

Before the
Federal Communications Commission
Washington, D.C. 20554

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

ORDER ON REVIEW

Adopted: May 13, 2004

Released: June 4, 2004

By the Commission:

I. INTRODUCTION

1. In this Order, we affirm the March 10, 2003 Order by the Chief, International Bureau, which found that six Philippine carriers had disrupted the U.S.-Philippine networks of either AT&T Corp. (AT&T) or MCI,1 or both, in retaliation for AT&T’s and MCI’s refusal to agree to the Philippine carriers’ demand for rate increases for termination services on their networks in the Philippines.2 The International Bureau concluded that, by this action, the Philippine carriers had “whipsawed” AT&T and MCI, thereby harming U.S. consumers.3 The

1 MCI, which formerly was known as WorldCom Inc., to which we hereinafter refer to as MCI.

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, 18 FCC Rcd 3519 (2003) (March 10, 2003 Order or Order).

3 See March 10, 2003 Order, 18 FCC Rcd at 3525-30 ¶¶ 10-13. The term “whipsawing” has been used to refer to a broad range of anticompetitive behaviors by foreign carriers possessing market power, in which the foreign firms exploit that market power in negotiating settlement rates with competitive U.S. telecommunications carriers. If a U.S. carrier does not pay the above-cost settlement rate for terminating its international traffic, it will lose business to a U.S. rival that is willing to pay the higher rate. See, e.g., AT&T Corp. Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina, Order, 11 FCC Rcd 18014, 18014, ¶ 1 (1996) (Argentina Order) (“The Commission will not allow foreign monopolists to undermine U.S. law, injure U.S. carriers or disadvantage U.S. consumers.”); Sprint Communications Company, L.P., Request for Modification of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Mexico, Memorandum, Opinion and Order, 13 FCC Rcd 24,998, 25000-01, ¶ 6 (1998) (Mexico Order) (“The Bureau has strictly enforced the Commission’s regulations against whipsawing.”). See also Cable & Wireless v. FCC, 166 F.3d 1224, 1226 (D.C. Cir. 1999) (“The FCC has long sought to protect U.S. carriers and U.S. consumers from the

(continued....)

Bureau ordered all U.S. carriers providing facilities-based services to suspend payments for termination services to the Philippine carriers pending restoration of AT&T's and MCI's circuits. It required that, upon restoration of the circuits, U.S. carriers comply with the Commission's International Settlements Policy (ISP)⁴ for traffic terminated on the U.S.-Philippine route as of February 1, 2003. The Bureau also removed the Philippines from the Commission's list of International Simple Resale (ISR) routes.⁵

2. On review, we affirm the International Bureau's *March 10, 2003 Order* finding that the Philippine carriers named in that *Order* "whipsawed" U.S. carriers, thereby harming U.S. consumers. In addition, we uphold the Bureau's action ordering the suspension of payments for termination services to the Philippine carriers pending restoration of circuits. Since issuance of the *March 10, 2003 Order*, the Bureau has lifted the suspension of payments against all the Philippine carriers upon notification by U.S. carriers that the Philippine carriers ceased blocking traffic to the United States and notification that circuits were fully restored.⁶ In addition, in our recent *2004 ISP Reform Order*, we eliminated our ISR policy and to removed the ISP from

(...continued from previous page)

monopoly power wielded by foreign telephone companies in the international telecommunications market."); *March 10, 2003 Order* at 3525-6, ¶ 10.

⁴ The ISP governs how U.S. carriers negotiate with foreign carriers for the exchange of international traffic, and is the structure by which the Commission has sought to respond to concerns that foreign carriers with market power are able to take advantage of the presence of multiple U.S. carriers serving a particular market. The Commission recently reformed the ISP to exempt its application to "benchmark compliant" countries. *See International Settlements Policy Reform: International Settlement Rates*, IB Docket Nos. 02-324 and 96-21, First Report and Order, FCC 04-53 (rel. March 30, 2004) (*2004 ISP Reform Order*). *See also* n.35 *infra*.

⁵ ISR, or the provision of switched services over resold or facilities-based private lines that connect to the public switched network at either end-point, permits U.S. carriers with the appropriate Section 214 authorization to engage in more commercially-oriented agreements that do not strictly adhere to the restrictions of the ISP on routes where the risks of competitive harm from such deviation are deemed low by demonstration of more cost-based settlement rates or equivalent opportunities in the foreign market to provide private line service. Under the Commission's ISR policy, U.S. carriers on ISR-approved routes may enter into contracts for the exchange of traffic with foreign incumbents outside the ISP. The ISR policy will be eliminated upon the effective date of our recent *2004 ISP Reform Order*. *See 2004 ISP Reform Order* at ¶ 31.

⁶ *See* AT&T Circuits to the Philippines Reactivated by Digital Telecommunications Philippines, Inc. and Bayan Telecommunications Company: Suspension Lifted on U.S. Carrier Payments to These Carriers, DA 03-1030 (rel. March 31, 2003); AT&T and MCI Circuits to the Philippines Reactivated by Smart: Suspension Lifted on U.S. Carrier Payments to Smart, DA 03-3664 (rel. November 17, 2003); AT&T and MCI Circuits to the Philippines Reactivated by PLDT: Suspension Lifted on U.S. Carrier Payments to PLDT, DA 04-63 (rel. January 15, 2004); AT&T and MCI Circuits to the Philippines Reactivated by Globe: Suspension Lifted on U.S. Carrier Payments to Globe, DA 04-162 (rel. January 26, 2004); Suspension Lifted on U.S. Carrier Payments to Subic, DA 04-359 (rel. February 12, 2004). *See also* AT&T Report on the Status of its Efforts to Have its Circuits Fully Restored on the U.S.-Philippine Route (filed March 25, 2003); Letter from James J.R. Talbot, Senior Attorney, AT&T, to Marlene Dortch, Secretary, Federal Communications Commission (filed October 6, 2003); Letter from Scott S. Shefferman, Associate Counsel, MCI, to Marlene Dortch, Secretary, Federal Communications Commission (filed November 14, 2003); Letter from Maria Cattafesta, Senior Attorney, Sprint, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed November 19, 2003); Letter from Patrick J. Donovan, Counsel for IT&E, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 03-38 (filed Dec. 9, 2003); Letter from James J.R. Talbot, Senior Attorney, AT&T, to Marlene Dortch, Secretary, Federal Communications Commission (filed January 12, 2004); Letter from Scott A. Shefferman, Associate Counsel, MCI, to Marlene Dortch, Secretary, Federal Communications Commission (filed January 22, 2004); Letter from James J.R. Talbot, Senior Attorney, AT&T, to Marlene Dortch, Secretary, Federal Communications Commission (filed January 26, 2004).

benchmark-compliant routes. The *2004 ISP Reform Order* set out a process by which interested parties could make public comment on those routes that the Commission believed were benchmark-compliant but that had not been approved as such through a public process.⁷ Since the ISR policies no longer exist and since the Philippines route was listed as a route eligible for this process, we dismiss the requests of both the Philippine and U.S. carriers in this proceeding that we modify the Bureau's *March 10, 2003 Order* to restore ISR to the Philippines route and to eliminate the requirement that U.S. carriers make payments in accordance with the ISP. We therefore dismiss in part and deny in all other respects the Applications for Review filed by the Philippine Long Distance Telephone Company (PLDT), Globe Telecom Inc. (Globe), and ABS-CBN Telecom North America, Inc. and Bayan Telecommunications, Inc. (ABS-CBN/Bayantel) on April 9, 2003 as discussed below.⁸ We also dismiss the Petition for Enforcement of the *March 10, 2003 Order* filed by International Access, Inc., d/b/a Access International.⁹

3. Our action today protects the ability of U.S. consumers to enjoy competitive prices as they make calls to the Philippines. Pursuant to this Order on Review, the ISP continues to apply to the route as set out in the Bureau's decision until such a time as the Commission removes it pursuant to the process set forth in the *2004 ISP Reform Order*.

II. BACKGROUND

4. The International Bureau issued its *March 10, 2003 Order* as a result of petitions filed by AT&T and MCI on February 7, 2003.¹⁰ The petitions alleged that certain Philippine carriers demanded increases in termination rates and responded to U.S. carriers who declined to agree to the demanded rate increases by blocking circuits with those U.S. carriers.¹¹ The Philippine carriers involved were: PLDT, Globe, Smart Communications, Inc. (Smart), Subic Telecom (Subic), Bayan Telecommunications Company (Bayantel), and Digital Telecommunications Philippines, Inc. (Digitel).¹² The background of this issue is detailed below.

5. The U.S.-Philippines route is the third largest U.S.-international route in terms of U.S.-outbound minutes.¹³ It generated approximately 1.7 billion minutes of traffic in 2002.

⁷ See *ISP Reform Order* at ¶¶ 26-38.

⁸ See PLDT Application for Review, IB Docket No. 03-38 (filed April 9, 2003); Globe Application for Review, IB Docket No. 03-38 (filed April 9, 2003); ABS-CBN/Bayantel Application for Review, IB Docket No. 03-38 (filed April 9, 2003) (Applications for Review).

⁹ See Petition for Enforcement of the *March 10, 2003 Order*, filed by International Access Inc., d/b/a Access International ("Access"), IB Docket No. 03-38, (filed March 12, 2004). Access requests that the Commission issue an order directing all U.S. carriers terminating traffic to the Philippines to make publicly available the accounting rates and settlement rates now in effect between those U.S. carriers and PLDT, the dominant carrier in the Philippines, and which have been in effect since the *March 10, 2003 Order*, and to direct PLDT to terminate traffic originated by Access at those settlement rates now in effect. The Commission does not require carriers to file interim agreements under the ISP. To the extent Access may have more expansive competitive concerns, it may avail itself of any of the competitive safeguards or procedures available under our rules and highlighted in the *2004 ISP Reform Order*.

¹⁰ *Id.*

¹¹ See *March 10, 2003 Order*.

¹² *Id.*

¹³ This volume of traffic places the Philippines route immediately below the U.S.-Mexico and U.S.-Canada routes and above the U.S.-United Kingdom route. See FCC, Section 43.61 International Telecommunications Data 2002.

From 1997 to 2002,¹⁴ the volume of U.S.-billed calls on the U.S.-Philippines route has grown each year by approximately thirty-eight percent.¹⁵ According to Commission data, the U.S.-billed revenue per minute, *i.e.*, the weighted average of U.S.-carrier prices for all calls to the Philippines, fell from \$0.97 per minute in 1997 to \$0.26 per minute in 2002.¹⁶ Although there has been a decline in consumer calling prices and termination rates on the route, the large increase in the number of minutes of traffic on the U.S.-Philippines route means that U.S. carriers, overall, have made larger net payments to Philippine carriers from 1997-2002 for termination of traffic.¹⁷ Commission data show a \$0.71 decline in calling rates from 1997 to 2002 and a \$0.28 decline in termination rates for the same period. The U.S. carriers with the largest shares of U.S.-billed traffic on the U.S.-Philippines route are AT&T, MCI, Sprint Corp. (Sprint), and PLDT's U.S. subsidiary, PLDT U.S.¹⁸ As for the Philippine market, according to the Philippine national regulator, the National Telecommunications Commission, five of the six Philippine carriers subject to the petitions, excluding Subic Telecom, collectively possess approximately eighty-five percent of the main telephone lines in the Philippines as of December 31, 2001.¹⁹ The dominant carrier in the Philippines is PLDT.²⁰

6. Prior to the events that culminated in the International Bureau's *March 10, 2003 Order*, AT&T and MCI had negotiated rates for termination services for U.S.-outbound international traffic to the Philippines of approximately \$0.08 per minute for termination on fixed

¹⁴ *Id.*

¹⁵ See FCC, Section 43.61 International Telecommunications Data 1997, 1998, 1999, 2000, 2001, and 2002.

