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

In the Matter of	)	
	)	IB Docket No. 03-38
Philippine Long Distance Telephone Company	)	
Globe Telecom, Inc.	)	
	)	
AT&T Emergency Petition for Settlement	)	
Stop Payment Order and Request for	)	
Immediate Interim Relief	)	
	)	
Petition of WorldCom, Inc., for Prevention of	)	
"Whipsawing" on the U.S.–Philippines	)	
Route	)	

PHILIPPINE LONG DISTANCE TELEPHONE COMPANY'S APPLICATION FOR REVIEW OF THE INTERNATIONAL BUREAU'S MARCH 10, 2003 ORDER

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

The International Bureau's Order, for which Philippine Long Distance Telephone Company ("PLDT") seeks review, conflicts with Commission regulations, precedents and policies in that it: (1) reverses the Commission's decision that termination rates at or below benchmark rates are presumptively just and reasonable; (2) retroactively suspends the Philippines from the ISR list without notice, opportunity for comment, and without legal authority; and (3) abrogates agreements that, when negotiated, were fully consistent with all U.S. laws and policies.

The Order also improperly creates new requirements, without due process and legal authority, that: (1) carriers submit cost-justification for rate increases that are below the benchmark, and (2) continued application of ISR rules must meet an undefined "public interest" requirement. These new requirements also suffer from the defect of conflicting with established Commission regulations, precedents and policies.

This extraordinary action was taken by the International Bureau in response to AT&T's and WorldCom's unsupported complaints of whipsawing. In reviewing those complaints, the Bureau should have been guided by the Commission's presumption that the Philippine market for termination of international calls is fully competitive. The Bureau also had before it substantial evidence that the Commission's presumption of competitiveness is founded in fact. The Bureau also was aware of the specific findings and conclusions of the independent regulatory agency in the Philippines that the rate increase requested by PLDT is fair and justified.

Yet, the Bureau ignored all this and found "whipsawing" where none exists and, in doing so, went far beyond the Commission's existing rules and policies to reach an incorrect and unfair result. The Order improperly expands the reach of the Commission's jurisdiction over the ratemaking actions of foreign carriers and substitutes the Bureau's rate judgments for those of the carriers' local regulatory authorities, putting the FCC in the role of a supra-national public utility commission.

The Commission should act immediately to reverse the Order and permit U.S. carriers to terminate their Philippine traffic directly on to the networks of the Philippine carriers at a rate that has found to be just and reasonable by the Philippine National Telecommunication Commission.

I. INTRODUCTION

Philippine Long Distance Telephone Company ("PLDT") hereby submits its application for review of the International Bureau's March 10, 2003 order (the "Order") regarding the petitions (the "Petitions") filed against it by AT&T and WorldCom, Inc. ("WorldCom") (jointly, "Complainants").[1] The Order should be reversed for three reasons: the decision conflicts with Commission regulations, precedents and policies; it addresses novel questions of law and policy not previously resolved by the Commission and decides them incorrectly; and it is the result of erroneous findings of fact and prejudicial procedural error.[2]

In order to force PLDT and other Filipino carriers not to increase the rates they charge the two largest U.S. carriers to terminate their Philippine traffic directly onto the Filipino carriers' networks, the Order takes the extraordinary action of requiring all U.S. carriers to suspend all payments for terminating their traffic in the Philippines. Even though the termination rate that Complainants challenge is 37 percent below the FCC benchmark, is "presumptively just and reasonable,"[3] meets the FCC's stringent standard for complete removal of the ISP, and has been agreed to by more than 20 other U.S. carriers in arms-length negotiations, the Order effectively prevents PLDT from raising its rates at all. Contrary to the Commission's long-held presumption that PLDT's below-benchmark rates are proper, the Bureau presumes that Complainants' allegations of unreasonableness are true. It goes even further by effectively

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1 In filing this Application, PLDT does not admit any jurisdiction by the Commission over PLDT or the rates, terms, and conditions under which it terminates traffic in the Philippines.

2 *See* 47 C.F.R. § 1.115(b)(2).

3 *International Settlement Rates*, 12 FCC Rcd 19806, 19939, Table 3 (1997) ("*Benchmarks Order*").

putting on PLDT the burden of proving that any rate increase is cost justified, and it imposes this new standard without notice or other requirements of due process.[4]

The ostensible basis for the Order is Complainants' claim that they were "whipsawed" by PLDT, but that theory cannot be applied in this case, where the Philippines is a competitive market and PLDT does not have the power to set rates without regard to competition. The Bureau's acceptance of Complainants' assertion that other Philippine carriers conspired with PLDT to exert market power as a group is not supported by fact -- indeed, it is contradicted by the facts as found by the Philippine National Telecommunication Commission ("NTC"). It is also contrary to Supreme Court precedent, under which acts that are as consistent with competitive conduct as not cannot form the basis for a claim of concerted anticompetitive conduct.[5]

The Bureau's treatment of whipsawing expands that theory beyond reason; if accepted, anytime a U.S. carrier opposes a widely-accepted rate increase -- however reasonable, as it is here -- the foreign carrier would be forced to accede to a non-market rate or suffer the consequences of a payment suspension Order. In addition to creating a perverse incentive for foreign carriers not to reduce rates in the future, the Order hurts consumers in both the U.S. and the Philippines. The Order has such consequences because it is at odds with the realities of how competitive markets work. Rates in a competitive market go up as well as down. By erroneously invoking "anti-whipsaw" to prevent a rate increase justified by market conditions

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4 The Order granted Complainants' wholly unjustified petition for emergency relief, leaving PLDT with little time to defend itself.

5 *See Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

and approved by NTC, the Order effectively imposes rate regulation on Philippine carriers for services provided wholly in the Philippines.

Contrary to the Bureau's reliance on Complainants' assertion that "the Philippine carriers provided no cost justification" for a rate increase to a below-benchmark-level rate,[6] the Commission presumes that below benchmark rates are reasonable. There is no precedent for foreign carriers being deprived of this presumption, and it is doubly unprecedented for a presumption of truth to be afforded to Complainants' assertions, as the Bureau has done. The very purpose of "benchmarks" that are "presumptively just and reasonable" is to provide "bright-line standards" that do not put the Commission in the position of analyzing foreign carriers' rates on an individualized cost basis.

Not only is the Order contrary to Commission rules and precedents, the relief provided by the Bureau puts the Commission in direct conflict with NTC, which found that the Order "undermines the very foundation of the viability and efficiency of the Philippine telecommunications industry," and will both "increase the cost of calls" and "impair established rights and obligations arising from contracts already perfected."[7] By requiring U.S. carriers to repudiate rate contracts that NTC has found "fair and reasonable" and directed to remain in force (id.), the Order violates principles of comity, as well as the United States' WTO obligations.

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6 Order at 4.

7 *See* Supplemental Declaration of Ramon Alger P. Obias, filed April 9, 2003 ("Supp. Obias Decl.") at ¶ 9, Ex. 2. This declaration compiles and summarizes information submitted to the Commission by PLDT in *ex parte* letters filed in the record of this case prior to the issuance of the March 10 Order.

II. FACTS

A. Complainants Are Engaging in Strong-Arm Tactics To Achieve a Commercial Advantage in Rate Negotiations Despite PLDT's Good Faith Negotiations Over the Past Year.

Although AT&T and WorldCom make it sound as though PLDT suddenly demanded a rate increase and threatened to terminate service immediately when they did not agree,[8] in fact, PLDT has spent the better part of a year trying to negotiate a rate increase with Complainants -- a rate increase that NTC agrees is justified. PLDT nevertheless continued to provide Complainants service even with no contracts in place. After months of stonewalling by Complainants, it became clear that they would not negotiate in good faith, leaving PLDT with no choice but to stop furnishing services for which it was not being properly compensated.[9]

In 2000, more than a year before the *Benchmarks Order* required adherence to a benchmark rate of 19 cents for the Philippines (and other lower-middle-income countries), PLDT agreed to reduce the termination rates it charged to AT&T to about 8 cents per minute, in part because AT&T promised that rate reduction would increase traffic. In fact, both the volume of fixed traffic from AT&T and the associated revenues declined substantially.[10] These losses exacerbated revenue losses PLDT was already experiencing from foreign carrier bankruptcies and fraud.[11]

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8 Order at 3-4.

9 Obias Declaration, filed Feb. 21, 2003 ("Obias Decl.") at ¶¶ 2-11. Both AT&T and WorldCom owe PLDT substantial sums for traffic PLDT terminated before it ceased accepting Complainants' direct traffic on February 1, 2003. Supp. Obias Decl. at ¶ 12.

