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May 5, 2003

Via Hand Delivery

Marlene H. Dortch  
Federal Communications Commission  
Office of the Secretary  
c/o Vistronix, Inc.  
236 Massachusetts Avenue, NE, Suite 110  
Washington, D.C. 20002

RECEIVED

MAY - 5 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: IB Docket No. 03-38

Dear Ms. Dortch,

Transmitted herewith are an original and four copies of ABS-CBN Telecom North America, Inc. and Bayan Telecommunications, Inc.'s Reply to Oppositions in the above-captioned proceeding.

Also enclosed is a copy of the filing marked "Stamp and Return," which I would appreciate your stamping and returning to my attention via my messenger.

Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

  
Gregory C. Staple

Enclosures

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

**RECEIVED**

In the Matter of )  
)  
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 **FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

MAY - 5 2003

To: The Commission

**ABS-CBN TELECOM AND BAYANTEL REPLY TO OPPOSITIONS**

ABS-CBN Telecom North America, Inc. ("ABS-CBN Telecom") and Bayan Telecommunications, Inc. ("Bayantel"), hereby reply to the AT&T Corp. ("AT&T") and WorldCom, Inc. d/b/a/ MCI ("MCI") Oppositions to the parties' Application for Review.

**I. Introduction**

With respect to ABS-CBN Telecom and Bayantel, the main question on review is not whether the Bureau may summarily adopt a remedial order which mandates ISP-based U.S. settlement contracts with a dominant foreign carrier that has blocked U.S. carriers' traffic, but whether the same remedy is justified where U.S. carriers concede that no traffic is being blocked; the foreign carrier lacks market power; and an FCC rule (47 C.F.R. §43.51(b)(2)) expressly authorizes non-ISP based contracts. The answer, we submit, is "No" because the Bureau's ISP enforcement power is not unlimited. It must be based upon the specific facts of the alleged ISP violation and respect the procedural safeguards which the Communications Act and the Administrative Procedure Act place on all enforcement actions.

Bayantel is not PLDT. PLDT (and affiliates) control approximately 50% of the subscriber lines in the Philippines. Bayantel has but 1%. PLDT acknowledges blocking AT&T and MCI's traffic. Bayantel is not blocking any U.S. traffic to its network and never has. Yet the Bureau's order requires U.S. carriers to treat Bayantel and PLDT alike in their settlement negotiations. That is irrational and undermines the competitive goals of the ISP. Reimposing the ISP on U.S. carrier negotiations with non-dominant carriers, such as Bayantel, unnecessarily limits their options while exposing the results to public scrutiny (and thus potential retaliation) – all of which discourages arrangements that may be more favorable to a U.S. carrier than the terms offered by a dominant carrier in the market.

## **II. AT&T and MCI Have Not Shown That The Bureau Has The Legal Authority To Summarily Reimpose The ISP On U.S. Carrier Agreements With Bayantel**

AT&T and MCI contend that a single paragraph in the Commission's ISP Reform Order<sup>1</sup> provides adequate authority for reimposing the ISP, at the Bureau's discretion, on any U.S. carrier contract.<sup>2</sup> Their interpretation does not bear scrutiny. In the paragraph in question, Paragraph 30, the Commission said:

We recognize that in certain unusual circumstances 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

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<sup>1</sup> 14 FCC Rcd 7963, 7973, ¶30 (1999).

<sup>2</sup> See AT&T Opposition at 22; MCI Opposition at 14. AT&T also cites the Commission's 1999 Argentina Order, 14 FCC Rcd 8306 at ¶23, where the agency held that the FCC's 1990 ISP rulemaking proceeding gave Telintar adequate notice that the Bureau might issue a stop-payment order to enforce the ISP's nondiscrimination provision. The current order is easily distinguished, however, because it penalizes U.S. carriers (e.g., ABS-CBN Telecom) rather than a foreign monopoly and withdraws contract rights from U.S. carriers that are protected by a rule (now, 47 C.F.R. §43.51(b)(2)) that was reaffirmed by the Commission in 2001. AT&T's reliance on Application of Larry S. Magnuson, et al., 3 FCC Rcd 1708 (1988), is also inapposite because that case involved enforcement of a published processing rule whereas the instant order overrode a published rule without prior notice. The additional cases that MCI cites to support the Bureau's enforcement authority are also off point. See MCI Opposition at 12 n.27. They involve instances where the Commission or a bureau took action requiring parties to comply with Commission rules where they previously were not in compliance or to clarify certain requirements at the request of certain regulated parties. None of the cases involves an enforcement order where, as with ABS-CBN Telecom, the regulated party was denied rights granted to it under an existing Commission rule and where the regulated party had not violated the rule in question (or any other FCC obligation).

collusive behavior in the foreign market. In such cases, the Commission may be required to take appropriate remedial action.

However, Bayantel has no ability unilaterally to set U.S. termination rates in the Philippines and did not behave in a collusive manner with other Philippine carriers.

Moreover, the cited paragraph does not contain any indication of what “remedial action” might be “appropriate.” The sentence merely states the obvious: if the FCC’s new settlement policies are breached, enforcement action may be taken. This hardly provides authority for the Bureau to dispense with traditional notice and comment requirements before selectively suspending a Commission rule – Section 43.51(b)(2) – and abrogating numerous U.S. carrier contracts predicated thereon.<sup>3</sup> Remarkably, the Bureau’s Order does not even mention this rule provision and contains no discussion whatsoever as to the competitive costs of suspending the rule in order to remedy the alleged ISP violation at issue.