¹⁶ See FCC, Section 43.61 International Telecommunications Data 1997 and 2002.

¹⁷ Specifically, Commission data show that, in 1997, U.S. carriers made a net payment for termination services of approximately \$166 million to Philippine carriers and made a payment of \$213 million in 2002.

¹⁸ See FCC, Section 43.61 International Telecommunications Data 2002. Based upon Commission data for 2002, AT&T accounted for approximately 42%, MCI accounted for 19.3%, Sprint accounted for 13.7%, and PLDT U.S. accounted for 10.6% of U.S.-billed traffic on the U.S.-Philippines route.

¹⁹ See "Growth in Wireline Telephone Service (1996-2001)," and "Telephone Distribution per Operator (as of December 31, 2001)" available at www.ntc.gov.ph. According to the International Telecommunication Union (ITU), main telephone lines are defined as fixed telephone lines connecting a customer's equipment to the Public Switched Network and which have a dedicated port on a telephone exchange. See ITU, World Telecommunication Development Report (2002) at A-87. In addition, according to Telegeography, five of the six carriers, excluding Subic Telecom, possess 93.7% of the market share as international carriers in the Philippines. This figure includes one carrier not subject to the petitions, Islacom. See *Telegeography 2003: Global Traffic Statistics and Commentary*, TeleGeography, Inc. (October 2001) at 26.

²⁰ The "List of Foreign Telecommunications Carriers that Are Presumed to Posses Market Power in Foreign Telecommunications Markets," (available on the Commission's website at www.fcc.gov/ib). Also, according to an *ex parte* letter filed by PLDT, PLDT possesses approximately 50.6% of the wireline services market and 67% of the land lines in the Philippines. PLDT's mobile affiliate, Smart, possesses 45% of the wireless market in the Philippines. See Letter from Thomas Leuba, Counsel for PLDT, to Jackie Ruff, International Bureau, Federal Communications Commission, Attachment A (filed March 3, 2003). PLDT also has a 45% ownership interest in the Philippine carrier Piltel that provides both wireline and wireless services, but PLDT maintains that it does not control Piltel. The Bureau's *March 10, 2003 Order* identified PLDT, Bayantel, Globe and Digital as having U.S. affiliates authorized to provide U.S.-international services. See *March 10, 2003 Order*, 18 FCC Rcd at 3536 n.93. Globe points out that it does not have a U.S. affiliate. See Globe Application for Review, at 21 and Appendix 1. As stated below, we dismiss this argument as it is in violation of the page limit set forth in 47 C.F.R. § 1.115(f). Even if we were to reach the merits, we do not regard the error as decisionally significant.

networks and \$0.12 per minute for termination on mobile networks.²¹ During renegotiation of the rate annexes to their underlying service agreements with U.S. carriers, the six Philippine carriers demanded higher rates at or about \$0.12 per minute for termination on their fixed networks in the Philippines by February 1, 2003 and \$0.16 per minute for termination on mobile networks in the Philippines from all international carriers, including AT&T and MCI.²² According to AT&T and MCI, the Philippine carriers provided no cost justification for the demanded rate increases.²³

7. On January 30, 2003, AT&T received a letter from PLDT stating that it would discontinue receiving AT&T's traffic if AT&T did not agree to the rate increase.²⁴ MCI received similar letters beginning January 9, 2003.²⁵ In an effort to prevent network disruptions, the International Bureau sent a written request on January 30, 2003 to the head of the Philippine National Telecommunications Commission, seeking the regulator's assistance in resolving the matter and notifying the regulator of the Commission's intent to protect U.S. consumers and competition from abuses of market power by foreign carriers.²⁶ Concurrently, the U.S. Department of State contacted the government of the Philippines, seeking to ensure that telecommunications circuits would not be disrupted on the U.S.-Philippines route.²⁷

8. On January 31, 2003, the National Telecommunications Commission issued a Memorandum Order to authorized Philippine carriers.²⁸ On February 7, 2003, the National

²¹ See, e.g., *AT&T Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief*, IB Docket No. 03-38, at 3-4 (filed February 7, 2003) (AT&T Petition); Miller Decl. at ¶¶ 8 & 10; AT&T Opposition at 2; Obias Decl. at 3-4 and Exhibits 2, 3, 4, 5, 6 & 7; PLDT letter to AT&T dated January 30, 2003; Globe Petition at 11-12; MCI Petition at 1-3; MCI Opposition at 3; Globe Opposition at 3-4 and Exhibit 3 (stating that it requested AT&T to stop sending Globe traffic but AT&T continued to send traffic and Globe claims it did not cut AT&T's direct circuits but it stopped terminating off-net traffic).

²² See AT&T Petition at 4; Petition of WorldCom, Inc. for Prevention of "Whipsawing" on the U.S.-Philippines Route, IB Docket No. 03-38 (filed February 7, 2003) (MCI Petition) at 2 and Attachments 1-3; Globe Telecom, Inc., SEC Form 6-K filing (January 29, 2003) at 18. See also *March 10, 2003 Order*, 18 FCC Rcd at 3521, ¶ 3.

²³ See AT&T Petition at 3-4; MCI Petition at 1-3; Miller Decl. at ¶¶ 8 & 10; AT&T Opposition at 2; Obias Decl. at 3-4 and Exhibits 2, 3, 4, 5, 6 & 7; PLDT letter to AT&T dated January 30, 2003; Globe Petition at 11-12; MCI Opposition at 3; Globe Opposition at 3-4 and Exhibit 3 (stating that it requested AT&T to stop sending Globe traffic but AT&T continued to send traffic and Globe claims it did not cut AT&T's direct circuits but it stopped terminating off-net traffic).

²⁴ See Attachment A to Declaration of Mark Miller, AT&T Petition; AT&T Petition at 4; Miller Decl. at ¶ 10; PLDT letter to AT&T dated January 30, 2003; Obias Decl. at 4 and Exhibit 6

²⁵ See, e.g., MCI Petition at 2-3; MCI Petition at 2; MCI Opposition at 3; Obias Decl. at 3-4 and Exhibit 5. See also *March 10, 2003 Order*, 18 FCC Rcd at 3522, ¶ 3.

²⁶ Letter from Donald Abelson, Chief, International Bureau, Federal Communications Commission, to the Honorable Armi Jane Borje, Commissioner, National Telecommunications Commission (January 30, 2003). On February 11, 2003, the Chief of the International Bureau, FCC, informed Commissioner Borje of the filing of "whipsaw" petitions at the Commission.

²⁷ See *March 10, 2003 Order*, 18 FCC Rcd at 3522, ¶ 4.

²⁸ See Memorandum Order, Republic of the Philippines, Department of Transportation and Communications, National Telecommunications Commission (January 31, 2003).

Telecommunications Commission issued an additional Memorandum Order to Philippine carriers.²⁹

9. In its petition, AT&T informed the Commission that PLDT and Globe began blocking their circuits carrying outbound U.S.-Philippine traffic on February 1, 2003.³⁰ Bayantel, Digitel, Smart, and Subic also began blocking a substantial number of circuits shortly thereafter.³¹ PLDT began blocking MCI's circuits on February 1, 2003.³² Although MCI had received similar demands for rate increases from nine carriers with which it corresponds in the Philippines, only PLDT, Smart, and Globe discontinued or degraded service with MCI.³³ AT&T attempted to refile its U.S.-Philippine traffic through alternative routes; however, AT&T noted that call quality and completion suffered.³⁴

10. AT&T and MCI filed petitions on February 7, 2003 requesting that the Commission take action to protect U.S.-international carriers from "whipsawing" behavior occurring on the U.S.-Philippines route. Specifically, AT&T requested immediate enforcement of the prohibition on "whipsawing" under the Commission's ISP³⁵ to prevent six foreign carriers in the Philippines (PLDT, Globe, Bayantel, Digitel, Smart, and Subic Telecom) from continuing to block AT&T's U.S.-Philippines traffic in order to force AT&T to agree to a unilateral increase in existing rates for termination services in the Philippines.³⁶ AT&T requested that the Commission issue an order directing all U.S. carriers to stop all payments to the Philippine

²⁹ See Memorandum Order, Republic of the Philippines, Department of Transportation and Communications, National Telecommunications Commission (February 7, 2003) (issuing "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 [a] level playing field in the conduct of your operations" (*emphasis in original*)); PLDT Comments, Attachment 12 at 2.

³⁰ See, e.g., AT&T Petition at 5; AT&T Reply at 2; AT&T Reply at 4-5, Attachments A & C; AT&T Opposition at 2-3. See also paragraph 26 *infra* concerning Globe's contention that it blocked only off-net traffic of AT&T.

³¹ See, e.g., AT&T Petition at 5; AT&T Reply at 2; AT&T Reply at 4-5, Attachments A & C; AT&T Opposition at 2-3. In its petition, AT&T stated that PLDT and Globe were blocking all or virtually all traffic sent by AT&T, while Smart, Bayantel and Subic were blocking the large majority of traffic sent by AT&T and Digitel was blocking about a third of AT&T's traffic. See AT&T Petition at 5.

³² See, e.g., MCI Petition at 3; MCI Reply at 3.

³³ See, e.g., MCI Petition at 1-2. Letter from Scott Shefferman, Associate Counsel, WorldCom, to Marlene Dortch, Secretary, FCC (filed February 21, 2003).

³⁴ See, e.g., AT&T Petition at 5-6; AT&T Reply at 3. Refile or re-origination involves sending traffic on a U.S.-international route through a third foreign point to the ultimate destination, taking advantage of the third foreign point's termination agreement with the ultimate destination foreign point.

³⁵ The Commission established the ISP to prevent foreign carriers with market power from discriminating or using threats of discrimination or other anticompetitive actions, against competing U.S. carriers as a strategy to obtain pricing concessions regarding the exchange of international traffic ("whipsawing"). Specifically, the ISP requires that: (1) all U.S. carriers must be offered the same effective accounting rate and same effective date for the rate ("nondiscrimination"); (2) all U.S. carriers are entitled to a proportionate share of U.S.-inbound, or return traffic based upon their proportion of U.S.-outbound traffic ("proportionate return"); and (3) the accounting rate is divided evenly 50-50 between U.S. and foreign carriers for U.S.-inbound and outbound traffic so that inbound and outbound settlement rates are identical ("symmetrical settlement rates"). 47 C.F.R. § 43.51 (2002). See *International Settlement Policy Reform and International Settlement Rates*, IB Docket Nos. 02-324, 96-261, Notice of Proposed Rulemaking, FCC 02-285, 17 FCC Rcd 19954, 19957, ¶ 3 (*ISP Reform NPRM*).