10 Between January 2001 and December 2002, these declined by more than 25 percent. Supp. Obias Decl. at ¶¶ 4-5 & Ex. 1.

11 *Id.* at ¶ 6.

After nearly two years of heavy losses on fixed traffic, PLDT advised AT&T, WorldCom, and other carriers in May 2002 that rates would increase beginning August 1, 2002.[12] Nearly 100 carriers worldwide, including more than 20 U.S. carriers, have entered into rate agreements with PLDT at rates of 12 cents or higher.[13] Despite numerous meetings with AT&T and WorldCom, each company stubbornly declined any rate increase, with AT&T insisting on a decrease to 6.5 cents. PLDT kept the 8 cent rate in place while it tried to negotiate, eventually setting a January 31, 2003 deadline.[14] Having been unable to convince Complainants to agree to a higher rate, and having been told by Complainants that they would not pay PLDT the going rate for terminating future traffic, PLDT was forced to stop subsidizing Complainants, and on February 1, 2003, finally ceased to take traffic directly from Complainants (though it continued to take traffic that they routed through carriers who had contracts and would pay PLDT).

Although PLDT thought it was engaged in *bona fide* negotiations with Complainants, it subsequently learned that they never intended to negotiate in good faith regarding a rate increase.[15] Instead, for months AT&T and WorldCom were priming the Bureau for assistance in opposing a rate increase. On January 31, 2003, the Bureau wrote NTC, apparently accepting

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[12] *Id.* at ¶ 7. As AT&T's and WorldCom's own increases of U.S. long distance rates show, changing conditions in competitive markets can cause previously reduced rates to go back up. As AT&T recognizes: "It's a competitive landscape, and in order to invest in upgrades and remain competitive, sometimes it's necessary to raise basic rates." *The Washington Post,* Financial E-1 (Jan. 1, 2002).

[13] Supp. Obias Decl. at ¶ 9.

[14] *Id.* at ¶ 7.

[15] After receiving leverage from the Bureau's Order, AT&T finally admitted that it "was pointless to agree to 'consider' an increase" when AT&T "has no intention to actually agree to such an increase." Supp. Obias Decl. at ¶¶ 10-11 & Ex. 3.

AT&T's and WorldCom's charges of "whipsawing" by Filipino carriers. This was immediately followed by the Complainants' filing of the "emergency" petitions that led to the Bureau's Order.

B. PLDT Is Obligated To Comply with NTC's Order To Close Direct Circuits To AT&T and WorldCom.

On February 26, 2003, NTC sent a letter to the Commission stating "that consistent with" its earlier February 7 Order, "absent any provisional or interim arrangement or agreement, there would be termination [*i.e.*, cessation] of service between" PLDT and Complainants, with the latter "encouraged to seek *other* routes or options to terminate traffic to the Philippines."[16] The Bureau, ignoring NTC's reading of its own Order, insists that NTC's February 7 Order required PLDT to open its circuits to AT&T, even with no contracts in place between the parties.[17]

In a second Order, dated March 12, 2003, NTC reiterated that the rates PLDT was asking from Complainants "are fair and reasonable," and ordered PLDT and the other affected carriers "[n]ot to accept terminating traffic via direct circuits from U.S. facilities-based carriers who do not pay Philippine carriers for services rendered."[18] NTC also found that the Order "undermines the very foundation of the viability and efficiency of the Philippine telecommunications industry," and condemned it as (1) "punish[ing] Philippine carriers who are within the jurisdiction" of NTC, "not the US FCC," (2) "increase[ing] the cost of calls on Filipino consumers," and (3) "impair[ing] established rights and obligations arising from contracts

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[16] *Id.* at ¶ 13, Ex. 4 (emphasis added).

[17] Order at 13, fn. 68.

[18] Supp. Obias Decl. at ¶ 9, Ex. 2.

already perfected."[19] Finally, NTC took issue with the Bureau's unsupported findings of "concerted action," finding them "without basis," and confirming that the "actions taken by Philippine carriers in compliance with domestic law on interconnection and non-discriminatory charges *do not constitute concerted anti-competitive action*."[20]

III. ARGUMENT

A. PLDT Has Not Engaged in Whipsawing.

"Whipsawing" is a theory rooted in a prior regulatory age, when foreign markets were not competitive and U.S. carriers were forced to deal with a single, usually government-owned or controlled, monopoly carrier. In that environment, the Commission sought to protect private U.S. carriers and U.S. ratepayers from unfairly subsidizing foreign governments' general revenue requirements, by, among other things, requiring that all U.S. carriers pay the same, non-discriminatory (and non-competitive) termination rate to a particular foreign monopoly carrier. The Commission attacked whipsawing not because it wanted to preserve competition (which did not exist), but to ensure that U.S. carriers were treated fairly by monopoly carriers.

The definition of "whipsawing," as set out in D.C. Circuit and Commission precedent and consistent with the doctrine's origin and purpose, establishes that whipsawing occurs when: (1) a foreign carrier with "monopoly" or "market" power in a non-competitive market imposes a termination rate by pitting competing U.S. carriers against one another,[21] and (2) U.S. carriers

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[19] *Id.*

[20] *Id.* (emphasis added).

[21] *Cable & Wireless P.L.C.*, 166 F.3d 1224, 1227 (D.C. Cir. 1999); *MCI Comm. Corp.*, 13 FCC Rcd 17168, 17169-70 (1998); *1998 Biennial Regulatory Review, Reform of the International Settlements Policy and Associated Filing Requirements*, 14 FCC Rcd 7963, 7966 (1999) ("*ISP Reform Order*").

have no "alternative means of terminating" international traffic.[22] These conditions do not exist in the Philippines, and the Bureau's attempt to apply the theory in this case is unsupported and inappropriate.

1. The Philippine International Telecommunications Market Is Competitive.

a. There Are Competitive Alternatives To PLDT for Terminating U.S. Carriers' Traffic.

The Philippines has nine international gateway facility operators, seven mobile operators, and dozens of fixed line operators. New carriers now account for more than half of all calls from the U.S. to the Philippines, and PLDT's share continues to decline.[23]

The Order ignores these competitors to PLDT and undertakes no meaningful analysis of the market for international telecommunications in the Philippines. Instead it announces that PLDT is a "dominant" local exchange carrier as defined by Commission rules, and therefore "has market power in the market for *local* telecommunications service in the Philippines."[24] Leaving aside the factual and legal error of equating "market share" with "market power" where there is contrary evidence of competition, the Bureau cites the wrong market -- the relevant market is that for international telecommunications between the U.S. and the Philippines, not the "local" market, which is different. PLDT's share of the relevant market -- of all fixed and mobile calls from the U.S. to the Philippines -- is 47.9%.[25]

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[22] *ISP Reform Order* at 7966; *In the matter of International Settlement Policy Reform, International Settlement Rates (NPRM)*, 17 FCC Rcd. 19954, at ¶ 23 & n.76 (2002).

[23] PLDT's estimated share of 47.9% includes Smart, PLDT's mobile subsidiary, and is based on total fixed and mobile minutes in 2002. Supp. Obias Decl. at ¶¶ 14-15, Ex. 5.

[24] Order at 9 (emphasis added)

[25] Supp. Obias Decl. at ¶ 15, Exs. 5-6.

b. PLDT's Termination Rates Are Far Below the FCC Benchmark Rate.

Reflecting the effects of competition, PLDT charges U.S. carriers much less than the FCC benchmark rate of 19 cents per minute (for "lower-middle income" countries) to terminate their international traffic in the Philippines.[26] Even the 12 cent per minute rate challenged here is 37% below the benchmark and -- according to the *Benchmarks Order* -- "presumptively just and reasonable."[27] Indeed, the 12 cent rate is 20% below the benchmark established by the Commission for the most highly developed nations.[28]

The *ISP Reform Order* recognizes such conditions as indicative of effective competition, for, "[u]nless a dominant carrier were subject to competitive pressures . . . it would have little incentive to reduce its rates substantially below the benchmark levels."[29] Yet the Bureau has ignored the competitive realities that have forced PLDT to reduce its rates by 24 cents since 1999, instead treating a four cent increase as conclusive evidence of the market power that must exist to find "whipsawing."[30]

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26 *Benchmarks Order* at 19860 & Table 3.

27 *Id.* at 19939. The *Benchmarks Order* cited with approval the 12 to 8 cent settlement rates U.S. carriers paid to Canada, describing these rates as "*substantially below*" the benchmark rate and indicative of "*robust competition.*" *Id.* at 19813 & fn.16 (emphasis added).

28 *Id.* at 19860 (establishing a benchmark of 15 cents per minute for "upper income" countries).

29 *ISP Reform Order* at 7983.

