

**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 REPLY TO
OPPOSITIONS TO APPLICATIONS FOR REVIEW**

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Philippine Long Distance Telephone Company (“PLDT”) replies to the “Oppositions” to the Applications for Review of the International Bureau’s March 10, 2003, Order (“*Order*”) filed by AT&T and MCI (the “Respondents”). Rather than confront the serious issues raised by the Bureau’s departure from the Commission’s decisions and rules,¹ and the Bureau’s erroneous market analysis and determination of collusive behavior, Respondents do little more than repeat the words and errors of the *Order*. Repetition makes them no more persuasive.

I. The Bureau Ignored The Commission’s Policy That Rates At Or Below Benchmarks Are “Presumptively Just And Reasonable.”²

Unable to deny that the Bureau failed to follow the presumption that rates at or below benchmarks are presumptively just and reasonable, Respondents argue that no such presumption exists. AT&T contends that, because operating agreements containing below benchmark rates must in some cases be filed with the Commission, there is no presumption that the rates are reasonable. AT&T Opp. at 15-16. This is nonsense; a filing requirement has nothing to do with a presumption. MCI suggests that the Commission’s presumption means only that rates exceeding the benchmarks “are presumptively unlawful.” MCI Opp. at 17 n.51. But that is not what the Commission’s words say or what the Commission has ever suggested that they meant. Nor is MCI’s tortured reading supported by a “full reading” of the *Benchmarks Order*, as it asserts (*id.*). A “full reading” cannot ignore that the FCC made clear that:

[W]e establish in this *Order* the rate at which a settlement rate agreed to by a U.S. international carrier satisfies that carrier’s obligation to comply with the “just and reasonable” requirements of Sections 201 and 205. [*Benchmarks Order* at 19818]

¹ That the Bureau was not interpreting or applying existing rules, but engaged in a rulemaking of its own, is conceded by MCI. See MCI Opp. at 19-20.

² *International Settlement Rates*, 12 FCC Rcd 19806, 19818, 19939, and 19941 (“*Benchmarks Order*”).

II. The Rules Do Not Require That Prior FCC Approval Be Obtained For Any Increase In A Foreign Carrier's Termination Rates On ISR-Approved Routes.

Neither AT&T nor MCI (or even the Bureau) points to any Commission rule requiring a U.S. carrier to obtain FCC approval before agreeing to an increase in a foreign carrier's termination rates on ISR-approved routes. Indeed, such a requirement would turn the FCC into a worldwide PUC charged with assessing the cost justification for all such rate increases. The Bureau erroneously relied upon cases involving *above*-benchmark rates, in which the Commission required a cost justification for a requested waiver of the ISP; in this case, no such waiver was required or sought. *See* PLDT App. at 17-18 & n.62. In support of the Bureau, AT&T simply repeats the Bureau's words in the *Order* and cites more ISP waiver cases. AT&T Opp. at 15 n.46. But none of these cases supports the result dictated by the Bureau, which would prohibit all termination rate increases, even when no waiver of ISP is required. Such a requirement cannot be squared with the Commission's ISR and other market-oriented rules and policies.³

AT&T and MCI do not supply the justification -- missing from the *Order* -- for the Bureau's retroactive removal of ISR authority, or explain why they should be permitted to withhold nearly \$8 million owed to PLDT for services rendered before the rate increase at issue became effective on February 1, 2003. Supp. Obias Decl. at ¶12. Instead, AT&T contends that the *Order* does not have a retroactive effect because it only applies to future *payments* (AT&T Opp. at 23), when in fact it and MCI are using the *Order* as an excuse to not pay for *past services* rendered at the old rates, before the challenged rates became effective.

³ MCI's Opposition is notably silent on this point, perhaps because it is on record in the Commission's current rulemaking proceeding seeking a *change* in the Commission's rules to establish such a policy of prohibiting rate increases. *See* Comments of WorldCom, Inc (Jan. 14, 2003), at 8-12, *International Settlements Policy Reform*, IB Docket No. 02-324.

III. Not Providing Direct Connections To Two Carriers Who Refuse To Pay The Same Rate Agreed To By Nearly 100 Other Carriers Is Not Whipsawing.

As shown in PLDT's Application, the *Order* improperly applies a "whipsaw" remedy to punish foreign carriers for not charging special termination rates to two U.S. carriers who refuse to pay widely-accepted rates. PLDT App. at 2-3, 15-16. AT&T and MCI cannot overcome this; they merely repeat their theory that a "whipsaw" exists because "PLDT has blocked the traffic of two U.S. carriers in retaliation for their refusal to agree to an increase in international settlement rates...." MCI Opp. at 2. In AT&T and MCI-speak, "retaliation" means refusing to provide services at the rates AT&T and MCI insist upon. But whipsaw has never been about the give and take of commercial negotiations; all carriers, including MCI and AT&T, must have the ability to determine the rates they charge for providing service and to deny service when there is no agreement on rates.

