Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
AT&T Corp. Emergency Petition for	)	
Settlements Stop Payment Order	)	
and Request for Immediate Interim Relief	)	IB Docket No. 03-38
	)	
and	)	
	)	
Petition of WorldCom, Inc.	)	
for Prevention of "Whipsawing"	)	
on the U.S.-Philippines Route	)	

MCI OPPOSITION TO APPLICATIONS FOR REVIEW

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SUMMARY

The Applications for Review filed by PLDT and others in this proceeding reflect a fundamental misunderstanding of the Commission's public interest mandates, policies, and procedures. Contrary to the Applicants' claims, the International Bureau acted appropriately under its delegated authority by issuing a *Stop Payment Order* in response to whipsawing by PLDT.

Indeed, the record contains ample evidence to support the International Bureau's finding of anticompetitive whipsawing in this case. The Bureau's finding was based on the significant evidence in the record that PLDT has been leveraging its market power to the detriment of U.S. carriers unwilling to accept its rate demands, and that PLDT and other Filipino carriers have effectively set a rate floor that has eliminated any competitive constraints on this rate increase.

Contrary to the Applicants' claims, MCI also demonstrates herein that: (1) the Bureau acted well within its authority in suspending the Philippines from the International Simple Resale ("ISR") list and imposing the International Settlements Policy ("ISP") on the U.S.-Philippines route; (2) the Bureau's *Order* is consistent with the Commission's benchmarks policy; and (3) the Bureau satisfied whatever hearing rights the Filipino carriers might have had in this proceeding.

PLDT attempts to portray itself as the aggrieved party in this case, but the reality is that the blocking of direct circuits by a foreign correspondent is an extreme measure that violates the Commission's policies. The Bureau responded appropriately by issuing its *Stop Payment Order*. The Commission therefore should reject the Applications for Review.

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MCI OPPOSITION TO APPLICATIONS FOR REVIEW

WorldCom, Inc. d/b/a MCI ("MCI")[1] hereby submits this Opposition to the Applications for Review ("Applications") filed by the Philippine Long Distance Telephone Company ("PLDT"), Globe Telecom ("Globe") and ABS-CBN Telecom North America, Inc. ("ABS-CBN") and Bayan Telecommunications, Inc. ("BayanTel") in the above-referenced proceeding. In the Applications, PLDT and Globe request that the Commission overturn the International Bureau's ("Bureau's") Order released on March 10, 2003, finding that PLDT and five other carriers in the Philippines had whipsawed U.S. carriers by blocking the circuits of MCI and AT&T, and ordering all facilities-based U.S. carriers to suspend settlement payments to those Filipino carriers in connection with direct switched voice services until the circuits on the route

[1] On April 14, 2003, WorldCom, Inc. announced that, effective immediately, it would be doing business under the name "MCI."

are unblocked.[2]

The Applications reflect a fundamental misunderstanding of the Commission's public interest mandates, policies, and procedures. The Applications also attempt to obscure the real issue in this proceeding, which is the abuse of market power by PLDT and other Filipino carriers. The simple fact is that PLDT has blocked the traffic of two U.S. carriers in retaliation for their refusal to agree to an increase in international settlement rates in the Philippines, a classic case of whipsawing. The Bureau acted appropriately under its delegated authority to enforce existing Commission polices against whipsawing by issuing its *Order*. The Commission therefore should reject the baseless Applications for Review.

I. INTRODUCTION AND BACKGROUND

PLDT and its wholly-owned mobile subsidiary, Smart, have now blocked MCI's traffic on two separate occasions in retaliation for MCI's refusal to agree to an increase of up to 50 percent in the international settlement rates paid to PLDT and Smart for terminating traffic on their respective networks in the Philippines. In its Application, however, PLDT also distorts the facts by accusing MCI of "stonewalling" and not negotiating in good faith. PLDT's assertions are counter to reality. As the following description of the timeline demonstrates, PLDT notified MCI on several occasions that it would increase its settlement rates, and when MCI failed to agree, PLDT blocked MCI's circuits. Then, in subsequent interim negotiations, PLDT continued to add unreasonable and unrealistic conditions to which MCI could not agree.

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[2] *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of WorldCom, Inc. For Prevention of "Whipsawing" on the U.S.-Philippines Route*, IB Docket No. 03-38, Order, DA 03-581 (International Bureau, rel. Mar. 10, 2003) ("*Order*" or "*Stop Payment Order*").