30 Obias Decl. at ¶ 20. Thus, even with the current rate increase, PLDT's rates will have dropped by 67 percent since 1999 (from 36 cents to 12 cents per minute). *Id.*

c. The Philippines Meets the Commission's Standards for ISP Removal.

By the Commission's own standards, the Philippines market is a competitive one. In addition to qualifying for International Simple Resale ("ISR") treatment,[31] the 12 cent rate PLDT is seeking would also qualify for complete removal of the ISP, a result available where foreign carriers "provide service in *competitive*" markets, *i.e.*, "where U.S. carriers are able to terminate at least 50% of their U.S. billed traffic in the foreign market at rates that are at least 25% below the applicable benchmark settlement rate."[32] According to the Commission, when rates meet this test, there is "*convincing evidence* that competitive pressures exist in the foreign market to constrain" the foreign carrier.[33] The Order cannot be reconciled with the Commission's acceptance of these indicia as proof of competition in the relevant market.

d. Termination Rates in the Philippines Are Lower Than in Other Countries Treated as Peers By the Commission.

Similarly irreconcilable with the Commission's precedent is the Order's reliance on termination rates in eight countries -- Australia, Malaysia, New Zealand, Singapore, Hong Kong, Japan, South Korea and Taiwan -- that are classified as being in a higher economic bracket than the Philippines, for proof that PLDT's 12 cent rate is improper.[34] Any fair comparison would involve other countries which, like the Philippines, are classified by the FCC as "lower-middle

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[31] *See* Public Notice DA 00-2356 (Oct. 19, 2000).

[32] *ISP Reform Order* at 7964-65 (emphasis added); *see also id.* at 7983.

[33] *Id.* at 7986 (emphasis added).

[34] Order at 9 fn.44; *Benchmarks Order* at Appendix C.

income." Of the 37 "lower-middle income" countries with rates published by the Commission, the average settlement rates are, in every case, as high or higher than the 12 cent rate at issue.[35]

Also relevant are AT&T's long distance rates to the Philippines, which are lower than its rates to any of the 62 countries designated as "lower-middle income" by the Commission.[36] Assuming some correlation between foreign carrier termination rates and U.S. long distance rates,[37] it is fair to assume that the settlement rates charged by Philippine carriers are as low, or lower than, the rates charged by the carriers in most, if not all, of the remaining 25 countries for which average termination rates are not publicly available. Finally, it is noteworthy that, according to the Commission, worldwide settlement rates average 14 cents per minute, two cents higher than the rate at issue here.[38]

2. PLDT Has Not Colluded with Other Philippine Carriers.

Faced with the fact that the market for international telecommunications traffic in the Philippines is competitive, AT&T and WorldCom have asserted, without benefit of support, that the Philippine carriers have engaged in "concerted action." The Bureau accepted these

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35 *See Consolidated Accounting Rates of the United States*, International Bureau (April 1, 2003), available at http:/www.gov/ib/pd/pf/consolar.xls.

36 *See* http://www.consumer.att.com/global/english/international/int_aisp.html (March 3, 2003). AT&T told the Bureau that its termination rates to six "lower-middle income" countries are below eight cents per minute, *see* AT&T Letter to Paul Margie (filed Mar. 5, 2003), but did not disclose its termination rates to the *other 55* "lower-middle income" countries. Even more disturbing than its withholding this information is the fact that AT&T appears to charge U.S. consumers many multiples of what it pays for termination, *id.;* the Bureau seems to assume that lower termination charges will benefit *consumers*, not Complainants, but AT&T's rates appear to refute such a conclusion.

37 *See Benchmarks Order* at 19931 ("we expect to see U.S. carriers pass on to consumers the savings in net settlement payments on a route-by-route basis"). *But see* n.35 *supra.*

38 *In the matter of International Settlement Policy Reform, International Settlement Rates (NPRM)*, 17 FCC Rcd. 19954, at ¶¶ 1,18 (2002).

bald assertions, and ignored contrary evidence, "finding" that the record "suggests" that the Philippine carriers "engaged in concerted action" to "whipsaw" U.S. carriers into accepting a rate increase.[39] It is, however, not "the record" but Complainants who suggest this, with only suppositions as their support. The Bureau must make its own findings, based on fact, to rebut the presumption established by the *Benchmarks Order*. Here, the only facts in the record contradict a finding of collusion on the part of the Philippine carriers.

Following Complainants' lead, the Bureau cited as evidence of concerted activity contracts Globe Telecom has with PLDT and other Philippine carriers regarding the rate Globe charges to carry over its own network international calls that the other Philippine carrier has previously accepted from an international carrier. The Bureau's assertion that "they all agreed to increase their termination rates on international calls"[40] misconstrues the facts, and is not supported, but contradicted, by its citation to Globe Telecom's January 29, 2003 Form 6-K filing. That filing makes clear that Globe entered into *separate* interconnection rate agreements with various Philippine carriers for handling this "off-net" traffic. These interconnection rate agreements, which are mandatory under Philippine law, do not set the rate Philippine carriers charge international carriers to terminate international calls in the Philippines. These agreements relate to the rate at which one Philippine carrier may charge another for terminating "off-net" international traffic. They in no way prevent Globe, PLDT, or any other Philippine carrier from charging U.S. carriers *less* than that rate for U.S. traffic terminated in the Philippines.

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[39] Order at 10.

[40] *Id.*

NTC's March 12, 2003 Order rejected the Bureau's "characteriz[ation] [of] the interconnection agreements of the Affected Carriers for termination rates amongst themselves as concerted action to 'whipsaw' US carriers and force them to agree to identical termination rates."[41] Rather,

> Interconnection among Philippine carriers is mandated by law, and Philippine interconnecting carriers must, by the same law, charge non-discriminatory rates. Thus, actions taken by Philippine carriers in compliance with the domestic law on interconnection and non-discriminatory charges *do not constitute concerted anti-competitive action. Each Philippine carrier nonetheless remains free to negotiate with its foreign counterpart for termination rates.*[42]

The only other "evidence" of concerted action cited by the Order is Complainants' unsupported allegations that Philippine carriers sought the same rate increase from U.S. carriers at the same time and then responded in identical fashion when Complainants refused to agree. These allegations are untrue, but even if they were true, they do not support a finding of collusion as a matter of law.

PLDT demonstrated that it notified AT&T and WorldCom in May 2002 of its intent to raise termination rates, *effective August 1.* When Complainants balked, PLDT extended the 8 cent rate both to permit negotiations and because AT&T threatened to divert its traffic from PLDT to other carriers. PLDT finally ended the 8 cent rate on February 1, 2003, having decided that the negotiations were futile.[43] Thus there was no lock-step action.

Even if other Filipino carriers raised rates on February 1, moreover, this is no more proof of "concerted action" than AT&T's and WorldCom's raising of their U.S long distance rates at

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[41] Supp. Obias Decl. at Ex. 2.

[42] *Id.* (emphasis added).

[43] Obias Decl. at ¶¶ 2-11, Ex. 1; Supp Obias Decl. at ¶¶ 7-8.

the same time.[44] As AT&T admits, "parallel behavior" or "price leadership" "may occur in competitive markets,"[45] and thus such parallel behavior does not establish the existence of a collusive agreement. For Complainants to meet their burden on a "whipsawing" claim, they "must present evidence 'that tends to *exclude the possibility*' that the alleged conspirators acted independently."[46] There is no such evidence.

Nor have Philippine carriers reacted the same way to Complainants' refusal to pay higher termination rates. As the Bureau concedes, of the "nine carriers" that sought a rate increase from WorldCom, only three (PLDT, its subsidiary Smart, and Globe) "discontinued or degraded service with WorldCom.[47] Of these three, Globe "has not blocked AT&T's direct circuits," but only the "off-net" traffic it handles that is destined for other Filipino carriers.[48] These diverse actions are the opposite of concerted behavior.

Finally, data from Arbinet, a "spot market" resale operator, confirms that there is not any uniform rate, but a variety of termination rates being offered for fixed line traffic into the Philippines. These include rates for termination of traffic into Manila at below 12 cents per

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44 *See The Washington Post*, Financial E-1 (January 1, 2002).

45 *Ex Parte* Letter from AT&T to Donald Abelson (filed Mar. 3, 2003), at 1-2.

46 *See Matsushita,* 475 U.S. at 588.