³⁶ See AT&T Petition at 1.

carriers for termination services pending full restoration of its circuits.³⁷ MCI similarly requested that the Commission immediately order all U.S. carriers to suspend payments to PLDT, until PLDT has fully restored all U.S. carrier circuits and accepts all facilities-based traffic from other U.S. carriers terminating on PLDT's network in the Philippines.³⁸ In addition, AT&T's petition included a U.S. Securities and Exchange Commission filing by Globe on January 29, 2003 which showed that Globe signed agreements with PLDT, Smart, Bayantel, and Digitel to amend their existing interconnection agreements to increase rates for domestic termination of international calls from \$0.08 to \$0.12 per minute for termination on fixed networks and from \$0.12 to \$0.16 per minute for termination on mobile networks.³⁹

11. On February 10, 2003, the Bureau placed the AT&T and MCI petitions on public notice.⁴⁰ On February 21, 2003, the Bureau received one comment and PLDT, Globe and Digitel filed oppositions to AT&T's and MCI's petitions.⁴¹

12. PLDT and Globe maintained, among other things, that AT&T and MCI are not victims of "whipsawing."⁴² In addition, PLDT argued that petitioners' request for interim relief should be denied because: (1) the proposed rates at issue are still below the Commission's relevant benchmark settlement rate of \$0.19 per minute for the U.S.-Philippines route and are "presumptively just and reasonable" under the Commission's policies; (2) the Philippine market is competitive as demonstrated by the Commission's approval of ISR on the U.S.-Philippines route; (3) PLDT had not offered its U.S. affiliate any "special concessions;" (4) the Commission should defer to the Philippine national regulator's February 7, 2003 Memorandum Order that PLDT interprets to condone its actions; and (5) the petitioners will not suffer irreparable harm.⁴³ Globe argued that the events occurring on the U.S.-Philippines route are justified by AT&T's nonpayment for termination services due on February 4, 2003 and that Globe only blocked off-net traffic to PLDT out of necessity to prevent losses it will bear.⁴⁴ Digitel argued that AT&T had engaged in business practices that amount to the reverse "whipsawing" of Philippine

³⁷ See AT&T Petition at 1-2.

³⁸ See MCI Petition at 1.

³⁹ See AT&T Petition at 4; Globe Telecom, Inc., SEC Form 6-K filing (January 29, 2003) at 18. See also *March 10, 2003 Order*, 18 FCC Rcd at ¶ 3, n.13.

⁴⁰ *Public Notice, DA 03-390 (February 10, 2003)*. The Bureau subsequently extended the initial comment deadline in *Public Notice, DA 03-468 (February 20, 2003)*.

⁴¹ See Comments of Digicel Limited, IB Docket 03-38 (filed February 21, 2003) (Digicel Comments). See Opposition of Globe Telecom, IB Docket No. 03-38 (filed February 21, 2003) (Globe Opposition); Philippine Long Distance Telephone Company's Consolidated Opposition to AT&T and WorldCom Petitions, IB Docket No. 03-38 (filed February 21, 2003) (PLDT Opposition); Comments of Digital Telecommunications Phils., Inc., IB Docket 03-28 (filed February 19, 2003) (Digitel Opposition).

⁴² See PLDT Opposition.

⁴³ See PLDT Opposition.

⁴⁴ See Globe Opposition. Moreover, both PLDT and Globe argue that there is no evidence of collusive behavior, and the agreements made among Philippine carriers for the proposed rates reflect "merely the instrument by which competitive carriers operating in different segments of the market (international, local exchange and mobile respectively) agree to terminate their traffic to their various networks." See PLDT Opposition at 6, n.13; Globe Opposition at 5.

carriers.⁴⁵ In addition, Digitel stated that it and the other Philippine carriers are suffering from the worldwide downturn in the telecommunications market and the devaluation of the Philippine currency, the peso, against the U.S. dollar.⁴⁶ On February 27, 2003, the Commission received six replies from U.S. and Philippine carriers.⁴⁷

13. On March 10, 2003, the International Bureau issued its *Order* finding that Philippine carriers “whipsawed” AT&T and MCI to the harm of U.S. consumers and ordered all U.S. carriers providing facilities-based services to suspend payments for termination services to the Philippine carriers pending restoration of circuits and removed the Philippines from the Commission’s list of ISR routes. Specifically, the International Bureau found that PLDT had “whipsawed” U.S. carriers by threatening and then following through on the threat of blocking U.S. carriers’ circuits to force a rate increase on U.S. carriers.⁴⁸ The Bureau further found that the five other Philippine carriers, together with PLDT, “whipsawed” U.S. carriers into a rate increase.⁴⁹

14. On April 9, 2003, PLDT, Globe,⁵⁰ and ABS-CBN/Bayantel filed Applications for Review requesting the Commission to review the Bureau’s *March 10, 2003 Order*.⁵¹ AT&T and

⁴⁵ Specifically, Digitel argued that AT&T requested a lower settlement rate from Digitel and when Digitel did not agree to lower its rate, AT&T diverted its international traffic to other carriers in the Philippines multiple times. Moreover, Digitel argued that it was not “blocking” AT&T’s circuits, but it simply sent AT&T a notice that it would terminate services with AT&T six months from the receipt of the notice. *See* Digitel Opposition. However, AT&T stated that its service with Digitel had been degraded and its traffic completion rates were still below pre-February 1, 2003 levels. *See* AT&T Reply at 2.

⁴⁶ *See, e.g.*, Digitel Opposition at 8. PLDT states that its foreign debt costs have almost tripled because of the devaluation of the Philippine peso from an exchange of 20 pesos to the U.S. dollar to 54 pesos to the U.S. dollar. *See* Letter from Margaret Pfeiffer, Counsel for PLDT, to Donald Abelson, Chief, International Bureau, Federal Communications Commission at 2 (filed February 27, 2003).

⁴⁷ *See* Reply Comments of ABS-CBN Telecom North America, Inc. (filed February 27, 2003) (ABS-CBN Reply); AT&T Reply to Oppositions to Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief (filed February 27, 2003) (AT&T Reply); Position Paper of Bayan Telecommunications, Inc. (filed February 26, 2003) (Bayantel Reply); Globe Telecom, Inc. Reply Comments (filed February 27, 2003) (Globe Reply); Reply Comments of Verizon (filed February 27, 2003) (Verizon Reply); Reply of WorldCom (filed February 27, 2003) (MCI Reply).

⁴⁸ *See* *March 10, 2003 Order*, 18 FCC Rcd at 3527-8, ¶ 11.

⁴⁹ *Id.* at 3528, 3523, ¶¶ 12 & 17. *See also* Memorandum Order, Republic of the Philippines, Department of Transportation and Communications, National Telecommunications Commission (March 12, 2003).

⁵⁰ We note that the Application for Review filed by Globe included an Appendix 1 making legal argument in violation of the limit of twenty-five pages. *See* 41 C.F.R. § 1.115(f). We hereby dismiss Appendix 1 and do not consider argument therein because it exceeds the page limit set forth in section 1.115(f) of the Commission’s rules. We further note no motion was filed by Globe to exceed the page limitation. To the extent we address the merits of any argument raised in Appendix 1, we are not waiving our dismissal or our right to dismiss these arguments on procedural grounds. Additionally, we would not be persuaded even if we were to reach the merits of any argument raised in Appendix 1. The arguments raised in Appendix 1 are either: addressed in this Order on Review, which we were not required to do; or, they were arguments not raised before the Bureau or were not decisionally significant.

⁵¹ *See* Applications for Review.

MCI opposed the Applications for Review.⁵² PLDT, Globe, and ABS-CBN/Bayantel filed Replies to the opposition comments on May 5, 2003.⁵³

15. Subsequent to the Bureau's *March 10, 2003 Order*, as U.S. carriers reached interim agreements with the Philippine carriers, the U.S. carriers, as required by the *Order*, informed the Commission when the Philippine carriers began restoring circuits to them on the U.S.-Philippine route. The Bureau immediately issued public notices lifting the stop payment order as it applied to each Philippine carrier that restored circuits.⁵⁴ The aspect of the *March 10, 2003 Order* removing the Philippines from the ISR list and requiring U.S. carriers to make payments in compliance with the ISP remain in place, however.⁵⁵

III. DISCUSSION

16. Under Section 1.115(b)(2) of the Commission's rules, an Application for Review, to warrant Commission consideration, must establish either that: (i) the delegated actions were in conflict with statute, regulation, case precedent or Commission policy; (ii) the actions involved a question of law or policy that has not previously been resolved by the Commission; (iii) the actions involved the application of precedent or policy that should be overturned or revised; (iv) there has been an erroneous finding as to an important or material question of fact; or (v) there has been prejudicial procedural error.⁵⁶ Further, no application for review will be granted if it relies on questions of fact or law on which the designated entity has been afforded no opportunity to pass.⁵⁷ In the event the Commission chooses to deny an Application for Review, the Commission may deny such an Application with or without specifying its reasoning.⁵⁸ In this

⁵² AT&T Opposition to Applications for Review, IB Docket No. 03-38 (filed April 24, 2003) (AT&T Opposition); MCI Opposition to Applications for Review, IB Docket No. 03-38 (filed April 24, 2003) (MCI Opposition).

⁵³ PLDT Reply to Oppositions to Applications for Review, IB Docket No. 03-38 (filed May 5, 2003) (PLDT Reply to Oppositions); Globe Reply to AT&T and MCI Oppositions to Globe's Application for Review, IB Docket No. 03-38 (filed May 5, 2003) (Globe Reply to Oppositions); ABS-CBN/Bayantel Reply to Oppositions, IB Docket No. 03-38 (filed May 5, 2003) (ABS-CBN/Bayantel Reply to Oppositions) (collectively, *Replies*).

⁵⁴ See n.6 *supra*.

⁵⁵ The Department of Justice Antitrust Division initiated an independent investigation into the possibility of anticompetitive practices among Philippine telecommunications companies involving certain services provided to the U.S. and other international long distance telephone carriers. See, e.g., Manolette P. Tabingo, *U.S. Justice dep't subpoenas 30 Filipino telco executives*, BUSINESS WORLD INTERNET EDITION, January 13, 2004; Estrella Torres, *Ricciardone off to US as RP telcos hearing starts*, TODAY, January 15, 2004 at 1; "Marichu Villanueva, *Palace: US owes apology to 30 Pinoy telecom execs harassed in Hawaii*, THE PHILIPPINE STAR NEWS, January 15, 2004 at 5; *Gov't plays down US probe of telecom firms*, PHILIPPINE DAILY INQUIRER, January 15, 2004 at A-1; Carina L. Roncesvalles, *RP to press issue on telco officials*, BUSINESS WORLD, p.12, January 15, 2004 at 12; *Hawaii fracas not seen affecting US, RP rate deals*, DAILY TRIBUNE, January 15, 2004 at 9; James Hookway, *Arroyo Wants Answers*, ASIAN WALL STREET JOURNAL, p. A3, dated January 14, 2004 at A3. See also *DFA Summons US Ambassador Over Telecoms Case*, Press Release, Philippine Department of Foreign Affairs, www.dfa.gov.ph, January 12, 2004. Our actions have been wholly independent from the Department of Justice investigation.

⁵⁶ 47 C.F.R. § 1.115(b)(2). See also 47 U.S.C. § 155(c)(4-7). The Applications for Review apparently seek review of the *Order* pursuant to subsections (i), (ii), (iii), (iv) and (v) of Section 1.115(b)(2) of the Commission's rules.

⁵⁷ See 47 C.F.R. § 1.115(c).

⁵⁸ 47 C.F.R. § 1.115(g).

Order, we address the major arguments raised by the parties in the proceeding; to the extent we do not address a particular argument set forth in the *Applications for Review*, we find that the arguments do not aggregate to the point of being decisionally significant.

17. In this Order on Review, we affirm the Bureau's finding in its *March 10, 2003 Order*⁵⁹ that Philippine carriers "whipsawed" AT&T and MCI to the harm of U.S. consumers. The record reflects that PLDT, Globe, Bayantel, Smart, Digitel and Subic demanded a similar and substantial rate increase at approximately the same time.⁶⁰ The record shows that at least five of the Philippine carriers entered into interconnection agreements that amended their existing interconnection agreements to increase rates for domestic termination of international calls from \$0.08 to \$0.12 per minute for termination on fixed networks and from \$0.12 to \$0.16 per minute for termination on mobile networks.⁶¹ The demanded rate increases closely mirror the rate increases reflected in the interconnection agreements entered into among the Philippine carriers.⁶² The record also shows that the six Philippine carriers disrupted circuits when their rate demands were not met.⁶³

18. We also affirm the Bureau's action ordering all U.S. carriers providing facilities-based services to suspend payments to the Philippine carriers for termination services pending restoration of circuits. The Commission has precedent in protecting U.S. consumers and competition from anticompetitive behavior such as "whipsawing."⁶⁴ The term "whipsawing"

⁵⁹ *March 10, 2003 Order*.