PLDT protests the notion that "PLDT suddenly demanded a rate increase and threatened to terminate services immediately when [MCI] did not agree,"[3] but that is precisely what PLDT has done. PLDT's first notification of the proposed rates to MCI did not occur until December 13, 2002. PLDT's first formal written demand to MCI arrived on January 9, 2003. In that letter, PLDT informed MCI that it would raise its settlement rates for traffic terminating on both fixed lines and mobile phones in the Philippines, threatening that, "[s]hould MCIWorldCom [sic] not agree with PLDT's new rates, we leave it to your discretion as to how your traffic to the Philippines will be routed."[4] On January 30, 2003, PLDT sent another letter to MCI, formally threatening to block MCI's traffic if MCI continued to resist PLDT's demands. In the letter, PLDT stated that, given MCI's refusal to accede to its unilateral demands by February 1, 2003, "PLDT shall be constrained to suspend accepting traffic from MCIWorldCom until such an agreement has been reached."[5] PLDT reiterated this warning in response to a good-faith counterproposal from MCI on January 31, 2003.[6] Finally, PLDT followed through on its threat of retaliation by blocking MCI's traffic on February 1, 2003. Contrary to PLDT's claim that negotiations occurred for "the better part of a year," less than two months lapsed between MCI's

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[3] PLDT Application for Review, IB Docket No. 03-38 (Apr. 9, 2003) at 4 ("PLDT Application").

[4] Letter from Edgardo SB. Antonio II, Head – Correspondent Relations 1, PLDT to Mark Dodman, Director – Asia Pacific, WorldCom (Jan. 9, 2003), attached as Attachment 1 to Petition of WorldCom, Inc. for Prevention of "Whipsawing" on the U.S.-Philippines Route, IB Docket No. 03-38 (Feb. 7, 2003) ("WorldCom Petition").

[5] Letter from Edgardo SB. Antonio II, Head – Correspondent Relations Division 1, PLDT, to Gene Spinelli, Regional Vice President, WorldCom (Jan. 30, 2003), attached as Attachment 2 to WorldCom Petition.

[6] Letter from Ramon P. Obias, Vice President, PLDT, to Gene Spinelli, Regional Vice President, WorldCom (Jan. 31, 2003), attached as Attachment 3 to WorldCom Petition.

first awareness of PLDT's rate increase demands and the blocking of MCI's circuits. PLDT's unreasonable approach is especially troubling considering the extent to which it departs from years of bilateral rate negotiations pursuant to PLDT's operating agreement with MCI and longstanding industry practice.

Nevertheless, in a good faith effort to resolve the impasse, MCI reached an "interim agreement" with PLDT on February 28, 2003. This agreement was intended to permit the resumption of direct services and bring the parties back to the negotiating table for an interim period of one month.[7] Despite MCI's demonstration to PLDT that it would be willing to compromise in an effort to arrive at terms acceptable to both parties, PLDT kept proposing additional terms and conditions that were beyond MCI's control or ability to accept. On April 15, 2003, almost immediately after MCI advised PLDT that certain of its proposed terms and conditions were unacceptable, PLDT once again began blocking all of MCI's traffic destined for PLDT's network, and that traffic remains blocked today.[8]

Given the background set forth above, it is disingenuous for PLDT to maintain that it was trying to "negotiate" for nearly a year, and MCI "stonewalled" or refused to act in good faith. Traditional definitions of negotiation include the concepts of mutual agreement and compromise.[9] PLDT, unfortunately, continues to demand a unilateral rate increase on a "take-it-

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[7] *See Ex Parte* Letter from Scott Shefferman, Associate Counsel, WorldCom, to Marlene Dortch, Secretary, FCC, IB Docket No. 03-38 (Mar. 4, 2003).

[8] *See* Letter from Scott Shefferman, Associate Counsel, MCI, to Marlene Dortch, Secretary, FCC, IB Docket No. 03-38 (Apr. 16, 2003) (also indicating that Smart began blocking MCI's traffic again on April 11, 2003).

[9] "Negotiate" is variously defined as: "to arrange for or bring about through conference, discussion and *compromise,*" Merriam-Webster Collegiate Dictionary; or "to arrange or settle by

or-get-blocked" basis, which runs counter to decades of industry practice in international telecommunications.

In sum, PLDT's attempt to portray itself as the aggrieved party in this case borders on the absurd. The reality is that the blocking of direct circuits by a foreign correspondent is an extreme measure. In MCI's history and throughout its relations with hundreds of correspondents throughout the world, MCI's circuits have been blocked only a handful of times, and then only for very brief periods. Rate disputes and disagreements occur frequently in negotiations. Nonetheless, disruptions of service are extraordinarily rare. PLDT's tactics thus are far outside the range of accepted industry practice, and have been addressed appropriately by the Bureau.

II. THE BUREAU PROPERLY FOUND THAT PLDT IS ENGAGING IN WHIPSAWING AGAINST U.S. CARRIERS

In its Order, the Bureau appropriately found that "AT&T and WorldCom present cases of 'whipsawing' and a violation of the Commission's ISP."[10] This finding was based on the significant evidence in the record that PLDT has been leveraging its market power to the detriment of U.S. carriers unwilling to accept its rate demands and that PLDT and the other Filipino carriers have colluded to eliminate any competitive constraints on this major rate increase.

