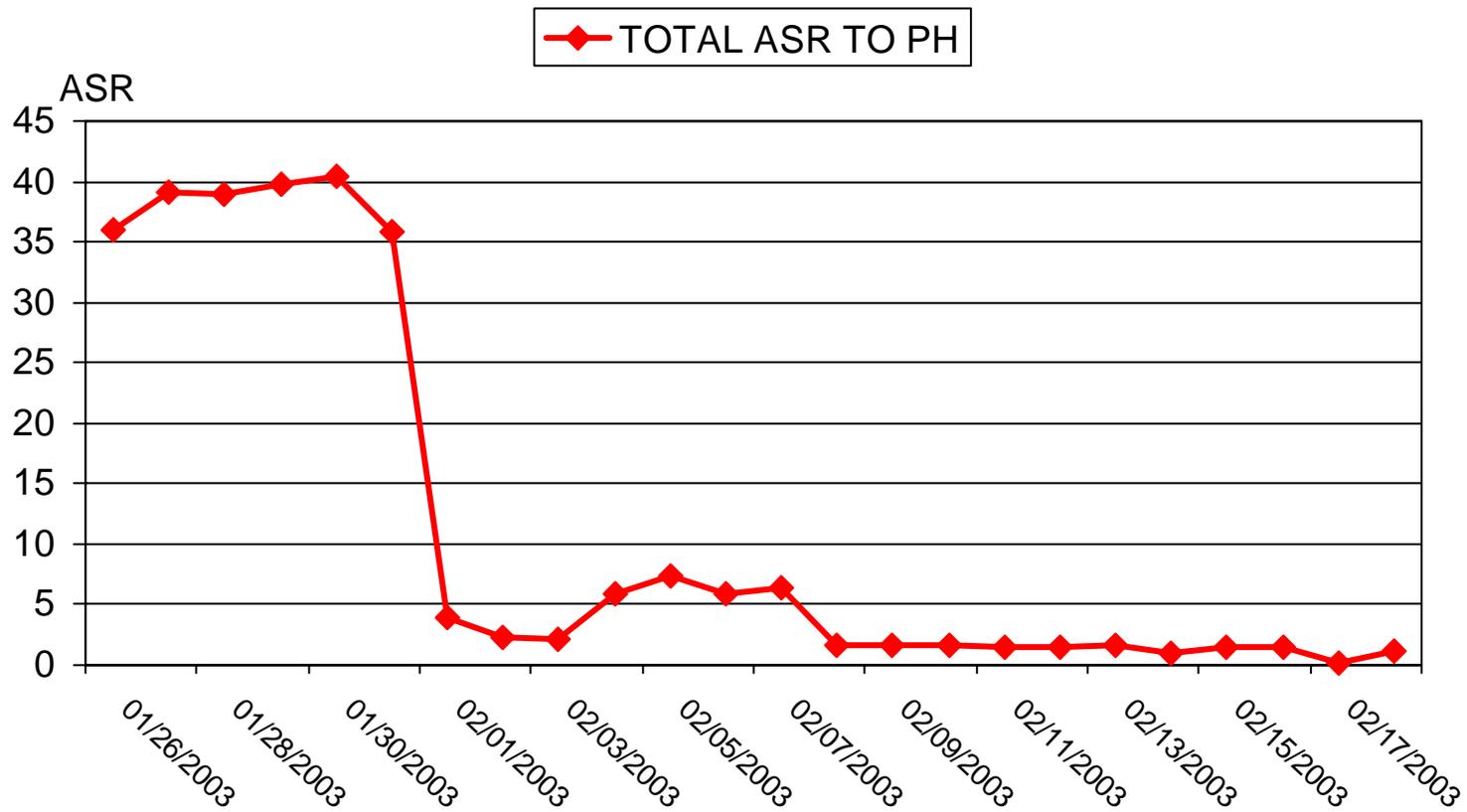
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ATTACHMENT A

Total ASR to the Philippines using Bilateral Carriers



ATTACHMENT B

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

In the Matter of)

IB Docket No. 03-38

Bayan Telecommunications Company)
Digital Telecommunications Philippines, Inc.)
Globe Telecom, Inc.)
Philippines Long Distance Telephone Company)
Smart Communications, Inc.)
Subic Telecom)

AT&T Emergency Petition for Settlements)
Stop Payment Order and Request for)
Immediate Interim Relief)

DECLARATION OF MARK MILLER.

1. I am the same Mark Miller who submitted a declaration in this proceeding dated February 6, 2003.
2. This Declaration updates the facts of my Declaration dated February 6, 2003 concerning AT&T's ability to terminate traffic in the Philippines during the month of February. During February 2 through 6, 2003, AT&T was actively searching for and testing alternative routes for its traffic to the Philippines. The instability of these routes during that period suggested that AT&T would not be able to complete more than a small proportion of its calls to the Philippines, either directly or through alternative routes. AT&T's subsequent analysis indicates that about 20 percent of AT&T's overall traffic failed to terminate in the Philippines during that period. The remaining 80 percent of AT&T's traffic that did get through chiefly through use of alternative routes, however, suffered from higher costs and, in some cases, lesser quality. The small

proportion of the traffic that got through on a direct basis also suffered from poor quality and required repeated dialing attempts by consumers. Due to the increased cost for alternative routes, AT&T also subsequently lost significant traffic volumes to the Philippines. Since February 11, AT&T has lost roughly two-thirds of its former traffic volumes on this route and is required to use alternative routes for this traffic at increased cost and frequently reduced quality.