⁶⁰ See, e.g., AT&T Petition at 3-4; Miller Decl. at ¶¶ 8 & 10; AT&T Opposition at 2; Obias Decl. at 3-4 and Exhibits 2, 3, 4, 5, 6 & 7; PLDT letter to AT&T dated January 30, 2003; Globe Petition at 11-12; MCI Petition at 1-3; MCI Opposition at 3; Globe Opposition at 3-4 and Exhibit 3 (stating that it requested AT&T to stop sending Globe traffic but AT&T continued to send traffic and Globe claims it did not cut AT&T's direct circuits but it stopped terminating off-net traffic).

⁶¹ See, e.g., AT&T Petition at 4; Globe Telecom, Inc., SEC Form 6-K filing (January 29, 2003) at 18; Globe Opposition at 4-5; AT&T Opposition at 3. See also *March 10, 2003 Order*, 18 FCC Rcd at ¶ 3, n.13.

⁶² See n. 60 & 61 *supra*; para 24 *infra*.

⁶³ See, e.g., AT&T Petition at 1, 5; Miller Decl. at ¶ 13; PLDT Opposition at 8; Obias Decl. at 4; AT&T Reply at 2-6 and Attachments A & C (based upon the answer seizure rate (ASR) measurements (number of calls completed vs. circuits seized) with each of the Philippine carriers, AT&T informed the Commission that each carrier was engaged in blocking circuits); AT&T Opposition at 3-4; AT&T Opposition to Motions for Extension of Time at 1-2 (filed February 19, 2003); MCI Petition at 3; MCI Opposition at 3; MCI Opposition to Motions for Extension of Time at 1-2 (filed Feb. 19, 2003); Letter from Scott Shefferman, Associate Counsel, MCI to Marlene Dortch, Secretary, Federal Communications Commission (dated February 21, 2003); ABS-CBN Reply at 3 and Esguerra Decl. at 3 (stating that Bayantel only has declined to terminate off-net traffic).

⁶⁴ The Commission's policy of protecting the public interest from anticompetitive behavior goes back over sixty years. The ISP was formerly termed the Uniform Settlements Policy, or USP. The USP initially applied to telegraph and telex services and evolved through Commission decisions and practices. The intent of the USP was to ensure that U.S. carriers were treated fairly and that U.S. customers received the benefits that result from the provision of international services on a competitive basis. Among other things, the policy required uniform accounting rates and uniform terms for sharing of tolls. See, e.g., *Mackay Radio and Telegraph Co.*, 2 FCC 592 (Telegraph Committee 1936), *aff'd sub nom. Mackay Radio v. FCC*, 97 F.2d 641 (D.C. Cir. 1938) (In the 1936 decision, the Commission denied an application for Section 214 authority to serve Norway because the settlement terms would have permitted the Norwegian carrier to "whipsaw," or engage in anticompetitive behavior against, U.S. carriers by manipulating traffic flows and retaining a greater percentage of the accounting rate.); *Modifications of Licenses in the Fixed Public and Fixed Public Press Services*, 11 FCC 1445 (1946); *Mackay Radio and Telegraph Company*, 25 FCC 690 (1951), *rev'd on other grounds sub nom. RCA Communications, Inc. v. FCC*, 210 F.2d 694 (D.C. Cir. 1952), *vacated and remanded*, 346 U.S. 86 (1953); *TRT Telecommunications Corp.*, 46 FCC 2d 1042

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refers to a broad range of anticompetitive behaviors by foreign carriers possessing market power, in which the foreign firms exploit that market power in negotiating settlement rates with competitive U.S. telecommunications carriers.⁶⁵ Failure to protect U.S. consumers and competition from this kind of behavior would likely result in U.S. carriers paying above-cost settlement rates to carriers out of fear that they would lose business to carriers willing to pay the higher rate.

19. While we affirm the Bureau's *March 10, 2003 Order*, as discussed below, we dismiss the requests of both Philippine and U.S. carriers that we modify the aspects of the *March 10, 2003 Order* removing the Philippines from the Commission's list of ISR-approved routes and requiring U.S. carriers to comply with the ISP in negotiating agreements for termination of service to the Philippines. We view this request as superceded by our recent decision in our *2004 ISP Reform Order* to eliminate our ISR policy and to remove the ISP from benchmark-compliant routes.⁶⁶ Since the Philippines route was placed on the list of routes that we believe to be benchmark-compliant, the relief requested by parties in this proceeding will be addressed through the process established in the *2004 ISP Reform Order*.⁶⁷ In this respect, we are encouraged that U.S. carrier circuits on the U.S.-Philippines route have been restored per interim agreements between U.S. and Philippine carriers, and that negotiations toward a final agreement have resumed.⁶⁸ The public interest is generally served where parties are free to negotiate commercial arrangements that tend to be more cost-based. In our *2004 ISP Reform Order*, we found that the ISP can inhibit U.S. carrier flexibility in arriving at agreements and that exempting its application from certain routes would enable U.S. carriers to negotiate more commercial arrangements.⁶⁹ We are hopeful that the actions we took in that decision will facilitate a resolution among the U.S. and Philippine carriers.

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(1974). In 1986, the Commission termed the USP the "ISP" and extended its application to International Message Telephone Service (IMTS) in response to significantly greater reported instances of "whipsawing." *See also* n.3 & 35 *supra*; n.64 *infra*.

⁶⁵ *See, e.g., Argentina Order*, 11 FCC Rcd 18014, 18014, ¶ 1 ("The Commission will not allow foreign monopolists to undermine U.S. law, injure U.S. carriers or disadvantage U.S. consumers."); *Mexico Order*, 13 FCC Rcd 24998 at 25000-01, ¶ 6 ("The Bureau has strictly enforced the Commission's regulations against whipsawing."). *See also Cable & Wireless v. FCC*, 166 F.3d 1224, 1226 (D.C. Cir. 1999) ("The FCC has long sought to protect U.S. carriers and U.S. consumers from the monopoly power wielded by foreign telephone companies in the international telecommunications market."). *See also March 10, 2003 Order*, 18 FCC Rcd at 3525-27, ¶ 10.

⁶⁶ *See 2004 ISP Reform Order* at ¶¶ 26-38.

⁶⁷ By virtue of the Bureau's *March 10, 2003 Order* removing the Philippines from the Commission-approved ISR list, the Bureau placed the Philippines on a list of countries identified in the *2004 ISP Reform Order* as requiring further notice and comment before the ISP is removed pursuant to that Order. *See 2004 ISP Reform Order* at Appendix E. The *2004 ISP Reform Order* allows all interested parties 30 days from the effective date of that decision to file comments or petitions on those routes, and 15 days to file responses. At the end of that period, we will remove the ISP for all routes for which no reasonable concerns have been raised. We will address those routes on which concerns have been raised after full review of the issues raised. *See 2004 ISP Reform Order* at ¶ 29.

⁶⁸ ABS-CBN argues that, in view of these changed circumstances, the Bureau should explain why U.S. carriers must nevertheless renegotiate their contracts with Bayantel based on the ISP. *See ABS-CBN Bayantel Application for Review* at 4. We need not address this argument in view of our action in our *2004 ISP Reform Order*.

⁶⁹ *See 2004 ISP Reform Order* at ¶¶ 13 and 28.

20. The Applications for Review allege that (1) there could have been no “whipsawing” because the Philippine market is competitive,⁷⁰ (2) the *March 10, 2003 Order* did not properly apply Commission precedent,⁷¹ (3) the *March 10, 2003 Order* was inconsistent with the *Benchmarks Order*,⁷² (4) the *March 10, 2003 Order* violated the principles of comity and treaty obligations,⁷³ (5) the Bureau exceeded the bounds of its delegated authority,⁷⁴ (6) the Bureau committed procedural error,⁷⁵ (7) the Bureau acted contrary to the public interest,⁷⁶ and (8) the Bureau’s *March 10, 2003 Order* was arbitrary and capricious.⁷⁷ In response, AT&T and MCI argue that (1) the Bureau properly found that the Philippine carriers engaged in “whipsawing,”⁷⁸ (2) the Bureau properly applied Commission precedent,⁷⁹ (3) the Commission’s anti-whipsaw policies are fully applicable to below-benchmark rates,⁸⁰ (4) no deference to the Philippine regulator is required, (5) the Bureau is fully authorized to enforce anti-whipsaw policies on ISR routes,⁸¹ (6) the Bureau acted in accordance with Commission procedures, precedent, rules and due process and provided adequate notice of the Bureau’s enforcement action,⁸² and (7) the Bureau properly did not grant the “so-called” waiver request.⁸³ We address each issue below.

21. *Philippine market.* PLDT and Globe allege that, because the Philippine international telecommunications market is competitive, there could have been no whipsawing.⁸⁴ We find that the Bureau properly considered and rejected arguments addressing the relationship between “whipsawing” and markets where competition exists.⁸⁵ The record demonstrates a market failure notwithstanding the existence of competing Philippine carriers. First, PLDT, the

⁷⁰ See, e.g., Globe Application for Review at 8, 11-15; PLDT Application for Review at 8, 10-12. See also ABS-CBN/Bayantel Application for Review at 2, 15-16.

⁷¹ See, e.g., PLDT Application for Review at 15-16.

⁷² See, e.g., PLDT Application for Review at 17-18; PLDT Reply to Oppositions at 1. See *International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280, 12 FCC Rcd 19806 (1997) (*Benchmarks Order*).

⁷³ See, e.g., PLDT Application for Review at 23-24; Globe Application for Review at 24-5.

⁷⁴ See, e.g., Globe Application for Review at 14-17.

⁷⁵ See, e.g., Globe Application for Review at 17-18.

⁷⁶ See, e.g., Globe Application for Review at 21.

⁷⁷ See, e.g., ABS-CBN/Bayantel Application for Review at 17.

⁷⁸ See, e.g., AT&T Opposition at 4-18; MCI Opposition at 5-10.

⁷⁹ See, e.g., AT&T Opposition at 14-18; MCI Opposition at 10-20.

⁸⁰ See, e.g., AT&T Opposition at 14-16; MCI Opposition at 16-18.

⁸¹ See, e.g., AT&T Opposition at 16; MCI Opposition at 13-16.

⁸² See, e.g., AT&T Opposition at 18-23; MCI Opposition at 18-20.

⁸³ See, e.g., AT&T Opposition at 9-10.

⁸⁴ See, e.g., Globe Application for Review at 8, 22-23; PLDT Application for Review at 8. See also ABS-CBN/Bayantel Application for Review at 2.

⁸⁵ See, e.g., *March 10, 2003 Order*, 18 FCC Rcd at 3524, 3527, ¶¶ 9, 11, 12 & n.42.

dominant local exchange carrier,⁸⁶ “whipsawed” U.S. carriers by threatening and then following through on the threat to disrupt circuits to force a rate increase on AT&T and MCI – the two U.S. carriers unwilling to agree to the rate increases during ongoing negotiations.⁸⁷ Second, the five other Philippine carriers engaged in the same action with PLDT.⁸⁸ While Globe argues that it could not engage in whipsawing alone,⁸⁹ the Bureau did not make this finding. Instead, the Bureau found that Globe and four other nondominant Philippine carriers acted with PLDT in the exercise of market power to “whipsaw” U.S. carriers.⁹⁰ Under these circumstances, the Bureau correctly determined that there was a market failure and acted to protect the public interest by achieving the restoration of circuits and continuation of commercial negotiations.

