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May 30, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

ExParte written presentation

Re: *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)*

Dear Ms. Dortch:

SMART Communications, Inc. ("SMART") is filing this letter in response to the May 8, 2003, letter from James J. R. Talbot, Senior Attorney for AT&T Corp. ("AT&T"), regarding amounts owed to SMART by AT&T. SMART has not been participating actively in comment filing rounds in the above-captioned proceeding, because SMART is a Philippines carrier not subject to the jurisdiction of the Federal Communications Commission ("FCC") and is not bound by its rules or policies or any orders it may issue. Nevertheless, SMART feels compelled to respond at this time in order to correct blatant mistakes and misstatements contained in AT&T's letter. In submitting this letter, SMART does not waive the question of jurisdiction of the FCC over it.

First, SMART is not, and never has been, engaging in any action that could constitute whipsawing. SMART is a wireless service provider active in the competitive Philippines marketplace. Based on the circumstances and realities in that marketplace, it made a commercial determination that a higher termination rate was justified and appropriate. The term *whipsawing* has been used as a term of art for decades in the international telecommunications field, but unless whipsawing has been redefined as "anything AT&T doesn't like," SMART's attempts to negotiate a new termination rate

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do not constitute what has always been defined as whipsawing. Indeed, with carriers representing an overwhelming majority (approximately 87 percent) of SMART's traffic having already agreed that the new rate proposed by SMART was acceptable, the notion that SMART was attempting to "whipsaw" AT&T with respect to its small minority of traffic is ridiculous.

Rather, what we have here is a case of two inefficient carriers (AT&T and MCI) who felt unable to compete and earn an acceptable profit with a termination charge identical to that voluntarily agreed to by almost all other carriers. Rather than dealing with this in a lawful manner, they went to the FCC and secured an order requiring all of these other carriers to violate their existing voluntary contracts. The result has been to prevent U.S. carriers from paying for services, already rendered at the legal, contractual and voluntarily negotiated rate, and to force these carriers to cease operating according to their own business judgments – until arrangements acceptable to AT&T can be negotiated.

The ability of a U.S. carrier to advance its commercial interest through utilization of U.S. regulatory processes – even when achieved at the cost of a serious disruption of traffic on the U.S.-Philippines route – has potentially serious implications. This is especially true when an "influential" carrier representing only a small percentage of a given market can overturn a rate deemed mutually acceptable and already implemented by carriers representing a large majority of traffic.

Even more worrisome, however, is that a regulatory agency in one country can, in support of its own policy, order companies to breach and violate voluntary partially *executed* contracts among entities of different nationalities. SMART will have serious concerns about the wisdom of providing any services or goods to U.S. entities, where such goods or services are not paid for in advance, if the FCC (and, presumably, any other arm of the U.S. government) claims a right to void the obligation to pay, as agreed, *after* the service is rendered. We suspect other companies in the Philippines and elsewhere will have similar concerns with respect to doing business with U.S. companies. Indeed, if U.S. agencies can be granted this right solely by U.S. law, based upon administratively developed policies, then any other country can grant a similar right to any of its agencies based on whatever policies they may choose to promulgate. This should be of great concern to U.S. businesses as well.

It is worth noting that U.S. carriers—including MCI and AT&T—frequently and routinely make commercial determinations that increases in their own rates are justified, without reference to any calculation of costs. Yet AT&T is, in this proceeding, suggesting that a foreign carrier, not even subject to this Commission's jurisdiction, somehow be held to a "cost" standard for termination rates that it does not meet for rates charged in the United States. Indeed, AT&T is free to, and has, in fact, *marked up* to its consumers, the differential in SMART's mobile termination rates, as it does in many, if not all, cases, generating extra profit to itself without ever raising the question of cost support. AT&T's concern about "justifying" increases is focused exclusively on its activities as a buyer. It never believes that such questions are relevant to its conduct as a seller.

MCI, meanwhile, is not asked to explain why its rates may increase, even though its costs presumably are going down via the reduction of debt service payments in bankruptcy. It appears that AT&T and MCI would like different rules to apply to what they pay for than what they collect.

Regarding payment of amounts AT&T owes to SMART, AT&T has made the unsupported assertion that its withholding of these back-due amounts is "unrelated" to the issue of continuing SMART's service agreement with AT&T. This is patently false. Under the express terms of the service agreement, AT&T was obligated to make payments promptly, even when it exercised its right to conduct an audit on the amounts.