PLDT asserts that the facts in this case do not warrant a finding of whipsawing or of collusion among the Filipino carriers.[11] PLDT is wrong on both counts. PLDT inaccurately

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discussion and *mutual agreement*," The American Heritage Dictionary, Fourth Edition (2000) (emphasis added).

[10] *Order* at ¶ 10.

[11] *Id*. at 11-16.

implies that whipsawing cannot occur unless there is a monopoly provider on the foreign end. In fact, as the Bureau concluded, whipsawing requires only that a provider on the foreign end have market power, and be able to prevent competitors at the foreign end from undermining its efforts to raise international termination rates. In this case, both conditions were met.

Here, PLDT's control over local access facilities and its dominant share of the Filipino international services market enable it to set the prices at which U.S. carriers may terminate traffic. The presence of competitors providing local service does not alter the fact that a carrier that is dominant in the provision of local services has both the incentive and the ability to leverage that market power into a related, competitive market. PLDT has reached an agreement with its domestic competitors with respect to international termination rates and domestic interconnection rates that effectively prevents these competitors from acting in a way that constrains PLDT's behavior.

PLDT's protestations that U.S. carriers have competitive alternatives to PLDT for terminating U.S. carriers' traffic overstate the extent of competition, particularly for the "last mile."[12] PLDT's competitors on the international segment rely on PLDT to originate and terminate calls from and to PLDT's customers. Since PLDT controls access to these customers, interconnection with PLDT is required.[13] As explained below, the domestic interconnection rate

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[12] PLDT retains control of approximately 67% of fixed local access lines and 45% of the wireless market through its affiliate, Smart.

[13] Although PLDT has accepted traffic destined for its customers (so-called "on-net" traffic) through third parties, it will do so only if such third parties pay to PLDT the 12-cent interconnection rate that PLDT and its domestic competitors have agreed to pay each other for the termination of international calls. Since no Filipino carrier is willing to take a loss to carry any call, the agreement among Filipino carriers to raise the domestic interconnection rate is

agreement among the Filipino carriers helps enforce the higher international termination rates. The agreement with respect to international termination rates and domestic interconnection rates effectively eliminates the opportunity for U.S. carriers to terminate traffic via PLDT's domestic competitors, and thereby constrain PLDT's behavior.

In addition, it is clear that PLDT and its affiliate, Smart, have indeed whipsawed U.S. carriers. When MCI refused to agree to its rates, PLDT threatened to block traffic over direct circuits. PLDT and Smart followed through on these threats during the periods of February 1 to February 28 and April 15 to the present. Thus, the choices faced by U.S. carriers are these: (1) pay PLDT the exorbitant rate increases that it seeks – in the process inflating costs and, ultimately, rates to U.S. consumers – but keep its direct bilateral circuits open; or (2) refuse the rate hikes, but suffer blocking of direct circuits, thus incurring even higher rates and poorer quality of service because of the need to route traffic to PLDT's customers through third parties.

Finally, PLDT's claim that it has not colluded with other carriers in the Philippines in order to raise prices for the termination of traffic in the Philippines is not credible. The evidence of collusion involves conduct contrary to the independent economic self-interest of the Filipino carriers and therefore excludes the possibility of independent action.[14] The rate increase would be counterproductive for any individual Filipino carrier unless all or virtually all of them agreed to it. Otherwise, a carrier that attempted to raise its rates, or stuck with the price increase, when other carriers did not join, would lose business to competitors with lower rates. Even the chief

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effectively an agreement to raise the international termination rate.

[14] *See* PLDT Application at 14 (citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)). *See generally* ABA Antitrust Section, ANTITRUST LAW DEVELOPMENTS

Filipino telecom regulator admitted that, "if a single carrier broke ranks, the effort to secure higher rates would instantly collapse."[15]

In support of its claims, PLDT relies principally on the fact that the carriers' domestic interconnection agreements, which were amended to include a 12-cent fee for off-net international traffic, did not establish a rate to be charged international carriers for terminating traffic in the Philippines. PLDT even asserts that high domestic interconnection rates "in no way prevent" the Filipino carriers from charging U.S. carriers a lower international termination rate.[16] If that assertion were true, it would support a finding of collusion. International settlement rates are typically contained in private, bilateral agreements. One Filipino carrier ordinarily would not disclose to its competitors actual – much less proposed – settlement rates incorporated in these confidential, bilateral agreements. Yet all Filipino carriers proposed a uniform rate increase within a short period of time.

However, the claim that the agreement among Filipino carriers to pay each other high domestic interconnection charges was unrelated to high international termination rates strains credulity. PLDT does not contend that it had an absolute right unilaterally to raise its domestic interconnection rates, and other carriers did not have to acquiesce to those rates. The collective increase in domestic termination rates prevented smaller carriers from negotiating lower international settlement rates with U.S. carriers, and also divided the spoils by ensuring that all the Filipino carriers terminating in-bound international calls would receive the benefit of the

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(FIFTH), at 11-12 & n.55 (2002) ("ANTITRUST LAW DEVELOPMENTS").