22. PLDT argues that the Bureau ignored the Commission’s decision that the Philippines market was competitive enough to allow ISR.⁹¹ The Commission’s approval of ISR, however, does not alone indicate the presence of competition such that it is unnecessary to impose competitive safeguards. The Bureau stated that “[a]s the approval of ISR for a U.S.-international route is meant to provide a mechanism to achieve the goal of more cost-based termination rates, it is not intended to be a Commission finding that competition exists in the foreign market.⁹² In addition, the Bureau stated that “[a]lthough the compliance with the settlement rate criteria for ISR approval may be an indication that there are competitive pressures on a U.S.-international route from competing carriers on the foreign end, the availability of least-cost routing methods such as refile and re-origination, or bypass mechanisms such as IP telephony, the Commission has retained the ISP on ISR-approved routes to address possible anticompetitive behavior or backsliding that may still occur.”⁹³ Indeed, in the *1999 ISP Reform Order*, the Commission expressly retained the ISP on all ISR routes and noted the potential harm for any practice by which a foreign carrier terminates U.S.-inbound traffic at low rates and exercises its market power to require that U.S. carriers pay much higher rates to terminate traffic in the foreign market.⁹⁴ The Commission always has retained safeguards against whipsawing, along with the “No Special Concessions” rule on routes approved for the provision of ISR.⁹⁵

⁸⁶ See The “List of Foreign Telecommunications Carriers that Are Presumed to Posses Market Power in Foreign Telecommunications Markets” (available on the Commission’s website at www.fcc.gov/ib).

⁸⁷ See *March 10, 2003 Order*, 18 FCC Rcd at 3527-8, ¶ 11.

⁸⁸ *Id.* at 3528, ¶ 12.

⁸⁹ See Globe Application for Review at 13.

⁹⁰ See *March 10, 2003 Order*, 18 FCC Rcd at 3528, ¶ 12.

⁹¹ See PLDT Application for Review at 18-20.

⁹² See *March 10, 2003 Order*, 18 FCC Rcd at 3529-30, ¶ 13.

⁹³ See *March 10, 2003 Order*, 18 FCC Rcd at 3530, n.59.

⁹⁴ See, e.g., *1998 Biennial Review – Reform of the International Settlements Policy and Associated Filing Requirements*, IB Docket Nos. 98-148 and 95-22, CC Docket No. 90-337 (Phase II), Report and Order and Order on Reconsideration, FCC 99-73, 14 FCC Rcd 7963, 7987, ¶ 62 (1999) (*1999 ISP Reform Order*).

⁹⁵ The “No Special Concessions” rule and certain filing requirements serve as safeguards against non-price discrimination and reinforce the ISP conditions. See 47 C.F.R. § 63.14 (2002). Generally, special concessions between U.S. and foreign carriers with market power pose an unacceptable risk of anticompetitive harm in the U.S.-international services market, whereas, special concessions between U.S. carriers and foreign carriers that lack market power may permit carriers to offer innovative services that result in lower rates to U.S. customers. *Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142 and 95-22, FCC 97-398,

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23. *Collective action.* PLDT and Globe argue that they did not act collusively to whipsaw U.S. carriers.⁹⁶ PLDT and Globe argue that: the interconnection agreement into which at least five of the Philippine carriers entered⁹⁷ only addresses domestic rates and does not prevent a Philippine carrier from charging a U.S. carrier lower rates;⁹⁸ the rates proposed by the U.S. carriers were not identical as the Bureau found;⁹⁹ and the record does not support a finding of collusion between the Philippine carriers as a matter of law.¹⁰⁰

24. We find that the International Bureau properly found that the Philippine carriers engaged in collective action to “whipsaw” AT&T and MCI.¹⁰¹ The record shows that PLDT, joined by five other Philippine carriers, disrupted AT&T and MCI circuits when these two carriers refused to agree to substantial and similar settlement rate increases that were demanded by the Philippine carriers.¹⁰² At least five of the Philippine carriers entered into agreements as to what they would charge each other for termination of international traffic.¹⁰³ Contrary to PLDT’s and Globe’s arguments, the interconnection agreement apparently did have an effect on international termination rates and, indeed, prompted Globe to block what it terms as “off-net traffic” (traffic with a final destination within the Philippines that falls outside of Globe’s network) to avoid charging AT&T and MCI rates lower than those in the interconnection agreement.¹⁰⁴ The fact that the rates the Philippine carriers proposed were not identical, as Globe

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Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 at 23957-65, ¶¶ 156-170 (1997) (*Foreign Participation Order*). The Commission further narrowed the application of the “No Special Concessions” rule in the *ISP Reform Order* by partially removing the rule as it applies to terms and conditions *under which traffic is settled*, including the allocation of return traffic or “grooming” arrangements, on a route where the Commission removes the ISP. For example, the “No Special Concessions” rule still applies to terms and conditions unrelated to the settlement of traffic, such as interconnection of international facilities, private line provisioning and maintenance, and quality of service on routes where the ISP is lifted. *See 1999 ISP Reform Order*, 14 FCC Rcd at 7994-98, ¶¶ 82-94. *See also Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Order on Reconsideration, 15 FCC Rcd 18158 (2000) (*Foreign Participation Recon Order*).

⁹⁶ *See, e.g.*, PLDT Application for Review at 11-15; Globe Application for Review at 10-13. *See also* ABS-CBN/Bayantel Application for Review at 15-16 (arguing they did not act in concert with other Philippine carriers to “whipsaw” U.S. carriers).

⁹⁷ *See* Globe Telecom, Inc., SEC Form 6-K filing, (January 29, 2003) at 18.

⁹⁸ *See* PLDT Application for Review at 12; Globe Application for Review at 10-11; ABS-CBN/Bayantel Application for Review at 15.

⁹⁹ *See, e.g.*, Globe Application for Review at 11-12.

¹⁰⁰ *See, e.g.*, PLDT Application for Review at 11-15; Globe Application for Review at 11.

¹⁰¹ *See March 10, 2003 Order* 18 FCC Rcd at 3533, ¶ 17.

¹⁰² *See, e.g., March 10, 2003 Order* 18 FCC Rcd at 3527-3528; AT&T Petition at 5; AT&T Reply at 2; AT&T Reply at 4-5, Attachments A & C; AT&T Opposition at 2-3; MCI Petition at 3; MCI Reply at 3; MCI Opposition at 3-4.

¹⁰³ *See* Globe Telecom, Inc., SEC Form 6-K filing, (January 29, 2003) at 18.

¹⁰⁴ Globe argues that the interconnection agreement only addressed domestic interconnection rates that could not be reasonably interpreted to reflect collusion among Philippine carriers with respect to international termination rates. *See* Globe Application for Review at 11. Bayantel made the same argument in its reply comments to the AT&T and MCI Petitions. *See* ABS-CBN Reply, Affidavit of Mariel Esguerra at 3, ¶ 7. We find that Globe’s comments belie these points when they attempt to rationalize the blocked traffic by the fact that they would lose approximately \$0.04 per minute of traffic transferred to another Philippine carrier’s network by virtue of the interconnection agreement setting rates at \$0.12 per minute. *See* Globe Application for Review at 5; Globe Reply to

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points out,¹⁰⁵ does not change the fact that the increases were similar (with slight discrepancies), substantial and unacceptable to AT&T and MCI.

25. PLDT and Globe argue that the Bureau failed to demonstrate “collusion” under the U.S. antitrust laws.¹⁰⁶ The Bureau neither attempted nor was required to make such a finding under the public interest standard of the Communications Act. The Bureau stated in the *March 10, 2003 Order* that it was not making such a finding under the antitrust laws.¹⁰⁷ As noted above, the Department of Justice is investigating the possibility of anticompetitive practices among the Philippine carriers under its authority pursuant to U.S. antitrust laws.

26. In addition, we reject Globe’s argument that it did not engage in whipsawing because it only blocked traffic that ultimately goes off of Globe’s network. Globe contends that the Bureau disregarded exculpatory evidence such as Globe’s assertion that it did not block circuits with AT&T but ceased to terminate off-net traffic to avoid financial losses.¹⁰⁸ AT&T responds that it provided data to the Commission showing that Globe terminated virtually no AT&T calls after February 2, 2003.¹⁰⁹ We find that the Bureau recognized this issue and properly considered and rejected this argument in the *March 10, 2003 Order*.¹¹⁰ In the *March 10, 2003 Order*, the Bureau stated that “[t]he fact that Globe is only partially blocking circuits with a U.S. carrier does not erase the fact that Globe is retaliating against AT&T for refusing to accede to a rate increase and is engaged in ‘whipsawing.’”¹¹¹ Moreover, the action taken by the Bureau in its *March 10, 2003 Order* was appropriate notwithstanding Globe’s claim that it was willing to continue negotiations.¹¹² The Bureau’s *Order* properly sought to remedy anticompetitive behavior of Globe and other Philippine carriers that effectively disrupted U.S.-international networks and affected U.S. consumers.

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Oppositions at 5. *See also* Globe Telecom., Inc., SEC Form 6-K filing (January 29, 2003) at 18. Indeed, the fact that the Philippine carriers entered into the interconnection agreements is an important factor as to why market forces did not defeat the anticompetitive behavior. If the carriers had not entered into the agreements, a U.S. carrier could have agreed to give one of the Philippine carriers all of its traffic at a lower rate than what another Philippine carrier demanded. But, with the interconnection agreements in place, no Philippine carrier could take all of the traffic without losing money every time it had to hand off a U.S. caller to the customer of another Philippine carrier.

¹⁰⁵ *See* Globe Application for Review at 11-12.

¹⁰⁶ *See* Globe Application for Review at 11-12; PLDT Application for Review at 13.

¹⁰⁷ *See March 10, 2003 Order*, 18 FCC Rcd at 3533, ¶ 17, n.80.

¹⁰⁸ *See* Globe Application for Review at 21-22 and Appendix 1. *See also* ABS-CBN Reply at 6-7. As discussed above, we dismiss Appendix 1 because it exceeds the page limit set forth in 47 C.F.R. § 1.115(f). We do not waive the dismissal or right to dismiss.

¹⁰⁹ *See* AT&T Opposition at 6; AT&T Reply at 4-5, Attachments A & C. *See also* letter from James J.R. Talbot, Senior Attorney, AT&T, to Donald Abelson, Chief, International Bureau, Federal Communications Commission at 6 (filed March 6, 2003); AT&T Reply, 4-5, Attachments A & C.

¹¹⁰ *See March 10, 2003 Order*, 18 FCC Rcd at 3528, ¶ 12.

¹¹¹ *Id.*

¹¹² *See* Globe Application for Review at 21-22, Appendix 1. AT&T responds that its refusal to pay Globe’s requested rate increase was not a refusal “to negotiate.” AT&T Opposition at n.20. We dismiss arguments raised in Appendix 1 of Globe’s Application for Review because they exceed the page limit set forth in section 1.115(f) of the Commission’s rules. We do not waive this dismissal or right to dismiss.