47 Order at 5.

48 Opposition of Globe Telecom, IB Docket No. 03-38 (filed Feb. 21, 2003), at 3-4. The Bureau views Globe's blocking of "off net" traffic as "whipsawing" that supports its theory of concerted action. Order at 10. But this view ignores not only the diversity in PLDT's and Globe's actions, but the legitimate business justification Globe has for not accepting traffic from entities that refuse to pay it a rate that will cover its costs. *Id.* The law does not permit an inference of concerted action in those circumstances. *See Matsushita*, 475 U.S. at 588 ("conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy").

minute.[49] Unlike Complainants' unsupported assertions, this is actual evidence that contradicts claims of a "cartel price" or that there is no alternative to the 12 cent rate.[50]

3. The Facts Here Do Not Constitute Whipsawing Under FCC Precedent.

The cases cited by the Bureau[51] fail to support both its definition of "whipsawing" and the drastic remedy it has imposed. The decision on which Complainants principally rely, the *Argentina Order*,[52] is distinguishable on multiple grounds. First, the rate sought by Telintar (Argentina's monopoly carrier) was "substantially above the settlement rate benchmark for Argentina" in effect at the time.[53] Here PLDT is seeking to increase its rates to a rate that is still 37% below the benchmark rate. Second, Telintar was a "monopoly" carrier with 100% of the market, and the Telintar/AT&T arrangement was governed by ISP. PLDT, with 47% of the market, is not a monopolist; further, as discussed above, and as the FCC's removal of ISP requirements attests, the Philippines market is competitive. (*See supra* at 8-11).

Third, when Telintar disrupted AT&T's international service, it had an interim accounting rate agreement with AT&T, but violated this contract to punish AT&T for seeking a rate reduction.[54] Here, Complainants would not enter into any contract, although the rate had

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49 *Ex parte* Letter from PLDT to Donald Abelson (filed Feb. 27, 2003), at 2 and Attachment A.

50 The Bureau refers to the Arbinent data in a footnote, for a fact not in dispute -- that it shows a recent increase in average rates -- but it ignores the true significance of the data as inconsistent with charges of collusive rate setting, and as reflective of alternatives to PLDT. Order at 16 fn.84.

51 *See, e.g.,* Order at 1 fn.1; 14 fn.73.

52 *In the Matter of AT&T Corp., Proposed Extension of Accounting Rate Agreement for Switched Voice Service to Argentina*, 14 FCC 8306 (1999) ("*Argentina Order*").

53 *Id.* at 8311.

54 *Id.* at 8308

been widely accepted in the U.S. and throughout the world, so no rate agreement was in place when PLDT suspended direct connection to its circuits on February 1. Instead, Complainants elected not to negotiate with PLDT, and AT&T threatened to take its business elsewhere unless it got the rate that it wanted (a threat it has followed through on during negotiations with PLDT in the past).[55] Refusing to carry traffic at below market rates can scarcely be termed "punishment."[56] Finally, the remedy imposed in the *Argentina Order* required Telintar to offer AT&T the lowest termination rates it offered other U.S. carriers -- exactly what PLDT has been offering Complainants all along.

In sum, neither the *Argentina Order*, nor any other case cited by the Bureau, provides precedent for the Order, which (i) abrogates contracts with foreign carriers, (ii) requires contracts to be renegotiated under the ISP under conditions that are loaded in Complainants' favor, and (iii) purportedly prevents U.S. carriers even from paying Philippine carriers what they are owed for carrying pre-February 1 traffic.[57]

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55 Supp. Obias Decl. at ¶ 8.

56 Complainants' refusal continued even after PLDT offered to retroactively reimburse AT&T and WorldCom for any overpayment in the event a final, lower rate were negotiated. Obias Decl. at ¶ 14.

57 Order at 20; Supp. Obias Decl. at ¶ 12. The other cases cited in the Order are also inapposite. *See infra* at 18 fn.62.

B. The Bureau's Order Is Contrary To the Commission's *Benchmarks Order*, Improperly Expands the Reach of the Commission's Jurisdiction Over Foreign Carriers' Rate Actions, and Was Issued Without a Requisite Rulemaking Proceeding.

1. The Bureau Improperly Has Created a New Requirement of Cost-Justification for Rate Increases That Are Below the Benchmarks.

The Commission's *Benchmarks Order* established benchmark rates for the termination of U.S. carriers' traffic in foreign countries. Under that Order, rates at benchmark levels are "presumptively just and reasonable,"[58] and there has been no question that U.S. carriers can pay foreign carriers' termination charges at or below the benchmark rates.[59]

In the Order, the Bureau imposes, for the first time, a new rule: even as to below benchmark rates, "[a] U.S. carrier must make a strong [cost] showing that a proposed rate increase [in a foreign carrier's termination rates] would be in the public interest."[60] Nothing in the *Benchmarks Order*, or any other Commission precedent, remotely supports the extraordinary notion that every time a foreign carrier wishes to increase rates to a level still below benchmark, detailed cost justification must be presented to the Commission for its approval. Indeed, this notion is fundamentally at odds with the rationale of the Benchmarks *Order*. The Bureau's citation of the *Benchmarks Order's* policy requiring rates *exceeding* benchmark to be justified with a sufficient cost showing is at best illogical.[61] Far from the supporting the Bureau, this

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[58] *Benchmarks Order* at 19856.

[59] *Id.* at 19941.

[60] Order at 14.

[61] *Id.* at n. 73; *see Benchmarks Order*, 12 FCC Rcd. at 19894.

policy highlights the lack of any requirement that rates below the benchmarks be subject to Commission scrutiny to determine whether they are cost-based.[62]

2. The Bureau Ignored the Commission's Decision To Apply ISR To the Philippines and Eliminate ISP Rules and Policies.

The Commission placed the Philippines on its ISR list more than two years ago.[63] As a result, U.S. carriers are free to negotiate individual termination rate agreements with Philippine carriers. The negotiated rates may vary among carriers and need not be identical for inbound and outbound traffic.[64] Accordingly, complaints that PLDT's rates are too high or discriminatory (even if true, which they are not), or regarding rate differentials between inbound and outbound traffic, are all irrelevant. It is, moreover, not discrimination to seek the same rates charged to other carriers and, when two carriers refuse to pay the rates to which others have agreed, deny them service.[65]

Rather than confront the inconsistencies between the logic of the Order and the Commission's ISR policies, the Bureau takes the unprecedented action of retroactively

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62 The cases cited in the Order are equally inapposite. In all of them the Commission merely prohibited a U.S. carrier from paying a foreign carrier a rate that was substantially above-benchmark. For example, in the India case, the Bureau refused to waive the ISP to allow an increase in rates that were well above the benchmarks ($1.38-$1.58 per minute), noting that the proposed rates "fail to make significant progress in moving . . . toward the benchmark rate." *MCI Comm. Corp.*, 13 FCC Rcd at 17170. And in *Sprint*, in which the Bureau also rejected an above-benchmark rate, it "reiterate[d]" that a foreign carrier's agreement to reduce its rates to the benchmark level is in the public interest despite the fact that this rate may be well above cost. *Sprint Comm. Corp.*, 13 FCC Rcd 24998, 25004 (IB 1998). In this case, the rates at issue are already below the benchmarks, and no waiver of the ISP was sought or required.

63 *See Public Notice*, DA 00-2356 (Oct. 19, 2000).

64 *ISP Reform Order* at 7968.

65 Nor has there been any showing of "Special Concessions" being granted to PLDT's U.S. carrier affiliate.

suspending the Philippines from the ISR list.[66] This action was taken without notice or opportunity for comment,[67] and without precedent or other legal authority.[68] Further, by applying its new rule retroactively, the Bureau forces repudiation of agreements that, when negotiated, were fully consistent with all U.S. laws and policies, as well as those of the Philippines.

The Order further deviates from Commission rules by imposing the ISP on a route that fully meets the standards for doing away with ISP. Although neither the Bureau nor the Complainants dispute that this standard has been met,[69] the Bureau asserts that compliance with established rules is not enough, insisting that there must be an additional, unspecified "public interest" showing and finding for removal of the ISP.[70] But neither the Commission's rules[71] nor any of its published actions eliminating a route from application of the ISP[72] impose such additional requirements. As a matter of settled precedent, the Commission never has denied a

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[66] *Id.* at 17-18.

[67] Neither AT&T nor WorldCom even asked that such action be taken. *See infra* at 22.

[68] There is no reported case in which the Commission has ever removed (or suspended) a country from the ISR list. In this case, the test for permitting ISR agreements -- settlement rates for at least 50% of traffic terminated at or below benchmarks -- is amply met even at a 12 cent rate. 47 C.F.R. §63.16(b)(1).

[69] AT&T essentially concedes as much. *See* AT&T Reply (Feb. 27, 2003), at 16.

[70] *See* Order at 12-13.

[71] *See* 47 C.F.R. § 43.51(e) and accompanying note.