[15] The Asian Wall Street Journal, Feb. 27, 2003, at A1.

[16] PLDT Application at 12. Pretextual reasons for anticompetitive conduct support a finding of

international rate increase. To the extent a Filipino carrier itself terminated in-bound international calls, it got the full benefit of the international termination rate increase; to the extent that it handed in-bound international calls off to other carriers for local termination, it was not harmed by the interconnection rate increase because the agreement among Filipino carriers to raise international termination rates enabled each of them to cover the increase in the domestic interconnection rate. The agreed-on domestic interconnection rate set an agreed-on "floor" for termination charges for international calls. Thus all of the Filipino carriers were better off due to the agreement to raise both international termination rates and domestic interconnection charges.[17]

Moreover, no increase in the costs of any individual Filipino carrier or other changed circumstances justifies the price increase or explains the simultaneous actions of carriers that should be competing. Even if some Filipino carriers have similar cost structures, their cost structures cannot be identical, and without collusion, all of them would not independently have decided to seek virtually the same increase in termination rates at virtually the same time. Notably absent from PLDT's argument in support of a rate increase is any credible claim that its costs for terminating calls have increased.[18] Indeed, the Bureau found that, "there is no evidence

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collusion. *See generally* ANTITRUST LAW DEVELOPMENTS at 12 & n.58 (collecting cases).

[17] The slight differences in rates imposed by the various carriers and the fact that the carriers did not take identical actions on the same day are of no consequence. *See, e.g., Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999).

[18] PLDT attempts to blame its termination rate increase on the decline in the value of the peso relative to the dollar. *See* Supplemental Declaration of Ramon Alger P. Obias ¶ 6 (attached to PLDT Application). However, that excuse fails because U.S. carriers settle in dollars, so the weakening of the peso automatically increases PLDT's revenues in dollars. Moreover, with respect to PLDT's debt service costs, it is common (and indeed prudent) practice for companies

in the record of this proceeding that [PLDT's rate increase] is cost-justified."[19] PLDT also argues that its new rate is reasonable because it is below the Commission benchmark,[20] but that hardly means that Filipino carriers are pricing at or below their costs.[21] Instead, the attempted increase in rates would reverse a long-standing trend of declining international termination rates on the U.S.-Philippines route and the majority of other international routes. Collusion is the only plausible explanation for the ability of the Filipino carriers to reverse this trend and successfully impose a substantial termination rate increase.

In summary, the record contains ample evidence to support the Bureau's finding of anticompetitive whipsawing in this case.

III. THE BUREAU ACTED IN ACCORDANCE WITH COMMISSION PROCEDURES, PRECEDENT, AND RULES

The Filipino carriers raise a number of procedural arguments in their Applications for Review. Although the International Bureau anticipated and addressed most of these arguments

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to hedge their debt against currency fluctuations. Indeed, according to Wall Street analyst reports, PLDT has recently taken steps to significantly reduce its dollar-denominated debt. *See, e.g.,* ABN-AMRO Research Report on PLDT, "Solid Showing," March 25, 2003, at 4 (noting PLDT management's boast that "38% of foreign currency debt is currently hedged and the company will look to raise this to 50% in the next one to two years."); Salomon Smith Barney Report on PLDT, "2002 Earnings at a Glance – In Line, Supports Our Positive View," March 25, 2003, at 2 (noting that PLDT intends to actively hedge up to 50% of its non-peso debt and that the remaining non-peso debt "would be taken care of" by PLDT's U.S. dollar-denominated revenues, which represent 64% of its total revenues.) In any event, U.S. carriers and consumers should not be forced to subsidize PLDT for its own business decisions related to borrowing.

[19] *Order* ¶ 11.

[20] PLDT Application at 9.

[21] *See Order* ¶ 16 ("The Commission has repeatedly stated that the benchmark rates are 'still considerably above cost-based rates,'" and it "expects that in a fully competitive market, U.S. carriers will negotiate rates below the benchmark rates.").

in the *Order*, MCI provides below additional reasons for the Commission to reject these claims on review. In particular, MCI shows that the International Bureau acted well within its authority in suspending the Philippines from the International Simple Resale ("ISR") list and imposing the International Settlements Policy ("ISP") on the Philippines route. MCI further shows that the *Order* is consistent with the Commission's benchmarks policy. Finally, MCI shows that the Bureau satisfied whatever hearing rights the Filipino carriers might have had in this proceeding.

A. The Bureau Acted Well Within Its Authority

PLDT and ABS-CBN argue that the Bureau exceeded its authority by improperly suspending the Philippines from the ISR list,[22] by imposing the ISP on a route that "meets the standards for doing away with ISP,"[23] and by violating the Commission's *Benchmarks Order*.[24] These arguments are without merit.