27. *Effect of Benchmarks.* PLDT and Globe argue that the Bureau has rewritten Commission policy by creating a new cost-justification requirement for below-benchmark rate increases and that the Bureau ignored the Commission's policy that rates at or below benchmark are presumptively reasonable.¹¹³ The Bureau did neither. The Commission's 1997 *Benchmarks Order* requires U.S. carriers to negotiate settlement rates at or below benchmark levels established by the Commission.¹¹⁴ The Commission established its benchmarks policy with the goal of reducing above-cost settlement rates paid by U.S. carriers to foreign carriers for the termination of international traffic where market forces had not already achieved that result.¹¹⁵ The Commission recognized, however, that the benchmark rates were "still considerably above cost-based rates" and it retained its ability to review modification of settlement rates.¹¹⁶ While the Commission considered benchmark settlement rates to be presumptively just and reasonable, the Commission did not establish benchmarks as a floor below which foreign carriers could engage in anticompetitive behavior for the purpose of forcing U.S. carriers to agree to rate increases that would be passed on to U.S. consumers. As the International Bureau pointed out in the *March 10, 2003 Order*, the Commission expected that, in a fully competitive market, U.S. carriers would negotiate rates below the benchmark rates, and the benchmark rates do not supercede Commission policy against anti-competitive whipsawing.¹¹⁷

28. In the matter before us, termination rates for the U.S.-Philippine route previously had been negotiated below the applicable benchmarks. The Bureau's *Order* focused on

¹¹³ See PLDT Application for Review at 17-18; PLDT Reply to Oppositions at 1; Globe Application for Review at 22-23.

¹¹⁴ See, e.g., *Benchmarks Order*, 12 FCC Rcd at 19806, ¶ 1.

¹¹⁵ *Benchmarks Order*, 12 FCC Rcd at 19862-63, ¶ 115. The Commission concluded that the benchmark rates are necessary because, under the current international accounting rate system, the settlement rates U.S. carriers pay foreign carriers terminate U.S.-originated traffic are, in most cases, substantially above the costs foreign carriers incur to terminate that traffic. International Settlement Rates, IB Docket No. 96-261, Report and Order on Reconsideration and Order Lifting Stay, FCC 99-124, 14 FCC Rcd 9256 at 9256, ¶ 3 (1999) (*Benchmarks Reconsideration Order*).

¹¹⁶ See, e.g., *March 10, 2003 Order*, 18 FCC Rcd at 3532, ¶16; International Settlement Policy Reform and International Settlement Rates, IB Docket Nos. 02-324, 96-261, Notice of Proposed Rulemaking, FCC 02-285, 17 FCC Rcd, 19954, 19978, ¶ 44; *Benchmarks Order*, 12 FCC Rcd at 19855-56, ¶¶ 101-102. Globe takes issue with the Bureau's statement that the ITU "has encouraged the promotion of cost-based rates." See *March 10, 2003 Order*, 18 FCC Rcd at n.54, citing ITU-T Recommendation D-140. Globe correctly points out that the Commission, in a previous order, accurately characterized Recommendation D-140 as calling for carriers to "adopt nondiscriminatory, cost-oriented, and transparent accounting rates." See *Benchmarks Order*, 12 FCC Rcd at 19814. The Commission indicated in the *Benchmarks Order* that benchmarks would implement Recommendation D-140, but also emphasized, however, that it was committed to achieve more cost-based rates beyond the immediate reduction of settlement rates through benchmarks. See *Benchmarks Order*, 12 FCC Rcd at 19814-19816. Nevertheless, the Bureau's characterization of Recommendation D-140 was not of decisional significance in how to respond to "whipsawing" by the Philippine carriers.

¹¹⁷ *March 10, 2003 Order*, 18 FCC Rcd at ¶ 16. See also *Benchmarks Order*, 12 FCC Rcd at 19863, ¶ 116, in which the Commission contrasts its ISP with its Benchmarks Policy, stating that the focus of the ISP is "on preventing foreign carriers from discriminating among U.S. carriers," and that the goal of the Benchmarks Policy is to "to reduce settlement rates where market forces have not led to more cost-based settlement rates." See also our recent *2004 ISP Reform Order*, in which we removed the ISP from benchmark-compliant routes, but retained regulatory safeguards to protect U.S. consumers from anticompetitive behavior by foreign carriers, such as threatening or carrying out circuit disruptions in order to achieve rate increases or changes to terms and conditions of agreements. See *2004 ISP Reform Order* at ¶ 60.

protecting U.S. consumers from the effects of the market failure caused by the anticompetitive behavior of six Philippine carriers attempting to force U.S. carriers to agree to an increase in previously negotiated rates. We find that the Bureau acted properly notwithstanding that the “rate” increases demanded by the Philippine carriers were below benchmarks.¹¹⁸ The Bureau stated that “[t]he fact that the increased rates demanded by PLDT and the other carriers do not overshoot the benchmark does not change the fact that the rate increase results from the exercise of market power through ‘whipsawing.’”¹¹⁹ The Bureau correctly found that “[i]t would be flatly contrary to the ISP, and it would be detrimental to consumer welfare in the Philippines and in the U.S., to permit PLDT to force up settlement rates by ‘whipsawing’ U.S. carriers, either alone or by acting in concert with other Philippine carriers.”¹²⁰

29. *Commission precedent.* PLDT attempts to distinguish the *Argentina Order* and argues that precedent does not support a finding of whipsawing.¹²¹ In the *Argentina Order*, the International Bureau ordered U.S. carriers providing direct facilities-based service to Argentina in correspondence with the Argentine carrier, Telinstar, to suspend settlement payments to Telinstar. The Bureau took this action upon finding that Telinstar had engaged in discriminatory and retaliatory behavior against AT&T that constituted “whipsawing” and violated the Commission’s ISP. That behavior involved blocking AT&T circuits to Argentina and disabling AT&T’s USADirect service to Argentina in retaliation for AT&T’s efforts to negotiate lower accounting rates consistent with Commission policy goals and direction to U.S. carriers.¹²²

30. PLDT argues that the Argentina rate was above benchmark while the PLDT rate is below benchmark.¹²³ As further discussed above, the fact that the rate increases demanded by PLDT and other Philippine carriers were below benchmark is irrelevant to the finding that Philippine carriers “whipsawed” U.S. carriers.¹²⁴ PLDT also argues that the Argentine carrier was a monopoly with 100% of the market and the arrangement was governed by the ISP, while the Philippines market is competitive.¹²⁵ As discussed above, the Bureau properly considered

¹¹⁸ The Bureau did not, as PLDT contends, add a requirement that carriers must submit cost studies to justify rate increases. See PLDT Application for Review at 20. Nor did the Bureau act in contravention of the Commission’s presumption of the reasonableness of benchmark rates by citing Commission precedent finding that “whipsawing” forces U.S. carriers to recover unreasonably high rates, as Globe contends. See Globe Application for Review, Appendix 1. See also Globe Application for Review at 22, Appendix 1. We dismiss arguments raised in Appendix 1 of Globe’s Application for Review because they exceed the page limit set forth in section 1.115(f) of the Commission’s rules. We do not waive this dismissal or right to dismiss. Even if we were to reach the merits, we would not be persuaded. The Bureau’s finding of whipsawing centered not on the rates themselves, but on the Philippine carriers’ anticompetitive behavior of acting in concert to cut off circuits while attempting to force a significant rate increase. See, e.g., *March 10, 2003 Order*, 18 FCC Rcd at 3532, ¶ 15. Cost studies are not required, but they might be one way of trying to prove that shutting down circuits in the midst of negotiations was reasonable.

¹¹⁹ See *March 10, 2003 Order*, 18 FCC Rcd at 3528, n.47.

¹²⁰ See *March 10, 2003 Order*, 18 FCC Rcd at 3528, n.47.

¹²¹ See PLDT Application for Review at 15-16.

¹²² See *Argentina Order*, 11 FCC Rcd at 18016-18017. See also *Argentina Order on Review*.

¹²³ See PLDT Application for Review at 15.

¹²⁴ See ¶¶ 27-28 *supra*.

¹²⁵ See PLDT Application for Review at 15.

and rejected those arguments.¹²⁶ The Bureau acted because the actions of the dominant Philippine carrier, along with nondominant carriers, harmed competition on the U.S. Philippines route. PLDT further argues that when the Argentine carrier disrupted AT&T's service, it had an interim accounting rate agreement that it violated to punish AT&T for seeking a rate reduction while no rate agreement was in place when PLDT suspended direct connection to its circuits. The Bureau was aware that there were existing unresolved contract disputes at the time as to the actual status of the agreements between U.S. and Philippine carriers.¹²⁷ The Bureau justifiably acted on the facts that had been brought to its attention with respect to the behavior of the Philippine carriers. The Bureau determined "whipsawing" based on the documented conduct of the Philippine carriers which were demands for similar and substantial rate increases at approximately the same time and then disrupting traffic at about the same time when their demands were not met.¹²⁸ Consequently, we are not persuaded by PLDT's attempt to distinguish the *Argentina Order*.

31. Globe also argues that the Bureau expanded the definition of whipsawing and enforced it against a below-benchmark rate established in a competitive market.¹²⁹ We find that the Bureau did not expand the definition of whipsawing. Indeed, six carriers, together which possess market power on a route, acting collectively to block service to U.S. carriers in an attempt to force those U.S. carriers to accept higher settlement rates falls squarely within the well-established definition of whipsawing.¹³⁰ As discussed above, the fact that the rates were below benchmark does not alter the fact that whipsawing occurred.¹³¹ The Bureau properly focused on protecting U.S. consumers from the effects of the market failure caused by the anticompetitive behavior of six Philippine carriers attempting to force two U.S. carriers to agree an increase in previously negotiated rates.¹³²

32. *International obligations.* PLDT and Globe argue that the *March 10, 2003 Order* violated the principles of comity and treaty obligations by failing to give respect to the decisions

¹²⁶ See, e.g., *March 10, 2003 Order*, 18 FCC Rcd at 3524 & 3527, ¶¶ 9, 11, 12 & n.42.

¹²⁷ See, e.g., *March 10, 2003 Order*, 18 FCC Rcd at 3531, n.69.

¹²⁸ See *March 10, 2003 Order*, 18 FCC Rcd at 3531, ¶ 15. Globe objects that the Bureau relied upon AT&T's statement and did not independently review the contracts. See Globe Application for Review, Appendix 1. We dismiss arguments raised in Appendix 1 of Globe's Application for Review because they exceed the page limit set forth in section 1.115(f) of the Commission's rules. We do not waive this dismissal or right to dismiss. Even if we were to reach the merits, we would not be persuaded. See also ABS-CBN Reply at 6-7. As AT&T points out, Globe does not offer an alternative interpretation of its underlying service agreement with AT&T. See AT&T Opposition at 6-7 and n.19.

¹²⁹ See Globe Application for Review at 8-10.

¹³⁰ See, e.g., *1999 ISP Reform Order*, 14 FCC Rcd at 7966, ¶ 8 ("In negotiating settlement rates, foreign monopoly carriers could pit competing U.S. carriers against one another, exploiting the fact that U.S. carriers unwilling to pay settlement rates demanded by foreign carriers would lose business on those routes to the higher-bidding U.S. competitors, as there are no alternative means of terminating international traffic. This practice, known as "whipsawing," can drive up the cost to U.S. carriers of terminating international traffic in foreign markets, and hence, the prices paid by U.S. consumers."). See also ¶ 33 *infra* citing *1999 ISP Reform Order*, 14 FCC Rcd at 7973, ¶ 30; *March 10, 2003 Order*, 18 FCC Rcd at 3519, n.1.

¹³¹ See ¶¶ 27-28 *supra*.

¹³² See, e.g., *March 10, 2003 Order*, 18 FCC Rcd at 3525-3532.

of the Philippine regulator.¹³³ We disagree. The Bureau's *March 10, 2003 Order* properly considered and rejected these arguments.¹³⁴ The Bureau properly found that "the Commission has the authority and responsibility to oversee and regulate rates authorized U.S. carriers agree to pay foreign carriers to the extent those rates affect U.S. competition and consumers, despite the indirect effect on a foreign market."¹³⁵ It is well-settled that our authority over U.S.-international settlement rates and practices is not an assertion of extraterritorial regulation of foreign carriers; rather, it is a constraint over U.S. carriers to protect the public interest.¹³⁶

33. Globe argues that the *March 10, 2003 Order* created an impossible situation for the Philippine carriers because the Commission issued the stop payment order and the Philippine regulator directed all Philippine carriers not to accept terminating traffic via direct circuits from U.S. carriers that do not pay them for services rendered.¹³⁷ The Commission has previously said that remedial action may be appropriate where a foreign carrier "that otherwise would appear to lack market power might possess some ability to set rates for terminating U.S. traffic due to government policies or collusive behavior in the foreign market."¹³⁸ We find that the Bureau properly acted to protect competition and U.S. consumers.