[72] *See, e.g., Public Notice, International Authorizations Granted,* 17 FCC Rcd 22508, 22509 (2002) (adding Bosnia Herzegovina to ISP-exempt list). Similarly, a party that seeks to remove a market from the list of markets that are exempt from ISP need not make a "public interest" showing; it need only show that the objective standard for ISP removal is not being met. *See* 47 C.F.R. § 43.51(e) and accompanying note. Nor is there a "public interest" standard in the Commission's rules governing routes that are ISR eligible. *Id.* at § 63.16.

request for a declaratory ruling where the objective, benchmark-based standard for removal of ISP was met.

3. The Order Rewrites the Commission's Benchmark, ISR and ISP Rules and Policies Without a Rulemaking Proceeding, and Improperly Expands the Commission's Jurisdiction, Putting It in the Role of "World PUC".

The Commission's *Benchmarks Order* and its associated ISR policies and elimination of ISP over certain routes, taken together, reflect a determination to avoid detailed regulation and cost-based analysis of each foreign carrier's termination charges. Instead, in markets where competition already has reduced termination rates below benchmark levels, the Commission concluded that "the ISP is [not only] unnecessary, its application *will actually inhibit competition* in the U.S. international services market" by, for example, favoring entrenched carriers at the expense of new entrants -- exactly what the Order threatens to do.[73]

The Bureau's Order clashes with these Commission rules and policies, treating compliance with the Commission's benchmarks as meaningless and suspending the ISR, although the standards for applying it continue to be met. If not reversed, the Order will rewrite the Commission's benchmarks rules and policies by: (1) reversing the Commission's determination that rates at or below benchmark rates are presumptively just and reasonable; (2) requiring -- for the first time -- that carriers submit cost studies to justify rate increases;[74] and (3) making continued application of ISR rules subject to a vague and undefined "public interest" requirement. Equally pernicious and without precedent is the Bureau's retroactive suspension of

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[73] *ISP Reform Order* at 7970, 7972-73 (emphasis added).

[74] Order at 14. The Bureau never defines what is a sufficiently "strong showing" to justify a rate increase.

ISR, without notice or opportunity to comment upon such action, through a summary "emergency" proceeding.

Such fundamental changes in the Commission's rules and policies not only go well beyond the delegated authority of the Bureau,[75] they violate the Commission's duty to "follow [its] own regulations, procedures, and precedents."[76] Basic principles of administrative procedure require that "an agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modifications or repeal."[77] Here, the Bureau is making new law without the Commission's initiating a rulemaking proceeding, contrary to law.

C. The Bureau's Procedures Violated the Commission's Own Rules and Denied PLDT Due Process.

The *Benchmarks Order* provides that, when a U.S. carrier seeks to complain about a foreign carrier's alleged lack of compliance with that Order's rules and policies, the U.S. carrier is to file a petition with the Commission, which must be served on the foreign carrier. That petition is then to be placed on public notice and the foreign carrier is given thirty-five (35) days to respond.[78] Here, the Bureau ignored this process. Upon nothing more than Complainants' unsubstantiated charges of whipsawing, the Bureau wrote to the Philippine regulatory agency,

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75 *See* 47 C.F.R. § 0.261(a)(1), (8) (the Bureau has the authority to administer and enforce the Commission's existing policies and rules, not to change them).

76 *National Conservative Political Action Committee v. Federal Election Committee*, 626 F.2d 953, 959 (D.C. Cir. 1980).

77 *American Federation of Government Employees v. Federal Labor Relations Authority*, 777 F.2d 751 (D.C. Cir. 1985).

78 *Benchmarks Order* at 19894.

apparently accepting the "whipsawing" charges.[79] Immediately thereafter, the Complainants filed their petitions, without even serving PLDT, and the Bureau then gave PLDT 11 days to respond to sweeping allegations of misconduct. [80] Proceeding this way violates both Commission rules and fundamental due process principles.

Due process was further denied by the Bureau's unprecedented action of retroactively removing the Philippines from the ISR list (and directing ISP to apply to all agreements between U.S. and Philippine carriers) *sua sponte*, without any notice to PLDT or any opportunity for PLDT to address the issue.[81] The Bureau has relied upon ISP requirements that were not in place when the agreements were entered to abrogate PLDT's contracts with U.S. carriers. Further, by making the Order retroactive, the Bureau seeks to force PLDT to reprice both inbound and outbound traffic that was carried before the Order was entered.[82] Given the serious and far-

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79 Letter from Donald Abelson, Chief of the International Bureau, to Commissioner Borje of the NTC (Jan. 31, 2003).

80 The Bureau further failed to follow Commission procedures by conducting what is essentially a ratemaking proceeding without regard to the requirements of Section 205 of the Communications Act. In its *Benchmarks Order*, the Commission, expressly relying on the authority granted to it (over U.S. carriers) under Section 205, held that a foreign carrier's rates at or below the benchmarks are just and reasonable. *Benchmarks Order* at 19939-44. Here, while the Bureau asserts that it is "not establishing a specific termination rate," Order at 2, it nevertheless abrogates contracts with rates below benchmark, invoking the Commission's authority to regulate the rates paid by U.S. carriers, *id.* at 14, and stating that action has been taken pursuant to Section 205. *Id.* at 21.

81 *See United Gas Pipe Line Co. v. FERC*, 597 F.2d 581, 586-87 (5th Cir. 1979) ("The law will not tolerate ... after-the-fact, in fact retroactive, imposition of standards.")

82 According to Complainants, the Bureau's stop payment order means they cannot pay PLDT for services they received at the 8 cent rate, thereby compounding the punitive, retroactive effect of the Order. *See* Order at 17, n.88; Supp. Obias Decl. at ¶ 12.

reaching consequences of this unprecedented action, denying PLDT the opportunity to address this issue was a denial of due process.[83]

D. The Order Violates Commission Policy, Principles of Comity and Treaty Obligations by Failing To Give Respect To the Decisions of the Philippine Regulator.

U.S. and Commission policy has long been to foster and encourage the development of independent regulatory bodies in foreign countries to, among other things, monitor and enforce the obligations of carriers to establish reasonable and non-discriminatory charges for the termination of international services.[84] Establishment of independent regulatory bodies, and the transparency that follows establishment of such bodies, has long been a keystone of U.S. trade policy.[85] Moreover, respect for the decisions of independent foreign telecommunications regulators is further required under the International Telecommunications Regulations ("ITR") to which the U.S. is subject.[86]

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[83] The Bureau's response to the due process issue is essentially that no process is due. *See* Order at 6, n.27.

[84] *See Benchmarks Order* at 19887; *Foreign Carrier Entry Order*, 11 FCC Rcd 3873, 3890-94 (1995).

[85] *See USTR 2003 Review of Telecom Trade Agreements Highlights Market Access Barriers around the World, USTR Report, Results of 2003 Section 1377 Review of Telecommunications Trade Agreements*, (April 2, 2003) (emphasizing crucial role of independent regulators in developing competitive telecommunications markets (available at www.ustr.gov/sectors/industry/Telecom1377/2033/2033-0402-results.pdf).

[86] *See The Constitution and Convention of the International Telecommunications Union (Geneva 1992, Kyoto 1994, Minneapolis 1998), Preamble* ("it is the sovereign right of each country to regulate its telecommunications"). The Bureau's reliance on the D.C. Circuit's opinion in *Cable & Wireless* for the proposition that the extraterritorial effect of the Order should be of no concern, *see* Order at 14, is misplaced. In *Cable & Wireless*, the court accepted the FCC's representations that, "[f]ar from threatening foreign carriers with enforcement actions, the *[Benchmarks] Order at most* states that the FCC will contact 'responsible [foreign] government authorizes' to 'seek their support in lowering rates.'" 166 (continued ...)

In the Philippines, NTC is such an independent regulatory body. The NTC gave full consideration to the concerns raised by the International Bureau with respect to the rates and agreements at issue and it found them to be both reasonable and lawful (*see supra* at 6-7). The Bureau, however, ignored NTC's findings and proceeded as if there were no independent regulatory body in the Philippines.

The Order is also inconsistent with this country's non-discrimination obligations under the WTO Basic Telecom Agreement, since it fails "to treat like services and service suppliers from other WTO Members no less favorably than it treats its own services and service suppliers."[87] While requiring a "strong showing" for foreign carriers to increase their termination charges,[88] no such showing is required for U.S. carriers to raise the termination charges they levy on foreign carriers.

(... continued)

F.3d at 1230 (emphasis added). Thus, the case in no way supports the actions taken by the Bureau. Order at 20.

87 *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891, 24038 (1997) (citing Article XII (National Treatment of the GATS).

88 Order at 14.

IV. CONCLUSION

The Bureau misapplied the law and improperly accepted bald allegations as fact, in order to conclude that PLDT has engaged in whipsawing, and neither cited nor had any basis for the extraordinary relief it has granted. The Order should be reversed.