As an initial matter, the Commission has broad authority to fashion appropriate relief for violations of its rules and policies, including its rules prohibiting whipsawing.[25] Under the Act, the Commission "may perform any and all acts, make such rules and regulations, and issue such

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[22] PLDT Application at 18-19.

[23] *Id.* at 19-20; Application for Review of ABS-CBN Telecom North America, Inc. and Bayan Telecommunications, Inc., IB Docket No. 03-38 (Apr. 9, 2003) at 21-23 ("ABS-CBN Application").

[24] *See* PLDT Application at 17-18, *citing International Settlement Rates*, Report and Order, 12 FCC Rcd 19806 (1997) ("*Benchmarks Order*"); *modified on recon.*, Report and Order on Reconsideration and Order Lifting Stay, 12 FCC Rcd 9256 (1999) ("*Benchmarks Recon*"), *aff'd sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

[25] As the Bureau emphasized in the *Order*, it is the established policy of the Commission and the Bureau to aggressively enforce the prohibition against whipsawing in order to protect U.S. consumers. *See Order* ¶ 1 n.1.

orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions."[26] The Commission has relied on this broad authority in issuing a wide range of orders designed to ensure compliance with the Act or Commission rules.[27] In issuing the *Order*, the International Bureau was acting under authority delegated to the Bureau by the Commission,[28] including the authority "[t]o administer and enforce the policies and rules on international settlements under part 64" of the Commission's rules.[29]

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[26] 47 U.S.C. § 154(i).

[27] In past decisions, for instance, the Commission (or the relevant Bureau) has: (i) prohibited or mandated certain practices in accord with the Act (*see*, *e.g.*, *Independent Data Communications Mfrs. Ass'n, Inc. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶ 1 (1995) ("*Frame Relay Order*"); *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, Memorandum Opinion and Order, 14 FCC Rcd 16252, ¶ 2); (ii) established deadlines or other temporal guidance for ceasing or implementing certain practices (*see*, *e.g.*, *Frame Relay Order* ¶¶ 1, 64); and (iii) required parties to comply with new procedures that will help the Commission monitor the lawfulness of certain conduct on an ongoing basis (*see*, *e.g.*, *Petition for Declaratory Ruling Regarding National Security Emergency Preparedness Telecommunications Procedures Manual*, Declaratory Ruling, 60 Rad. Reg. 2d (P&F) 314, ¶ 20 (1986), *modified on recon.*, Memorandum Opinion and Order, 2 FCC Rcd 98 (1986); *Bell Atlantic Telephone Cos.; Petition for Declaratory Ruling or Clarification Regarding Joint Cost Attestation Audits*, Memorandum Opinion and Order, 3 FCC Rcd 6574 (1988)).

[28] *See* 47 C.F.R. § 0.261 (describing authority delegated to the International Bureau); *see also* 47 C.F.R. § 0.51 (describing functions of the International Bureau).

[29] 47 C.F.R. § 0.261(8). *See also AT&T Corp., MCI Telecommunications Corp., Sprint, LDDS, WorldCom; Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Peru*, Order on Review, 14 FCC Rcd 8318, ¶ 26 (1999) (explaining that, in enforcing the prohibition against whipsawing, the International Bureau was "enforcing existing rules, the ISP, adopted and subsequently amended by the Commission in a series of rulemakings.") ("*Peru Order*").

1. The Bureau Has Authority to Fashion Measured Responses to the Anticompetitive Behavior of the Filipino Carriers

Contrary to PLDT and ABS-CBN's allegations, the International Bureau has broad discretion to suspend the Philippines from the ISR list and to impose the full ISP on the Philippines route, grounded in the statutory obligation to protect the interests of U.S. carriers and consumers. The Commission "has long recognized that whipsawing can harm U.S. consumers by promoting artificially high accounting rates."[30] As a result, the ISP evolved to ensure that "U.S. entities are treated fairly and that American consumers receive the benefits that result from the provision of international services on a competitive basis."[31] The statutory basis for enforcing the ISP derives, *inter alia*, from "the mandate of Section 201 [of the Act] that all charges and practices for and in connection with the provision of foreign communications be just and reasonable."[32] This statutory mandate remains fully applicable even where the Commission has placed a route on the ISR list or lifted certain aspects of the ISP.

The Commission has recognized that the full enforcement of the ISP's nondiscrimination, proportionate return, and symmetrical settlement rates requirements may, under certain circumstances, impede rather than promote competition.[33] Therefore, the Commission's rules

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[30] *Peru Order* ¶ 10; *AT&T Corp.; Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina*, Order on Review, 14 FCC Rcd 8306, ¶ 10 (1999) ("*Argentina Order*").

[31] *Order* ¶ 10 (quoting *Implementation and Scope of the International Settlements Policy for Parallel International Communications Routes*, Order on Reconsideration, 2 FCC Rcd 1118, ¶ 2 (1987)).