34. *Delegated authority.* PLDT and Globe argue that the Bureau exceeded the bounds of its delegated authority.¹³⁹ In this Order, we affirm all substantive points of the *March 10, 2003 Order*.¹⁴⁰ Therefore, we need not address PLDT's and Globe's arguments regarding delegated authority.

35. *Procedural error.* Globe argues that the Bureau erred by pursuing a rulemaking process when the situation called for adjudication with an adequate hearing.¹⁴¹ We find that Globe's argument was not raised before the Bureau and, consequently, cannot be raised here and is accordingly dismissed on procedural grounds.¹⁴² Even if we were to reach the merits, which we are not required to do, we would not be persuaded. We note that the Commission has broad

¹³³ See PLDT Application for Review at 23-24; Globe Application for Review at 24-5.

¹³⁴ See, e.g., *March 10, 2003 Order*, 18 FCC Rcd at 3532, ¶ 15; *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). We note that the Commission has eliminated the callback policies cited by Globe. See Globe Opposition at 13; *Enforcement of Other Nations' Prohibitions Against the Uncompleted Call Signaling Configuration of International Call-Back Service*, IB Docket No. 02-18, RM-9249, Order, FCC 03-63, 18 FCC Rcd 6077 (rel. March 28, 2003).

¹³⁵ See *March 10, 2003 Order*, 18 FCC Rcd at 3531-2, ¶ 15; *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

¹³⁶ *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). See also *2004 ISP Reform Order* at ¶ 74.

¹³⁷ See Globe Application for Review at 24-25.

¹³⁸ See *1999 ISP Reform Order*, 14 FCC Rcd at 7973, ¶ 30.

¹³⁹ See PLDT Application for Review at 20-21; Globe Application for Review at 13-16.

¹⁴⁰ See, generally, *March 10, 2003 Order*.

¹⁴¹ See Globe Application for Review at 17-18. See also ABS-CBN/Bayantel Application for Review at 21. In addition, ABS-CBN/Bayantel argue that the International Bureau inappropriately suspended section 43.51(b)(2). See ABS-CBN/Bayantel Reply to Oppositions at 3. In light of the recent *2004 ISP Reform Order* that set out a process to exempt certain routes (including the Philippine) from the ISP, we need not address these arguments here.

¹⁴² See 47 C.F.R. § 1.115(c).

discretion to proceed through rulemaking or adjudication.¹⁴³ There is no requirement for a hearing on the record in the instant case.¹⁴⁴ Additionally, as discussed below, the Bureau was not required to provide special or particularized notice to the Philippine carriers, as the *March 10, 2003 Order* was an act of domestic regulation.¹⁴⁵ In addition, the Philippine carriers were given adequate notice of relevant petitions and were afforded the opportunity to comment and reply to the petitions filed by AT&T and MCI and to the relief requested in those petitions.¹⁴⁶

36. Globe argues that the Bureau failed to seek notice and comment on those aspects of the *March 10, 2003 Order* that were appropriately addressed in a rulemaking.¹⁴⁷ We find that Globe's argument was not raised before the Bureau and, consequently, cannot be raised here and is accordingly dismissed on procedural grounds.¹⁴⁸ Even if we were to reach the merits, which we are not required to do, we would not be persuaded. The Bureau acted in accordance with due process. The Bureau did not create a new rule; it merely applied Commission policy on "whipsawing" to a new factual circumstance.¹⁴⁹ The requirements of notice and opportunity to comment do not apply to interpretive rules – rules that do not contain new substance but merely express the agency's understanding of a statute or rule.¹⁵⁰ Furthermore, "an agency's conclusion that its order is interpretive 'in itself is entitled to a significant degree of credence.'" ¹⁵¹ Finally, the Philippine carriers had reasonable notice and opportunity to comment in any event.¹⁵² In fact, the Bureau provided Philippine carriers with more notice and opportunity for comment than was provided in previous ISP enforcement actions upheld by the Commission.¹⁵³

¹⁴³ See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

¹⁴⁴ See, e.g., *American Telephone and Telegraph Co. v. FCC*, 572 F.2d 17, 21-22 (2d Cir. 1978). See also *AT&T Corporation Application for Authority under Section 214 of the Communications Act, as amended, to Discontinue the Offering of High Seas Service and to Close its File No. ITC-MS-19981229-00905*, 16 FCC Rcd 13636 (2001).

¹⁴⁵ See n.152 *infra*.

¹⁴⁶ The Commission made clear in the *Argentina Order* that no specific notice was required that the Bureau might impose a stop payment order, because carriers were already on notice from the Commission's rules and prior ISP decisions that discriminatory practices would result in enforcement action. See *Argentina Order on Review*, 14 FCC Rcd at 8315-16, ¶¶ 23-24.

¹⁴⁷ See *Globe Application for Review* at 18-20. See also *Globe Application for Review* at 22-23.

¹⁴⁸ See 47 C.F.R. § 1.115(c).

¹⁴⁹ See, e.g., n.3, 35, 64 & 65 *supra* regarding "whipsawing."

¹⁵⁰ See *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (finding that agencies have the authority to "clarify . . . existing rules without issuing a new NPRM and engaging in a round of notice and comment."). See also *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992).

¹⁵¹ See *Viacom International Inc. v. FCC*, 672 F.2d 1034, 1042 (2nd Cir. 1982) (citation omitted).

¹⁵² *Public Notice*, DA 03-390 (February 10, 2003). This Notice was not required under the rules. Indeed, the Bureau provided Philippine carriers with more notice and opportunity for comment than has been provided in previous ISP enforcement actions upheld by the Commission. The Bureau subsequently extended the initial comment deadline in *Public Notice*, DA 03-468 (February 20, 2003). See *Peru Order*, 14 FCC Rcd 8318 at 8328-29, ¶¶ 24-26 (concluding that the Bureau's enforcement of its existing ISP against U.S. carriers represented "an act of domestic regulation" and finding that the Bureau "had no obligation to serve the modification requests on any foreign carrier or to seek comment from them . . . [and the Commission satisfied] whatever process rights a foreign correspondent . . . may have by providing notice of the ISP [and any amendments the Commission makes in its rulemakings]."). See also *Argentina Order on Review*, 14 FCC Rcd at 8315-16, ¶¶ 23-24.

¹⁵³ See, e.g., *Argentina Order on Review*, 14 FCC Rcd at 8315-16, ¶ 23.

37. Globe and ABS-CBN/Bayantel argue that the Commission erred in determining remedies.¹⁵⁴ We disagree. The Commission has broad authority to take action on anticompetitive behavior.¹⁵⁵ As discussed above, the Commission always has retained the ISP and its safeguards against “whipsawing,” along with the “No Special Concessions” rule, on routes approved for the provision of ISR.¹⁵⁶ Because the Commission may protect consumers from the effects of whipsawing, either through the ISP or now as part of the safeguards retained where the ISP has been removed from routes,¹⁵⁷ the stop payment order imposed by the Bureau is within Commission authority and comprises appropriate remedial action. Furthermore, the remedy is not unnecessarily broad. It is narrowly focused on restoration of U.S. carrier circuits on the U.S.-Philippine route and a resumption of commercial negotiations on termination rates without anticompetitive whipsawing behavior.

38. PLDT and Globe further argue that directing U.S. carriers to suspend payments has an impermissible retroactive effect.¹⁵⁸ We find that this issue was not raised before the Bureau and the parties cannot appropriately raise it before the Commission and, therefore, it is dismissed on procedural grounds.¹⁵⁹ Even if we were to address the merits, which we are not required to do, we would not be persuaded. The parties cite no legal authority for the proposition that the Bureau’s action had an impermissible retroactive effect. Further, the issuance of a stop payment order upon the finding of “whipsawing” is not new and the parties were on notice as to

¹⁵⁴ See Globe Application for Review at 20-21 (arguing that the Bureau acted contrary to due process in ruling on matters not put before it and granting relief not requested by any party). See also ABS-CBN/Bayantel Application for Review at 20, 22-23 (arguing that even assuming they engaged in whipsawing, given the prior ISP exemption, such a finding did not provide a legal basis for automatically reimposing ISP and also that reimposition required a full explanation of relevant costs and benefits akin to that conducted by the FCC in 1999 when it repealed the ISP rule).

¹⁵⁵ See 2004 ISP Reform Order at ¶¶ 41-42 (citing *Cable & Wireless v. FCC*, 166 F.3d 1244 (D.C. Cir. 1999); 47 U.S.C. § 152(a); 47 U.S.C. § 153(17); 47 U.S.C. § 201(a) & (b); *Cable and Wireless v. FCC*, 166 F.3d at 1231 (finding that accounting rates constitute a “practice” or a “charge” that is “in connection with” the provision of international communications within the meaning of Section 201); *Regulation of International Accounting Rates*, Order on Reconsideration, 7 FCC Rcd 8049, 8052 n.18 (1992) (stating that the Commission may enforce the ISP requirements using whatever mechanisms that are within the Commission’s authority to ensure nondiscriminatory accounting rate arrangements); *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 Re: Applications on Review*, Order on Review, FCC 99-89, 14 FCC Rcd 8318 (1999); *Petition of AT&T Corp for Approval of a Waiver of the International Settlements Policy Regarding Arrangements for Service between the United States and Venezuela*, Report and Order, DA 00-1255, 15 FCC Rcd 9684 (Int’l Bur. 2000); *Sprint Communications Company L.P., Petition for Waiver of the International Settlements Policy to change the Accounting Rate for Switched Voice Service with Chile (Bell South)*, Order, DA 01-2120, 16 FCC Rcd 16387 (Int’l Bur. 2001); *GTE Hawaiian Tel International Inc., Petition for Waiver of the International Settlements Policy to change the Accounting Rate for Switched Voice Service with Vietnam*, Order, DA 01-713, 15 FCC Rcd 6838 (Int’l Bur. 2001).

¹⁵⁶ See, e.g., 1999 ISP Reform Order, 14 FCC Rcd at 7987, ¶ 62. See also March 10, 2003 Order, 18 FCC Rcd at 3528-30, ¶ 13.

¹⁵⁷ See 2004 ISP Reform Order.

¹⁵⁸ See Globe Application for Review at 20-21; PLDT Application for Review at 19. See also ABS-CBN/Bayantel Application for Review at 20.