The fact is that, in order to gain leverage over SMART in commercial negotiations, AT&T withheld these payments, in clear violation of the service agreement. This may be a "normal industry practice" for AT&T while it was engaged in commercial negotiations, but it was not in compliance with the existing agreement and SMART never agreed to any waiver of its rights under the agreement.[1] While AT&T claims the amounts were subject to "normal review," the agreement itself specifies what payments had to be made, and how, in those circumstances. AT&T violated that agreement in order to gain commercial leverage over SMART in negotiations. Given this behavior, payment issues are clearly a major factor in the current impasse between SMART and AT&T—an impasse AT&T wants to blame on some unsupported allegation of "whipsawing."

Moreover, AT&T has invented a construction of SMART's rights under the service agreement that purports to hold that SMART cannot terminate the agreement in the face of AT&T's violation of it. Neither the United States government nor U.S. carriers have ever before taken a position that a rate or agreement, once negotiated, must be continued in perpetuity, over the express opposition of one of the parties. Indeed, in

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[1] It should be noted that, after being unable to resolve past-due amounts for the year 2000 for more than two years, AT&T now acknowledges—at a time when it is actually prohibited from making payments—that the amounts are valid.

circumstances in which U.S. entities were the ones raising rates, the U.S. has taken exactly the opposite position. And yet this appears to be AT&T's position. If a single party could require eternal continuation of a rate or agreement, this would take away any incentive on their part to negotiate a new agreement. Indeed, it would take away parties' rights to negotiate new rates in their traffic agreements.

SMART is simply not interested in providing termination at the rate AT&T insists upon. Given that, and in the absence of any agreed-upon arbitration mechanism to settle the impasse over the current agreement, there is no other alternative but to terminate that agreement pursuant to its terms for doing so. Had the parties wished to have mandatory arbitration requirements, they were free to include them, or similar clauses, in the service agreement. They did not do so. AT&T cannot credibly claim that any dispute such as the current one can be resolved by it, unilaterally, or by U.S. regulatory or legal authorities.[2]

In addition, AT&T claims that "service must be fully restored before the suspension of U.S. carrier payments to SMART may be lifted, which requires the continuation of the service agreement between AT&T and SMART and the rescission of SMART's notice of termination."[3] It appears that AT&T is claiming that the continuation of its existing service agreement with SMART is required by the FCC's recent order in this proceeding, suspending payments. This agreement, however, does not seem to be compliant with the FCC order, because that order required that U.S. carriers conclude agreements, for traffic beginning February 1, 2003, that are compliant with the International Settlements Policy ("ISP"). According to the terms stated by the Commission, the existing service agreement is not ISP-compliant. AT&T is clearly misstating the Commission's clear direction in its recent order to eliminate its obligation to negotiate a new, mutually agreeable, rate.

Finally, in its letter, AT&T asserts that SMART has attempted to prevent AT&T from terminating traffic on its network "because AT&T has acted in accordance with the Commission's longstanding direction" to negotiate with foreign carriers in a manner consistent with relevant cost trends.[4] Most other carriers clearly did not believe that their action violated any FCC "direction" when they reached commercially acceptable agreements with SMART. Moreover, were such a "direction" deemed to bind U.S.

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[2] In fact, AT&T has continued to reduce the amount it is offering in a new agreement. Rather than merely raising its demanded asking price in response to this behavior, SMART has continued to maintain the price for termination services at the level deemed reasonable and acceptable, not only by virtually all carriers around the world, but by carriers representing most of the U.S. traffic terminated on SMART's network.

[3] AT&T letter, May 8, 2003, p. 2.

[4] Id. at p. 3.

carriers, MCI would certainly have an obligation to negotiate lower termination rates in every one of its international agreements as a result of the elimination of most of its debt and obligations through bankruptcy. Of course, there is no indication, whatsoever, that any carrier perceives such a "direction" when it would result in less, rather than more, revenue.

AT&T appears to believe that it, acting alone, with some 8 percent of the traffic to the Philippines, can unilaterally veto any commercial arrangement it does not prefer—or which may not favor it commercially. Because AT&T does not like a proposed rate—a rate that almost all other carriers have agreed to—AT&T believes it can block any commercial transaction between SMART and any other U.S. carrier. Unfortunately, this view seems to have been accepted, at least by the staff of the FCC. Moreover, AT&T's actions and its rhetoric, in letters to this Commission, reveal that AT&T believes SMART has no redress to its tactics.

If other U.S. carriers, unaffiliated with SMART, can reach mutually acceptable commercial agreements with SMART, and AT&T cannot—whether because of inefficiencies or another reason—AT&T cannot claim the right to block those commercially agreed arrangements, particularly between carriers from markets that are demonstrably competitive.

Respectfully submitted,

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May 29, 2003

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