[32] *Peru Order* ¶ 10; *Argentina Order* ¶ 10.

[33] *See 1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements; Regulation of International Accounting Rates; Market Entry and Regulation of Foreign-affiliated Entities*, Report and Order and Order on Reconsideration,

allow for the Commission either to permit a route to become eligible for ISR[34] (and therefore be relieved of certain obligations under the ISP) or, if more stringent criteria are satisfied, to remove the ISP from a route entirely.[35]

The crucial point, however, is that the Commission has never ceded its statutory obligation to protect U.S. consumers from anticompetitive behavior. For example, the Commission has always retained the ISP, including the prohibition against whipsawing, on routes approved for ISR.[36] Even where the ISP has been removed, "the Commission has reserved the right to take remedial action if necessary where 'a foreign carrier that otherwise would 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.'"[37]

In light of the Commission's broad authority to take remedial action, and in light of the fact that this authority was delegated to the Bureau,[38] it is clear that the Bureau was acting well within the bounds of its authority when it temporarily suspended the Philippines from the ISR list. In mandating this suspension, the Bureau simply fashioned a measured response designed to effectuate the Commission's responsibility to protect U.S. consumers.[39] There is thus no merit to

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14 FCC Rcd 7963, ¶ 11 (1999) ("*ISP Reform Order*").

[34] *See* 47 C.F.R. § 63.16; *ISP Reform Order* ¶¶ 13-15.

[35] *See* 47 C.F.R. § 43.51; *ISP Reform Order* ¶ 16.

[36] *Order* ¶ 13; *ISP Reform Order* ¶ 62.

[37] *Order* ¶ 14 (quoting *ISP Reform Order* ¶ 30).

[38] *See supra*, nn.27-28.

[39] Moreover, as discussed below, PLDT had notice of the Bureau's concern that the ISP was

the allegation that the Bureau exceeded its authority when it suspended the Philippines from the ISR list.

There is likewise no merit to the argument that the Bureau lacked authority to impose the ISP on the Philippines route because that route "fully meets the standards for doing away with ISP."[40] Under the Commission's rules, the ISP applies to a route unless the Commission takes action finding otherwise.[41] As the Bureau pointed out, the removal of the ISP from routes with dominant foreign carriers "is not automatic," and cannot occur unless and until a carrier has petitioned to have the ISP removed and the Commission has made an affirmative finding that such removal is in the public interest.[42] This requirement ensures that the ISP is not removed from routes where the risk of anticompetitive activity is still high.

PLDT does not allege that such a petition has been filed for the Philippines route, nor does PLDT allege that the Commission has made the necessary affirmative finding that removal of the ISP from the Philippines route is in the public interest.[43] In the absence of an affirmative Commission finding that the ISP does not apply to the Philippines route, the issue of whether the Commission might at some future date find that that route "fully meets the standards for doing away with the ISP" is of theoretical interest only. The only relevant facts for this proceeding are:

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being violated and filed comments and other documents to address that concern. *See* PLDT Application at 19 (alleging that Bureau's action "was taken without notice or opportunity for comment").

[40] PLDT Application at 19.

[41] *Order* ¶ 14 n.61.

[42] *Order* ¶ 14.

[43] Indeed, the Philippines does not appear on the Commission's official list of international routes exempted from the International Settlements Policy, *available at:* <http://www.fcc.gov/

(i) that the Commission has not removed the ISP from the Philippines route; and (ii) even if it had done so, the Commission has reserved the right to take remedial action and to re-impose the ISP at any time. In light of these facts, the Bureau clearly had authority to require U.S. carriers to comply with all of the requirements of the ISP with respect to the Filipino carriers.[44]

2. The Bureau's Actions are Fully Consistent with the *Benchmarks Order*

Despite the Filipino carriers' protestations, the fact that the rates in question here are below the Commission's benchmark rate has no bearing on this proceeding.[45] As the Commission has recognized, carriers charging rates at or below the benchmark are still capable of engaging in anticompetitive conduct.[46] Indeed, the *Benchmarks Order* itself contains additional mechanisms for detecting and addressing anticompetitive behavior by carriers with benchmark-compliant rates.[47] Thus, it is clear that the mere fact that the Filipino carriers' rates fell below the benchmark does not preclude a finding that they engaged in anticompetitive behavior or prevent the Bureau from re-imposing the ISP on the U.S.-Philippines route.[48]

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ib/pd/pf/isp_exempt.html>.

[44] *See Order* ¶ 21.

[45] *See e.g.,* PLDT Application at 9; Globe Application for Review ("Globe Application") at 14.