¹⁵⁹ See 41 C.F.R. § 1.115(c).

how the stop payment order is applied.¹⁶⁰ Furthermore, court decisions regarding retroactivity of agency decisions support the proposition that the Bureau's action did not have an impermissible retroactive effect.¹⁶¹

39. ABS-CBN and Globe argue that certain issues more appropriately should have been addressed in the Commission's recent ISP reform proceeding.¹⁶² We disagree. The request for comment in the recent ISP rulemaking did not change the fact that the Commission has an existing and ongoing policy in place and has an obligation to protect against "whipsawing."¹⁶³ Indeed, the *2004 ISP Reform Order* emphasized the Commission's continuing commitment to protect against anticompetitive behavior including "whipsawing."¹⁶⁴ Moreover, in the request for comment, the Commission stated that it "has consistently reserved the right to impose safeguards on a case-by-case basis on routes where it permits non-ISP arrangements if there is a need to prevent market distortions."¹⁶⁵ The Bureau's *Order* properly focused on protecting U.S. consumers from the effects of the market failure caused by the anticompetitive behavior of six Philippine carriers attempting to force U.S. carriers to agree to an increase in previously negotiated rates at the risk of retaliation to their networks.¹⁶⁶

40. *Public Interest.* Globe argues that the Bureau acted contrary to the public interest because it allows U.S. carriers to "reverse-whipsaw" Philippine carriers.¹⁶⁷ Globe also argues that the Bureau *Order* undermines developing countries' interest in liberalizing because it presumes that competitive markets must always have constantly reducing prices.¹⁶⁸ Globe further argues that, to the extent the *Order* undermines foreign carrier interest in doing business with U.S. international carriers, the *Order* contravenes the fundamental purpose of the Commission to make available to all people of the United States worldwide wire and radio communications services.¹⁶⁹ We find that the Bureau's *Order* properly followed the Commission's long-standing policy of ensuring that "U.S. entities are treated fairly and that American consumers receive the

¹⁶⁰ See *Argentina Order on Review*, 14 FCC Rcd at 8306, ¶ 1; *Argentina Order*, 11 FCC Rcd 18014, ¶ 15. See also *1999 ISP Reform Order*, 14 FCC Rcd at 7973, ¶ 30 (stating that remedial action may be appropriate where a foreign carrier "that otherwise would appear to lack market power might possess some ability to set rates for terminating U.S. traffic due to government policies or collusive behavior in the foreign market.").

¹⁶¹ See, e.g., *Celotronic Telemetry, Inc. v. FCC*, 272 F.3d 585 (D.C. Cir. 2001).

¹⁶² See ABS-CBN/Bayantel Application for Review at 20-21; ABS-CBN/Bayantel Reply to Oppositions at 3-4 (arguing that the Commission recently sought public comment on the standard for taking such action and that the Bureau had an obligation to give parties prior notice and fair opportunity to comment); Globe Application for Review at 19-20 (arguing that AT&T's concerns regarding rates that, while below benchmarks, are allegedly not cost-based are better addressed in the Commission's ISP reform proceeding).

¹⁶³ See, generally, ¶¶ 27-28 & n.3, 5, 35, 64 & 65 *supra*.

¹⁶⁴ See, e.g., *2004 ISP Reform Order* at ¶¶ 45, 54 ("Absent such a safeguard, foreign carriers with market power could use their market power to whipsaw or otherwise discriminate in favor of certain U.S. carriers, including their own affiliates.").

¹⁶⁵ See *ISP Reform NPRM*, 17 FCC Rcd at 19975, ¶ 37.

¹⁶⁶ See, e.g., *March 10, 2003 Order*, 18 FCC Rcd at 3525-3532.

¹⁶⁷ See Globe Application for Review at 23.

¹⁶⁸ *Id.*

¹⁶⁹ See Globe Application for Review at 24.

benefits that result from the provision of international services on a competitive basis.”¹⁷⁰ Indeed, the public interest is served by achieving cost-based accounting rates.¹⁷¹ Again, we stress that the Bureau’s *Order* properly focused, not on the rates themselves, but on the anticompetitive behavior of the six Philippine carriers cutting off circuits in an attempt to force U.S. carriers to agree an increase in previously negotiated rates.¹⁷²

41. *Waiver request.* ABS-CBN argues that the Bureau’s *March 10, 2003 Order* was arbitrary and capricious because it ignored ABS-CBN’s waiver request.¹⁷³ We find that there was no specific waiver request submitted by ABS-CBN. Under Section 1.3 of our rules, “[w]aiver of the Commission’s rules is appropriate only if special circumstances warrant a deviation from the general rule. Such deviation must serve the public interest and be consistent with the policies underlying the rule.” We find that, while ABS-CBN made a general argument that action taken by the Commission should be tailored narrowly to exclude any U.S. international carrier with a *de minimis* amount of U.S.-billed traffic on the route (*e.g.* less than 2%), this argument did not rise to the level of a waiver request.¹⁷⁴ We find that even if we were to consider the argument as a waiver request, which we are not required to do, it neither raised a special circumstance justifying a waiver request nor warrants deviation from our rules.¹⁷⁵

42. *Request to vacate.* Finally, PLDT and Globe each filed *ex parte* letters requesting the Commission to vacate the Bureau’s *March 10, 2003 Order*.¹⁷⁶ AT&T opposes the PLDT and Globe requests.¹⁷⁷ PLDT contends that the Bureau’s *Order* should be vacated as moot assuming

¹⁷⁰ See *Implementation and Scope of the International Settlements Policy for Parallel International Communications Routes*, CC Docket No. 85-204, Order on Reconsideration, 2 FCC Rcd 1118, ¶ 2.

¹⁷¹ See, *e.g.*, *1999 ISP Reform Order*, 14 FCC Rcd at 7967, 7994, ¶¶ 9, 80. See also *2004 ISP Reform Order* at ¶¶ 44-45 (“We find, in particular, that blockage or disruption of U.S. carrier networks by foreign carriers directly harms the public interest, leads to decreases in call quality or completion and to potential increases in calling prices. Resorting to such retaliatory abuse of market power against U.S. carriers, as opposed to resolving disagreements through commercial negotiations, is unlikely ever appropriate or justified in the public interest and does not benefit the provision of international services to customers in the United States or abroad.”).

¹⁷² See, *e.g.*, *March 10, 2003 Order*, 18 FCC Rcd at 3527-28.

¹⁷³ See ABS-CBN/Bayantel Application for Review at 17. The Commission may grant a waiver of its rules for good cause shown. See 47 C.F.R. §1.3; 16 FCC Rcd 20263 at 20265, ¶ 5 (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969)). Under Section 1.3 of our rules, “[w]aiver of the Commission’s rules is appropriate only if special circumstances warrant a deviation from the general rule. Such deviation must serve the public interest and be consistent with the policies underlying the rule.”

¹⁷⁴ See ABS-CBN Reply at 4, 10.

¹⁷⁵ See 47 C.F.R. § 1.3; *Northeast Cellular Telephone Co. v. FCC*, 897, F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)); see also *Industrial Broadcasting v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970) (applicant bears heavy burden to demonstrate that his arguments for waiver are substantially different from those which have been carefully considered at rulemaking proceeding).

¹⁷⁶ See Letter from Henry Goldberg, Counsel for PLDT to Marlene H. Dortch, Secretary, Federal Communications Commission (filed December 5, 2003); Letter from Patricia Paoletta, Counsel for Globe Telecom, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (filed January 20, 2004); and Letter from Margaret K. Pfeiffer and Thomas R. Leuba, Counsel for PLDT, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed February 13, 2004). See also Letter from Patricia Paoletta, Counsel for Globe Telecom, Inc. to Marlene Dortch, Secretary Federal Communications Commission (filed January 30, 2004).

¹⁷⁷ See Letter from James J.R. Talbot, AT&T Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 03-38 (filed January 27, 2004).

that Philippines and U.S. carriers reach commercial agreements on termination rates, circuits are unblocked, and payment permitted.¹⁷⁸ PLDT states that it will seek court review if the Commission deals with applications for review on the merits and affirms the Bureau's action.¹⁷⁹ Globe states that the Commission should vacate the Bureau's *Order* because there is no evidence of "collusion" by Globe and other Philippine carriers and that such action will facilitate restoration of ISR arrangements with the Philippines.¹⁸⁰ AT&T contends that restoration of ISR does not require vacating the Bureau's *Order*, which AT&T maintains provides precedent with prior anti-whipsaw orders after resolution of the undergoing disputes.¹⁸¹ PLDT argues that there is little value in preserving the *Order* as precedent if it purportedly creates no new law or policy and if the policy or rules upon which it is based are subsequently modified.¹⁸²

43. We will not vacate the Bureau's *March 10, 2003 Order*. The *March 10, 2003 Order* made appropriate determinations based on the facts in the record. As discussed above, we hold that the Bureau's *March 10, 2003 Order* correctly found that each of the Philippine carriers engaged in "whipsawing" in violation of the ISP by disrupting the circuits on the U.S.-Philippines route of certain U.S. carriers in retaliation for the refusal of those carriers to agree to rate increases for termination services.

44. Neither the resolution of the commercial disputes underlying the Bureau's *Order* nor the restoration of the ISR to the Philippines would provide a basis for vacating the *Order*. The fact that the parties have entered into interim agreements and service has been restored on the U.S.-Philippines route does not moot the finding of the *March 10, 2003 Order* that there was whipsawing on the U.S.-Philippines route. Furthermore, even final resolution of commercial disputes between U.S. and Philippine carriers would not render the *Order* "moot" as PLDT contends. Moreover, we agree with AT&T that the Bureau's *March 10, 2003 Order*, as well as the action that we take here in affirming it, provides precedent for enforcing the Commission's policy against "whipsawing." And, while we recently acted to exempt a substantial number of routes from the ISP, including the Philippines, we reaffirmed safeguards that maintain our policy against whipsawing U.S. carriers to protect U.S. consumers against anti-competitive conduct.¹⁸³ The actions taken by the International Bureau in its *March 10, 2003 Order* were consistent with continuing Commission policy in this area.

45. Further, it is not clear that the commercial dispute between U.S. and Philippine carriers has been brought to conclusion. AT&T and MCI have interim agreements with the Philippine carriers. Any future final agreements are subject to continued negotiation. We

¹⁷⁸ See Letter from Henry Goldberg, Counsel for PLDT, to Marlene H. Dortch, Federal Communications Commission, IB Docket No. 03-38 (filed December 5, 2003) (PLDT December 5 *Ex Parte* Letter).

¹⁷⁹ See PLDT December 5 *Ex Parte* Letter.

¹⁸⁰ See Letter from Patricia Paoletta, Counsel for Globe, to Marlene H. Dortch, Federal Communications Commission, IB Docket No. 03-38 (filed January 20, 2004); Letter from Patricia Paoletta, Globe, to Marlene H. Dortch, Federal Communications Commission, IB Docket No. 03-38 (filed January 30, 2004).

¹⁸¹ See Letter from James Talbot, AT&T, to Marlene H. Dortch, Federal Communications Commission, IB Docket No. 03-38 (filed January 27, 2004).

¹⁸² See Letter from Margaret Pfeiffer, Counsel for PLDT, to Marlene H. Dortch, Federal Communications Commission, IB Docket No. 03-38 (filed February 13, 2004).

¹⁸³ 2004 *ISP Reform Order* at ¶ 40-52.

conclude that vacating the Bureau's *March 10, 2003 Order* is inappropriate under these circumstances.

46. *Conclusion.* The Applications for Review present no facts that would cause the Commission to reverse the Bureau's findings. Having found that PLDT's, Globe's and ABS-CBN's and Bayantel's allegations are without merit and fail to meet the requirements of Section 1.115 of the Commission's rules,¹⁸⁴ we affirm the International Bureau's *March 10, 2003 Order*. We dismiss, in part, the Applications for Review filed by PLDT, Globe and ABS-CBN/Byantel and deny them in all other respects, as discussed above.

IV. ORDERING CLAUSES

47. For the reasons discussed above, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 5, 201, 214, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155, 201-205, 214, 303(r), 309 and Sections 1.3 and 1.115 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.115, that the Applications for Review of the International Bureau's *March 10, 2003 Order* filed by PLDT, Globe and ABS-CBN/Byantel are DISMISSED, in part, to the extent reflected in paragraphs 2 and 19 of this Order on Review, and are DENIED in all other respects.

48. IT IS FURTHER ORDERED that the Petition for Enforcement of the *March 10, 2003 Order* filed by Access is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁸⁴ 47 C.F.R. § 1.115.