Respectfully submitted,

PHILIPPINE LONG DISTANCE
TELEPHONE COMPANY

By: ______________________

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Dated: April 9, 2003

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

In the Matter of	)	
	)	IB Docket No. 03-38
Philippine Long Distance Telephone Company	)	
Globe Telecom, Inc.	)	
	)	
AT&T Emergency Petition for Settlement	)	
Stop Payment Order and Request for	)	
Immediate Interim Relief	)	
	)	
Petition of WorldCom, Inc., for Prevention of	)	
"Whipsawing" on the U.S.–Philippines	)	
Route	)	

SUPPLEMENTAL DECLARATION OF RAMON ALGER P. OBIAS

1. My name is Ramon Alger P. Obias. I am Vice President of International Business for the Philippine Long Distance Telephone Company ("PLDT"). In this position, I am responsible for the negotiation of PLDT's various traffic termination arrangements with foreign carriers around the world, including U.S. carriers. More specifically, I have direct responsibility for PLDT's efforts to negotiate termination rates with both AT&T and WorldCom.

2. I submit this declaration in support of PLDT's Application for Review of the International Bureau's March 10, 2003 Order, and to supplement the declaration I submitted on February 21, 2003 in this proceeding.

3. In my original declaration, I described the fact that PLDT had notified AT&T and WorldCom that PLDT intended to increase its termination rates, effective

August 1, 2002, and extended that deadline on several occasions while negotiations with these carriers continued. In this declaration, I would like to explain why PLDT agreed to an 8 cent per minute rate in the first place, and why PLDT has found it necessary to seek a rate increase to 12 cents per minute.

4. In 2000, PLDT agreed with AT&T on a rate of 8.3 cents per minute for the vast majority of traffic that AT&T terminated with PLDT. PLDT agreed to this low rate because, at the time, AT&T committed to send PLDT a firm volume of traffic, and because AT&T convinced PLDT that by lowering its rate, PLDT would see an increase in the volume of such traffic flowing to it from the U.S. PLDT agreed to this rate despite the fact that the FCC's Benchmarks Order did not require it to meet the benchmark rate of 19 cents until 2001.

5. In subsequent rate negotiations, however, AT&T refused to agree to a firm volume of traffic. In my view, this position undermined the very justification AT&T had offered for the 8 cent rate to begin with. PLDT's fears were later realized when AT&T began sending less fixed traffic to PLDT. Between January 2001 and December 2002, both the volume of fixed (on-net) traffic from AT&T, and the revenues derived from that traffic, declined by more than 25 percent. *See* Exhibit 1.

6. These revenue losses suffered by PLDT were exacerbated by additional revenue losses due to foreign carrier bankruptcies and fraud. In addition, like most telecommunications carriers worldwide, PLDT is highly leveraged and has seen its costs increase dramatically in recent years. For example, a substantial

proportion of PLDT's foreign debt is in US dollars and debt-service costs have almost tripled because of the drop in the exchange rate between the Philippine peso and the American dollar (from about 20 pesos per dollar at the time the borrowing was incurred to 53 pesos per dollar currently). This, in turn, has forced PLDT to increase its national long distance rates as well as its international termination rates.

7. In May, 2002, after coming to grips with the fact that the 8 cent rate was not generating the promised increase in traffic volume or revenue, and having endured nearly two years of heavy losses on fixed traffic, PLDT advised AT&T, WorldCom, and other carriers of its intention to increase its termination rates by August 1, 2002. As described in my earlier declaration, PLDT met on numerous occasions with both AT&T and WorldCom, but each company refused to agree to any rate increase. In an act of good faith, PLDT extended the effectiveness of the 8 cent rate to each carrier many times, eventually all the way through January 31, 2003. AT&T and WorldCom remained adamant that they would accept no rate increase; AT&T even asked for a rate decrease to 6.5 cents per minute.

8. In October 2002, AT&T threatened to divert traffic from PLDT if rates were increased. PLDT took this threat seriously, as AT&T had in the past diverted traffic from PLDT as means to gain leverage during rate negotiations. For example, during rate negotiations in the first half of 2000, AT&T diverted progressively more traffic away from PLDT from February through May.

9. Despite the fact that the two largest U.S. carriers refused to accept a rate increase, PLDT has reached agreement for a termination rate of 12 cents per minute (or higher) for fixed traffic and 16 cents per minute (or higher) for mobile traffic, with nearly 100 carriers worldwide, including more than 20 carriers in the U.S. These new termination rates are cost-justified under the Cost Manual that PLDT submits to the Philippine NTC on an annual basis. The NTC has found these rates to be "fair and reasonable." *See* Exhibit 2, at 2. (Memorandum Order dated March 12, 2003, issued by the Philippine NTC).

10. As to AT&T and WorldCom, PLDT now believes that they never intended to negotiate regarding a rate increase. It is now clear that, without PLDT knowing, AT&T and WorldCom sought the Commission's assistance in forcing PLDT to accept their terms while at the same time professing to negotiate with PLDT in good faith. Although PLDT thought it was engaged in *bona fide* negotiations, AT&T and WorldCom apparently had already been complaining to the FCC of "whipsawing" by Filipinio carriers and working together to secure the International Bureau's January 31, 2003 letter to the NTC to that effect.

11. In a letter agreement dated February 28, 2003, PLDT reached an interim agreement with WorldCom, and has been engaged with WorldCom in further negotiations. In contrast, AT&T responded to PLDT's overtures to negotiate by stating that it is "pointless to agree to 'consider' an increase when AT&T has no intention to actually agree to such an increase." *See* Exhibit 3. In my view,

AT&T's own words confirm that it never intended to negotiate in good faith with PLDT.

12. AT&T and WorldCom owe PLDT approximately $5.1 million and $2.7 million, respectively, for termination services provided to them by PLDT prior to February 1, 2003. Both companies have taken the position that the International Bureau's March 10 Order prevents them from paying PLDT for these past services rendered.

13. Attached at Exhibit 4 is a letter from the NTC to the FCC dated February 26, 2003, which attaches an NTC Memorandum Order dated February 7, 2003. Both documents are referred to in the NTC's March 12 Order (Exhibit 2).

14. PLDT competes in an intensely competitive market for international telecommunications. Today, the Philippines has nine international gateway facility operators, seven mobile operators, and dozens of fixed line operators. These new carriers have taken more than half of the market from PLDT.

15. As shown in Exhibit 5, we estimate that PLDT has a market share of only about 47.9% of all calls from the U.S. to the Philippines. This market share estimate includes Smart, PLDT's mobile subsidiary, and is based on total fixed and mobile minutes in 2002. This estimate also is consistent with figures published by TeleGeography for *outgoing* traffic to the U.S., which show PLDT with a 49.9% share in 2001. Exhibit 6. According to TeleGeography, PLDT's share of the outgoing traffic has declined every year over the past decade as new competitors have taken business away from PLDT. This view is certainly consistent with our

experience, and we suspect that when TeleGeography publishes PLDT's market share for 2002, it will show a decline from 2001.

16. Perhaps the stiffest competition faced by PLDT comes from mobile carriers. Mobile carriers now handle more U.S. to Philippines traffic than fixed line carriers, and they are growing much more quickly. According to the NTC, the number of cellular mobile subscribers in the Philippines grew from about 1.3 million in 1997 to more than 12 million in 2001. *See* www.ntc.gov.ph/images/consumer-frame.html.

17. As the mobile carriers grow, they continue to take market share from the fixed line carriers, a phenomenon PLDT calls "land-line substitution." Indeed, our experience tells us that mobile service is viewed as substitutable with land-line service, and our customers can and do switch between the two services based on price and quality of service. We believe this trend will continue as new Filipino competitors continue to enter the mobile business. Digital recently entered the market, Bayantel has been allocated mobile spectrum by the NTC and will enter in the near future, and Nextel is now backed by a new group of investors and intends to re-launch its mobile service in the Philippines within six to nine months.

Pursuant to 28 USC § 1746, I, Ramon Alger P. Obias, declare under penalty or perjury under the laws of the United States of America that the foregoing is true and correct.