[46] *See, e.g., Benchmarks Recon* ¶ 33. Concerns about foreign carriers' ability to exploit the difference between cost-based rates and the benchmark rates to whipsaw US carriers led the Commission to retain the ISP even on benchmark-compliant routes. *See, e.g.,International Settlements Policy Reform, International Settlement Rates,* Notice of Proposed Rulemaking, 17 FCC Rcd 19954, ¶ 22 ("*NPRM*").

[47] *Benchmarks Order* ¶¶ 132, 222, 224, 231, 243, 248, 257, 259.

[48] Even as the Commission adopted its benchmark rates, it noted that "in most cases" the ISP would continue to be necessary to prevent whipsawing of U.S. carriers by foreign carriers. *Benchmarks Order* ¶ 117. The Filipino carriers' argument is further undermined by the fact that the ISP applies on routes that have been approved for ISR, even though ISR rates generally are below benchmark rates. *Order* at ¶ 13; *NPRM* n.30; *NPRM* ¶ 37.

Moreover, as the Commission explained in its *Benchmarks Order*, the benchmarks policy and the ISP address two distinct concerns. The ISP focuses on "preventing foreign carriers from discriminating among U.S. carriers."[49] By contrast, the goal of the Commission's benchmarks policy is "to reduce settlement rates where market forces have not led to more cost-based settlement rates."[50] Whether a carrier's rates fall below the Commission's benchmarks therefore has little, if any, bearing on whether that carrier is violating the Commission's ISP.[51]

In this case, the anticompetitive behavior addressed in the *Order* was not limited merely to the specific rates charged by the Filipino carriers, or even the magnitude of the increase in termination rates that the Filipino carriers sought to impose.[52] Rather, the *Order* primarily addresses the concerted manner in which the Filipino carriers took action and the tactics they

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[49] *Benchmarks Order* ¶ 116.

[50] *Id.*

[51] It is clear that a rate can be below the benchmark but above relevant costs. *See, e.g.*, *Benchmarks Order* ¶ 19 (noting that benchmark rates will "exceed, usually substantially, any reasonable estimate of the level of foreign carriers' relevant costs of providing international termination service"). The benchmark rates therefore are intended to act as a ceiling, not a floor. *NPRM* ¶ 10 (benchmark settlement rates serve as "guidelines for how much the Commission believed was the *maximum* reasonable and just amount U.S. carriers should pay") (emphasis added); *Benchmarks Order* ¶ 26. As a full reading of the *Benchmarks Order* and other relative precedents make clear, the benchmark rates do not act as "safe harbor" as the Philippine carriers seems to believe. *See PLDT Application* at 17; *Globe Application* at 14. Rather, rates that are above the benchmark are presumptively unlawful, *Benchmarks Order* ¶¶ 185, 286, while carriers charging rates below the benchmark may still be subject to additional scrutiny. *See, e.g., Benchmarks Order* ¶¶ 132, 222, 224, 259.

[52] It is telling, however, that the Filipino carriers were unable to provide any credible cost justification for their substantial rate increases, particularly if one assumes that the Filipino carriers had not been providing termination at below-cost rates prior to the rate hikes. *Order* ¶¶ 3, 11. *See also, supra* at note 18.

employed in attempting to circumvent the negotiation process and impose the increased rates on U.S. carriers.[53] As the Bureau explained, the Filipino carriers have protected U.S. carriers "that have agreed to the demanded rate increases from the risk of retaliation" and have taken this action in "a collective and uniform manner."[54] Thus, it is not the rate increase demands alone, but the manner in which the Filipino carriers attempted to achieve the rate increases that led the Bureau to find that whipsawing had occurred.[55]

B. The Bureau Satisfied Whatever Hearing Rights the Filipino Carriers Had in this Proceeding

Globe argues that the International Bureau erroneously treated this proceeding as a rulemaking instead of an adjudication and thereby deprived Globe of an "adequate hearing."[56] Globe is mistaken.

As the Bureau explained in its *Order*, enforcing the ISP represents an "act of domestic

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[53] *Order* ¶ 15; *see also Order* ¶ 11 ("PLDT's actions are designed to force the rate increase on U.S. carriers. Thus, PLDT's actions amount to 'whipsawing' of AT&T and WorldCom, in violation of the Commission's ISP."); *Order* ¶ 13 (the Commission has aggressively enforced the ISP to prevent unilateral rate increases that ultimately harm U.S. consumers).

[54] *Order* ¶ 17.

[55] *See* WorldCom Reply, IB Docket No. 03-38 (Feb. 27, 2003) at 9-10 ("*WorldCom Reply*"); AT&T Reply, IB Docket No. 03-38 (Feb. 27, 2003) at 8 ("*AT&T Reply*"). PLDT's assertions that a fair comparison to its rate increases "would involve other countries which, like the Philippines, are classified by the Commission as 'lower-middle income'" are also irrelevant. PLDT Application at 10-11. Nevertheless, like AT&T, MCI has termination rates below 8 cents to six countries in the lower-middle income category and with three other countries, including China, in the lower-income categories. *See* Letter from James J.R. Talbot, Senior Attorney, AT&T, to Paul Margie, Legal Advisor to Commissioner Copps, FCC, IB Docket No. 03-38 (Mar. 5, 2003). In response, PLDT strains to argue in a footnote that somehow comparing the rates in these nine countries to the Philippines is not enough. PLDT Application, n.36.