3. I declare, under penalty of perjury, that the facts stated above, and all other facts stated in the AT&T Reply to Oppositions to Emergency Petition For Settlements Stop Payment Order and Request For Immediate Interim Relief, are true and correct.

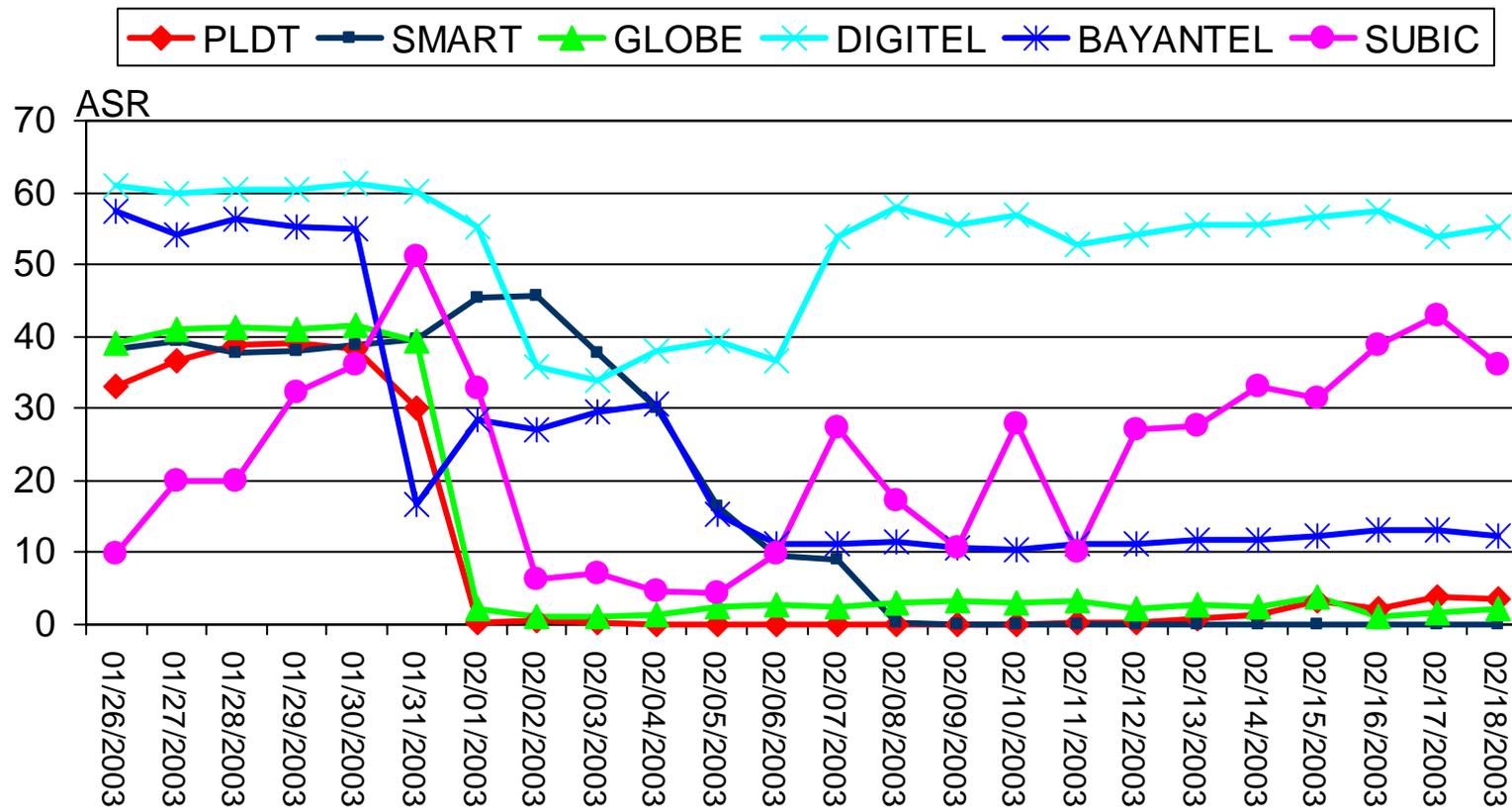


Mark Miller
Regional Director
Asia/Pacific Route Management
AT&T Corp.

Dated: February 27, 2003

ATTACHMENT C

Blockage in the Philippines by Carrier



ASR = Number of Calls Completed Vs Circuit's Seized