By: ______________________
Ramon Alger P. Obias
Vice President,
International Business

Dated: April 9, 2003

Exhibit 1

AT&T to PLDT Inbound Minutes and Revenue
2001 - 2002
(On Net Fixed Traffic)

Month/Year	Minutes (Millions)	Gross Revenue (Million US$)
Jan-01	18.36	1.47
Feb-01	14.84	1.19
Mar-01	14.29	1.14
Apr-01	11.50	0.92
May-01	9.85	0.84
Jun-01	8.35	0.71
Jul-01	11.33	0.94
Aug-01	19.49	1.59
Sep-01	19.69	1.61
Oct-01	11.16	0.93
Nov-01	14.41	1.19
Dec-01	15.66	1.30
Jan-02	15.06	1.27
Feb-02	13.60	1.15
Mar-02	13.28	1.12
Apr-02	8.46	0.72
May-02	8.65	0.74
Jun-02	7.57	0.64
Jul-02	9.31	0.70
Aug-02	10.33	0.78
Sep-02	12.48	0.94
Oct-02	13.26	0.99
Nov-02	11.50	0.86
Dec-02	13.89	1.04

REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS
NATIONAL TELECOMMUNICATIONS COMMISSION
BIR Road, East Triangle, Diliman, Quezon City

March 12, 2003

MEMORANDUM ORDER

Philippine Long Distance Telephone Company (PLDT)
SMART Communications Inc.
GLOBE Telecom, Inc.
Bayan Telecommunications, Inc.
Other Public Telecommunications Entities (PTEs) similarly situated

This Commission is in receipt of the Order of Mr. Donald Abelson, Chief, International Bureau of the United States Federal Communications Commission (FCC) dated March 10, 2003 (the "Abelson Order") ordering all facilities-based carriers subject to FCC jurisdiction to suspend all termination payments to the Philippine Long Distance Telephone Company ("PLDT"), Globe Telecom, Inc. ("Globe") , Bayan Telecommunications, Inc. ("Bayantel"), Digital Telecommunications Philippines, Inc. ("Digitel"), Smart Communications, Inc. ("Smart") and Subic Telecom ("Subictel") (collectively, "the Affected Carriers") until such time as the US FCC issues a Public Notice that AT&T's circuits on the US-Philippines route are fully restored.

On February 7, 2003, this Commission issued an order to the Philippine carriers "without existing and effective agreements relative to termination rates . . . to negotiate and conclude agreements. Pending any conclusion, the parties may agree on provisional/interim arrangements for continuity of service."

On February 26, 2003, this Commission conveyed its official position on the termination rate dispute to the FCC, this Commission's counterpart regulatory agency in the United States, and among others stated in said letter that *"absent any provisional or interim arrangement or agreement, there would be termination of service between the parties who are thereby encouraged to seek other routes or options to terminate traffic to the Philippines."*

Nonetheless, this Commission continues to encourage Philippine carriers with no existing and effective agreements with foreign carriers relative to termination rates to negotiate and conclude bilateral agreements.

The Abelson Order clearly frustrates the mandate of this Commission, its orders and issuances.

This Commission is tasked to enforce the declared national policy of Republic Act 7925 *"to develop and maintain a viable, efficient, reliable and universal telecommunications infrastructure using the best available and affordable telecommunications technologies as a vital tool to nation-building and development."* To attain this objective, the telecommunications industry must be able to generate and collect revenues on a timely basis and plow them back into expansion and improvement of the telecommunications infrastructure for sustained growth and development.

The Abelson Order is detrimental to the attainment of this objective. By ordering a suspension of all payments, whether for services already rendered, or services yet to be rendered, the Abelson Order undermines the very foundation of the viability and efficiency of the Philippine telecommunications industry.

To prevent injury to the Philippine telecommunications industry that this Commission is mandated to protect, this Commission hereby provides its direction to Philippine carriers on the effect of the Abelson Order vis-à-vis this Commission's official position.

The ultimate effect of the Abelson Order is *first*, to punish Philippine carriers who are within the jurisdiction of this Commission and not of the US FCC; *second*, to increase the cost of calls on Filipino consumers; and *third*, to impair established rights and obligations arising from contracts already perfected. Therefore it is incumbent upon this Commission to assert its jurisdiction.

The Commission has observed the incident before the International Bureau of the US FCC and without passing on the question of the International Bureau Chief's jurisdiction to render his final conclusion in the incident, we point out that the conclusions made in the Abelson Order are without basis. Notably, the Abelson Order has characterized the interconnection agreements of the Affected Carriers for termination rates amongst themselves as concerted action to "whipsaw" US carriers and force them to agree to identical termination rates. Interconnection among Philippine carriers is mandated by law, and Philippine interconnecting carriers must, by the same law, charge non-discriminatory rates. Thus, actions taken by Philippine carriers in compliance with the domestic law on interconnection and non-discriminatory charges do not constitute concerted anti-competitive action. Each Philippine carrier nonetheless remains free to negotiate with its foreign counterpart for termination rates.

This Commission maintains, as contained in its position to the FCC of February 26, 2003, that the Philippine carriers' US $ 0.12 per minute (for calls terminating to fixed line network) and US $ 0.16 per minute (for calls terminating to mobile network) termination rate offers are fair and reasonable, being well within the benchmarks of both the FCC and the International Telecommunications Union (ITU). Benchmarks serve the purpose of setting forth universally acceptable standards of what is fair and reasonable and are accorded respect. It is ironic that the Abelson Order now puts in question and negates the very benchmarks established by the US FCC.

PREMISES CONSIDERED, this Commission hereby **DIRECTS** all the Affected Philippine carriers, and all other Philippine carriers who, though not specifically named in the Abelson Order, may likewise be affected by it:

(1) Not to accept terminating traffic via direct circuits from US facilities-based carriers who do not pay Philippine carriers for services rendered; and

(2) To take all measures necessary to collect payments for services rendered in order to preserve the viability, efficiency, sustained growth and development and continued competitiveness of the Philippine telecommunications industry.

SO ORDERED.

ARMI JANE R. BORJE
Commissioner

KATHLEEN G. HECETA
Deputy Commissioner

JORGE V. SARMIENTO
Deputy Commissioner

Copy furnished : The Executive Secretary, Malacanang
The Secretary, Dept. of Transportation and Communication
Attn : Undersecretary Virgilio L. Pena

Exhibit 3

Mark Miller
Regional Director
Asia/Pacific Route Management

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March 4, 2003

Ramon Alger P. Obias
PLDT
Vice President
International Business
9/F Ramon Cojuangco Building
Makati Avenue, Makati City, 0721 Philippines
Fax: 632-812-2808

Dear Mr. Obias,

I am in receipt of your e-mail dated March 3, 2002 to Rom Carlos of AT&T concerning reaching an interim rate agreement with AT&T. In addition, Mr. Carlos has informed me of the general terms of the proposed interim agreement.

You have requested AT&T inform you that it would be "open and willing to consider the payment of higher termination rates to PLDT" as a pre-condition to formal discussions on the interim agreement. I could respond to you agreeing to such a request. However, that would be misleading and unfair to PLDT. AT&T would like to approach these negotiations in an honest manner. AT&T has already informed the Philippine carriers that it is not willing to increase the last-expired termination rates. Therefore, it would be pointless to agree to "consider" an increase when AT&T has no intention to actually agree to such an increase. Moreover AT&T's viewpoint is consistent with the FCC's overarching policy and objectives on low cost based international termination rates.

At some point, we hope and expect AT&T and PLDT will reach a new agreement on termination rates. In the interim, AT&T is willing to pay an interim rate to PLDT. However, as PLDT has already agreed with WorldCom on an interim rate, AT&T expects that PLDT would not discriminate against AT&T, and offer AT&T a similar arrangement.

AT&T suggests, that as a sign of good faith and to get negotiations restarted that PLDT immediately unblock our bilateral circuits and that the parties extend the terms of the last-expired agreement on an interim basis. AT&T will make a pre-payment to PLDT in a similar manner as in the past. During the period of the interim agreement the parties will negotiate toward a mutually acceptable new agreement. Upon execution of the new agreement, the terms shall be retroactive to February 1, 2003. Any adjustments necessary to true-up the differences in the interim agreement and the new agreement will be made.

AT&T hopes to retain our partnership and hopes to normalize our business relationship so that we can begin to concentrate on new business between our respective companies. AT&T looks forward to your concurrence.

Sincerely,

Mark Miller

Mark Miller

EXHIBIT 4

REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS
NATIONAL TELECOMMUNICATIONS COMMISSION
BIR Road, East Triangle, Diliman, Quezon City

February 26, 2003

The Honorable Commissioners
Federal Communications Commission
Washington, DC 20554 USA

Subject : Termination Rates on US-Philippines Route

SIRS/MESDAMES:

It has come to our attention that AT&T and MCI/Worldcom have filed separate petitions before the Federal Communications Commission (FCC) alleging "whipsawing" and disruption of service on the U.S.-Philippine route on the basis that AT&T and MCI/Worldcom have not reached an agreement with Philippine carriers on termination rates.