Respondents make a bow to the real practice of whipsawing U.S. carriers by claiming that they have been discriminated against because they have been denied direct service by PLDT while PLDT has continued to provide such connections for other carriers. MCI Opp. at 17. The facts, however, show that PLDT kept direct connections with carriers who paid the widely-accepted termination rates and suspended them as to AT&T and MCI because they did not agree to rates that were accepted by more than 20 U.S. carriers, and nearly 100 carriers worldwide. Supp. Obias Decl. at ¶ 9. Standing the theory of whipsawing on its head, AT&T and MCI seek preferential treatment, insisting on rates that would effectively result in discrimination against the other U.S. carriers.⁴

⁴ According to AT&T, a foreign carrier never can stop providing termination service to a U.S. carrier so long as an "underlying service agreement remains in effect," even if there is no agreed termination rate. AT&T Opp. at 6. The Bureau accepted this interpretation of the Service Agreement (*Order* at ¶ 15), even though the Agreement was never put in the record and the Bureau never actually reviewed it. But the Service Agreement -- which has a 20 year term and

IV. Respondents Compound The Bureau's Failure To Recognize The Competitive Nature Of The Philippine International Telecommunications Market.

The Bureau did not have any basis for finding that PLDT is not subject to competitive pressure in its home market, ignoring, among other things, that termination rates in the Philippines are so far below the FCC benchmarks *because* of competition in the Philippines.⁵ AT&T's citation to the *Foreign Participation Order*, far from supporting the Bureau, highlights the infirmities of its market analysis, for the Commission made clear that:

In evaluating market power, the Commission has recognized that neither market share, by itself, nor lower costs, sheer size, superior resources, financial strength, and technical capability, by themselves, confer market power . . . [M]arket conditions related to demand and supply elasticities are the more *crucial determinants* of a firm's market power. These conditions include the availability of close demand substitutes and ease of entry and expansion.⁶

The Bureau ignored these "crucial determinants" in this case, and instead relied solely on measures of market share. *Order* at ¶ 11 & n.42. AT&T and MCI have not repaired this basic deficiency.

V. Respondents Have Not And Cannot Support Their Claims Of Collusion.

AT&T's and MCI's allegations of "collusion" fail as a matter of law and fact. Neither explains how the domestic interconnect agreements among Filipino carriers -- which are mandated by Philippine law -- prevent Filipino carriers from charging less than the domestic interconnect rate for on-net traffic. And neither disputes that the Arbinet data submitted by

covers many services other than international call termination -- does not require a party to continue to provide a particular service in the absence of an agreement on rate. AT&T does not dispute that its Termination Rate Agreement with PLDT expired by February 1, 2003, or that the Philippine NTC has, for this reason, confirmed PLDT's right to suspend termination services to AT&T. *See* Supp. Obias Decl., Ex. 2.

⁵ *See* PLDT App. at 9 (citing *ISP Reform Order* at 7983) ("Unless a dominant carrier were subject to competitive pressures . . . it would have little incentive to reduce its rates substantially below the benchmark levels").

⁶ *Foreign Participation Order* at ¶ 162 fn.317 (emphasis added); *See also Bell Canada Petition for Declaratory Ruling*, 16 FCC Rcd. 12465, at ¶ 7 (2001).

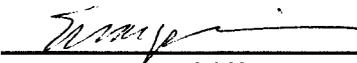
PLDT shows that termination rates lower than those being offered by PLDT are available in the market. PLDT App. at 14-15.

Instead, AT&T confusingly alleges that PLDT's position is "contradicted" by Globe. AT&T Opp. at 11. But Globe simply has stated that it could not continue to handle AT&T's *off-net* traffic at the old termination rate without losing money. Globe App. at 12. Globe's decision to stop terminating AT&T's off-net traffic is entirely consistent with an independent decision made by Globe, in its own financial interest. *Id.* Conduct that is "consistent with permissible competition" cannot, standing alone, "support an inference of antitrust conspiracy."⁷ And AT&T has admitted, as it must, that "parallel behavior" and "price leadership" "may occur in competitive markets" (PLDT App. at 14), and thus antitrust conspiracy cannot be inferred merely because Filipino carriers are seeking similar termination rates.⁸

VI. Conclusion

The Respondents' pleadings do nothing to buttress an *Order* that is fatally flawed in both its legal and factual conclusions and which should be reversed.

Respectfully submitted,
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⁷ See *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

⁸ See ABA Antitrust Section, ANTITRUST LAW DEVELOPMENTS (Fifth), at 10 (2002) ("courts consistently have held that conscious parallelism, by itself, will not support a finding of concerted action"). MCI's argument that the Filipino carriers actions are "contrary to [their] independent economic self-interest" and are therefore indicative of collusion (MCI Opp. at 7), defies logic. It is of course often the case that, in competitive markets, a price increase "sticks," and thus even if it were true that other Filipino carriers were not undercutting the rate offered by PLDT, this would not support an inference of "collusion."

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 Reply to Oppositions to Applications For Review was sent this 5th day of May, 2003, via first class mail, postage prepaid, and by the additional means shown below, to the following:

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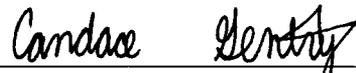
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