[56] Globe Application at 17-18. *See also* ABS-CBN Application for Review at 21 (claiming that "there was no hearing here").

regulation" that applies only to U.S. carriers, and does not amount to an assertion of jurisdiction over foreign carriers.[57] The Bureau therefore had no obligation even to provide notice of the proceeding to the foreign carriers.[58] Given that this is a matter between the Bureau and the domestic carriers,[59] and given that the Filipino carriers were not even entitled to notice of the proceeding, they cannot have had a right to a "hearing."

Nevertheless, the Filipino carriers were provided notice in this proceeding. Moreover, the carriers actually participated in the proceeding, filing comments and other documents in response to the Public Notice.[60] Any hearing rights the Filipino carriers might have had in this matter were satisfied when the Bureau publicly sought and reviewed their written submissions.[61]

Contrary to Globe's assertion, the Bureau was not obligated to treat the proceeding as an "adjudication" or "adjudicative action" or to provide oral hearings.[62] Rather, the Bureau clearly

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[57] *See Order* ¶ 9 n.27; *see also AT&T Corp., MCI Telecommunications Corp; Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Various Countries*, Order on Review, 13 FCC Rcd 23924, ¶ 20 (1998); *Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078 (D.C. Cir. 1997).

[58] *See Order* ¶ 9 n.27.

[59] Indeed, PLDT is unwilling to concede that the Commission has jurisdiction over the foreign carriers or the rates, terms, and conditions under which they terminate traffic in the Philippines. PLDT Application at 1 n.1.

[60] *See Order* ¶ 9. In contrast to the notice afforded the Philippine carriers by the Commission, interested parties were not provided any notice prior to the issuance of two orders by the Philippine National Telecommunications Commission ("NTC"). *See Order* ¶ 4 (describing Memorandum Orders issued by NTC on January 31, 2003 and February 7, 2003).

[61] The fact that the *Order* does not cite every filing made by the Philippine carriers does not somehow make the *Order* defective, as Globe suggests. Globe Application at 18 n.60. There is no provision in the Communications Act, the Administrative Procedures Act ("APA"), or the Commission's rules that requires a Commission order to cite every filing made in a particular docket.

[62] Globe Application at 17, 18.

had authority to treat the proceeding as an "informal rulemaking" in accordance with the APA.[63] Under the APA, when an agency is conducting an informal rulemaking, the agency need not hold a trial-like oral hearing, but merely must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[64] The Bureau clearly complied with these requirements in conducting this proceeding.

Finally, even if the Bureau had treated this matter as an adjudication, it still would not have been required to conduct an oral hearing. Such hearings are required only when the Commission acts pursuant to a statute requiring a hearing "on the record."[65]

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[63] *Western Union Telegraph Co. v. FCC*, 665 F.2d 1126, 1151 (D.C. Cir. 1981) ("It is settled law that FCC policy decisions impacting, but not setting, rates may, when appropriate, be made in an informal rulemaking rather than in an adjudicatory ratemaking proceeding.").

[64] 5 U.S.C. § 553(c).

[65] *Compare*, *e.g.*, 12 U.S.C. § 1817(j)(4) (requiring "hearing" to be "determined on the record" under APA), *with* 47 U.S.C. § 205 (requiring "full opportunity for hearing"). *See*, *e.g.*, *Gencom Inc. v. FCC*, 832 F.2d 171, 174 n.2 (D.C. Cir. 1987) (Commission's adoption of a paper hearing procedure conforms with APA because the relevant sections of the Act do not contain the "on the record" language that is "necessary to trigger the full panoply of trial-like hearing requirements"); *AT&T v. FCC*, 572 F.2d 17, 21-22 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978); *Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, Report and Order, 86 F.C.C.2d 469, ¶ 67 (1981), *modified on other grounds*, 89 FCC 2d 58 (1982), *further modified on other grounds*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom. United States v. FCC*, No. 82-1526, slip op. (D.C. Cir. March 3, 1983).

IV. CONCLUSION

As set forth herein, the Applications reflect a fundamental misunderstanding of the Commission's public interest mandates, policies, and procedures. In issuing its *Order*, the Bureau acted appropriately under its delegated authority to enforce longstanding Commission policies against whipsawing. The Commission therefore should reject the Applications for Review.

Respectfully submitted,

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April 24, 2003

CERTIFICATE OF SERVICE

I, Maria Ialacci, hereby certify that on this 24th day of April 2003, a copy of this "MCI Opposition to Application for Review" was delivered by first class mail to the persons listed below.

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