The contention that the ISP Reform Order delegated power to the Bureau to reinstate a rule provision repealed by the Commission in that very order is also contradicted by the FCC’s most recent 2002 rulemaking notice regarding the ISP. There the FCC expressly sought public comment regarding the exact issue on which the Bureau has presumed to act – namely, on whether “whipsawing” or other anti-competitive behavior is sufficient grounds for reinstating the ISP or whether other public interest factors should be determinative.<sup>4</sup> Given that the

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<sup>3</sup> The ISP Reform Order, 14 FCC Rcd at 7980, amended Sections 43.51 and 64.1001 of the Rules, 47 C.F.R. §§43.51, 64.1001, by removing the ISP and related contract filing requirements for arrangements between U.S. carriers and foreign carriers that lack market power, such as Bayantel. Thus, as initially amended, Section 43.51(g) provided an “[e]xemption from the international settlement policy and contract filing requirements [for a] carrier that enters into a contract . . . with a carrier that lacks market power in the foreign market.” *Id.* at 8011. In 2001, this exemption was strengthened and recodified as Section 43.51(b)(2). *See 2001 Biennial Regulatory Review Policy and Rules Concerning the International Interexchange Marketplace, Report and Order*, 14 FCC Rcd 10647, 10678 (2001). Restated Section 43.51(b)(2) mandates the FCC filing of ISP-based agreements only for a carrier that “does not qualify for the presumptions set forth in Note 3 to this section that it lacks market power on the foreign end . . .”. Under Note 3, a U.S. carrier may assume that a foreign carrier lacks market power if the carrier does not appear on the FCC’s list of carriers presumed to have market power, available at <http://www.fcc.gov/ib>. Bayantel does not appear on that list.

<sup>4</sup> *See ISP Reform Notice*, 17 FCC Rcd 19954, 19975 (2002).

Commission itself has yet to answer that question, the Bureau plainly overstepped its authority in rushing to do so without inviting any public comment whatsoever. As such, the reimposition of the ISP on U.S. carrier contracts with Bayantel and other non-dominant Philippine carriers did not comport with due process.

### **III. AT&T and MCI Do Not Defend The Bureau's Decision To Maintain The ISP Provisions Of The Bureau's Order Despite Lifting The Stop Payment Provisions**

On March 31, the Bureau revised its March 10 order to lift the stop payment provisions applicable to Bayantel because AT&T and MCI advised the Bureau on March 25 that Bayantel was not blocking their traffic.<sup>5</sup> Having implicitly conceded that no purpose is served by barring U.S. carrier payments to a Philippine carrier that is not whipsawing any U.S. carrier, the Bureau had an obligation to explain -- in view of these changed circumstances -- why U.S. carriers must nevertheless renegotiate their contracts with Bayantel based on the ISP. The Bureau's failure to do so -- which is not defended by either AT&T or MCI -- provides additional grounds for reversal.<sup>6</sup>

### **IV. AT&T and MCI Also Do Not Defend The Bureau's Failure To Address The ABS-CBN Telecom Waiver Request**

The Court of Appeals has made it clear that “[w]hen an agency receives a request for waiver that is ‘stated with clarity and accompanied by supporting data’” – *see, e.g.*, the ABS-CBN Telecom Reply Comments at pp. 2 and 10 – “such requests ‘are not subject to perfunctory

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<sup>5</sup> *See Public Notice*, DA 03-1030, released March 31, 2003.

<sup>6</sup> To the extent necessary, the Commission should waive Section 1.115(c) of its Rules, 47 C.F.R. §1.115(c), to consider as a whole the Bureau's March 10 Order as modified by the March 31 Public Notice. No purpose would be served in a duplicative process that requires Bayantel and ABS-CBN Telecom to file a separate or amended Application for Review solely to take into account the Bureau's later notice when the short comings of the notice were duly raised by the original Application (see p. 23, n.79) and interested parties (e.g., AT&T and MCI) had a full opportunity to address the applicants' challenge to the Bureau's modified decision, though they have chosen to remain silent.

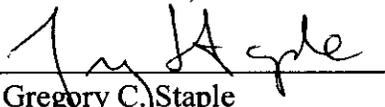
treatment but must be given a hard look.”<sup>7</sup> The Bureau’s Order did not even acknowledge ABS-CBN Telecom’s waiver request, let alone give it a “hard look.” The fact that neither AT&T nor MCI have tried to rationalize the Bureau’s failure in their Oppositions only underscores the infirmity of the Bureau’s action.

**V. Conclusion**

For all of the above reasons, the Bureau’s Order must be vacated, or at a minimum, reformed in a pro-competitive fashion by (a) exempting ABS-CBN Telecom; and (b) lifting the ISP requirement for U.S. carrier contracts with Bayantel.

Respectfully submitted,

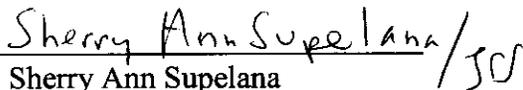
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May 5, 2003

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<sup>7</sup> BellSouth Corp. v. FCC, 162 F.3d 1215, 1224 (D.C. Cir. 1999) (quoting WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969)).

## **CERTIFICATE OF SERVICE**

The undersigned, an employee of Vinson & Elkins L.L.P., hereby certifies that the foregoing document was mailed on May 5, 2003 by First Class U.S. Mail, postage prepaid, or was hand-delivered\*, to the following:

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