It is the position of the National Telecommunications Commission (NTC) in keeping with international practice, commercial arrangements and national laws that termination rates are private commercial arrangements entered into by carriers of their own free will pursuant to the Constitutional guarantee of freedom to contract. It is our position that the Philippine carriers' US$0.12 per minute (for calls terminating to fixed line network) and US$0.16 per minute (for calls terminating to mobile network) termination rate offers are still well below the US$0.19 per minute FCC benchmark and the ITU suggested rate of US$0.238 applicable to countries such as the Philippines and are, therefore, fair and reasonable. The Philippine termination rates are in accord with the benchmarks of the US and the International Telecommunications Union (ITU) and have been accepted by most foreign operating administrations worldwide.

Consistent with our Memorandum Order dated February 7, 2003, which we attach for your reference, we have ordered our Philippine carriers with existing and effective agreements with foreign carriers relative to termination rates to **comply with the terms thereof, specifically in maintaining the flow of traffic in and between circuits and facilities covered by such agreements.** In the event that there exists no effective agreements, they are encouraged to negotiate and conclude agreements. Pending any conclusion, the parties may agree on provisional/interim arrangements for continuity of service. **It is, however, understood that absent any provisional or interim arrangement or agreement, there**

would be termination of service between the parties who are thereby encouraged to seek other routes or options to terminate traffic to the Philippines.

The NTC is most concerned with the request of AT&T and MCI/Worldcom for an immediate relief seeking the issuance by FCC of an order stopping US carriers from paying settlements to Philippine carriers until the termination rate issue is resolved. If so ordered by the FCC, this will definitely create dire consequences to the Philippine economy and is definitely detrimental for the Philippines, a developing economy with an infant telecommunications infrastructure that badly needs foreign exchange revenues.

We strongly urge FCC to give due consideration to the official position taken by the Philippines regulatory body, consistent with international comity and in the interest of all economies.

Very truly yours,

ARMI JANE R. BORJE
Commissioner

KATHLEEN G. HECETA
Deputy Commissioner

Copyfurnished:

Mr. Donald Abelson
Chief
International Bureau
Federal Communications Commission

REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS
NATIONAL TELECOMMUNICATIONS COMMISSION
BIR Road, East Triangle, Diliman, Quezon City

February 07, 2003

MEMORANDUM ORDER

Philippine Long Distance Telephone Company (PLDT)
SMART Communications Inc.
GLOBE Telecom Inc.
Bayan Telecommunications Inc.
Other Public Telecommunications Entities (PTEs) similarly situated

SUBJECT: **NTC Memorandum Order dated January 31, 2003 re: Maintaining Status Quo of existing communications circuits in the interest of public service and national welfare.**

In response to the Order of this Commission dated 31 January 2003, as duly enfranchised and authorized service providers in the Philippines, you made representations and commitments before the Commission, to always maintain your communication circuits open and ensure no disruption of service. You have likewise informed the Commission that in keeping with international practice, national laws and commercial agreements, you shall protect and promote your interest to negotiate mutually agreed international termination rates with other foreign administrations.

Further, the Commission is informed that as of this date, you have arrived at a number of bilateral agreements/arrangements for the increase in termination rates, with operating foreign administrations. While two, three or four administrations have not agreed on the increased termination rates, negotiations are on-going.

As shown, Philippine termination rates, even at increased rates, are still **well below the FCC benchmark rate of US$.19/minute for low middle income economies, such as the Philippines. It is also shown that these rates are low compared with ITU suggested target settlement rates for countries with teledensity between 1 to 5 telephones per 100 population which is US$.238 per minute.**

WHEREFORE, with your commitment and pursuant to the mandate to give assistance and encouragement to Philippine international carriers to establish interconnection with other countries so as to provide access to international communications highways on **competitive basis,** the National Telecommunications Commission (NTC) hereby AMENDS its Order dated 31 January 2003 with respect to the termination rates, as follows:

1. Philippine telecommunication carriers with existing and effective agreements with foreign telecommunication carriers relative to termination rates shall comply with the terms thereof, specifically in maintaining the flow of traffic in and between circuits and facilities covered by such agreements; and

2. Philippine telecommunication carriers without existing and effective agreements relative to termination rates are encouraged, as stated in the Order of January 31, 2003, to negotiate and conclude agreements. Pending any conclusion, the parties may agree on provisional/interim arrangements for continuity of service.

This Order is issued with a warning that the Commission shall exact observance of your 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. All other interconnection issues/concerns relative to the termination rates, such as access charges, shall be addressed accordingly in the context of this memorandum in compliance with the interconnection mandate.

FOR COMPLIANCE.

ARMI JANE R. BORJE
Commissioner

KATHLEEN G. HECETA
Deputy Commissioner

JORGE V. SARMIENTO
Deputy Commissioner

Copy furnished: The Executive Secretary, Malacañang
The Secretary, Dept. of Transportation and Communications
Attn: Undersecretary Virgilio L. Peña

US TO PHILIPPINES - 2002
ESTIMATE OF TRAFFIC DATA AND MARKET SHARE

Fixed Lines	Million Minutes	Market Share
PLDT (includes Subic)	486	50.6%
Digitel	162	16.9%
Bayantel	80	8.3%
GlobeTel (includes Islacom)	80	8.3%
PTC/Paptelco*	73	7.6%
Others (Philcom, Capwire, ETPI, LBNI)	60	6.3%
Piltel**	19	2.0%
Subtotal	**960**	**100.0%**

Mobile	Million Minutes	Market Share
Globe	500	51.3%
Smart	440	45.1%
Piltel**	35	3.6%
Others	-	0.0%
Subtotal	**975**	**100.0%**

Total Traffic (Fixed Lines and Mobile)	Million Minutes	Market Share
PLDT/Smart (includes Subic)	926	47.9%
Globe/GlobeTel (includes Islacom)	580	30.0%
Digitel	162	8.4%
Bayantel	80	4.1%
PTC/Paptelco*	73	3.8%
Others (Philcom, Capwire, ETPI, LBNI)	60	3.1%
Piltel**	54	2.8%
Subtotal	**1,935**	**100.0%**

* PTC are the private local telephone operators. Paptelco is the name of their association.

** PLDT owns about 45% of Piltel, but it does not control Piltel.

EXHIBIT 6

Market Shares of International Carriers

Percentage of Outgoing Minutes

Country/Carrier	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Philippines*													
PLDT			100.0	91.6	84.2	69.0	68.0	79.0	73.0	69.0	65.4	51.8	49.9
Globe Telecom								2.0	7.0	8.6	16.0	30.6	36.7
Digitel								2.0	3.0	4.3	4.9	5.0	4.5
Eastern Telecommunications						7.0	6.0	5.0	7.0	6.4	3.4	4.6	3.8
Bayan Tel							<1.0	4.0	5.0	5.7	4.6	3.5	2.6
Capitol Wireless						<1.0	<1.0	1.0	1.0	3.5	4.1	3.1	1.5
Philippine Global Communications				8.4	15.8	23.0	23.0	6.0	3.0	1.1	1.3	1.2	0.9
Others						1.0	3.0	1.0	1.0	1.0	1.0	1.0	1.0
Portugal													
Marconi											100.0	83.3	79.9
Cable & Wireless												8.6	13.1
Jazztel												2.0	1.8
Others												6.1	5.6
Singapore													
Singapore Telecom													83.7
StarHub													10.4
WorldCom													2.4
Teleglobe													2.3
Others													1.1
Spain													
Telefónica									100.0	90.5	82.7	82.6	72.2
Cable & Wireless												3.3	8.6
Retevisión										4.5	4.3	3.7	3.5
WorldCom													2.4
BT Ignite												1.4	2.3
Teleglobe											2.2	2.6	2.9
Lince											2.1	2.4	3.3
COLT													2.1
Others										5.0	8.7	3.7	2.9
Sweden													
Telia				100.0	92.0	87.0	76.0	69.0	66.0	62.0	53.0	47.1	43.4
WorldCom											4.0	13.8	17.0
Tele2					8.0	13.0	21.0	22.0	22.0	24.0	18.0	14.5	13.2
Cable & Wireless												100.0	6.2
Telenordia											7.0	4.8	4.4
Teleglobe											2.0	2.9	2.8
COLT													2.0
Others							3.0	9.0	12.0	14.0	16.0	16.5	11.0

Notes: See page 21.

*Philippines: PLDT market shares include Smart Communications traffic prior to 1999 acquisition. Globe Telecom market shares include Islacom traffic prior to 2001 merger.

Source: Telegeography research

CERTIFICATE OF SERVICE

The undersigned, an employee of Goldberg, Godles, Wiener & Wright, counsel to the Philippine Long Distance Telephone Company, hereby certifies that the foregoing Application for Review was sent this 9th day of April, 2003, via first class mail, postage prepaid, and by the additional means shown below, to the following:

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