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January 9, 2003

Gloria Blue
Executive Secretary
Trade Policy Staff Committee
ATTN: Section 1377 Comments
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

RE: **AUSTRALIA, BRAZIL, CHINA, FRANCE, GERMANY, INDIA, ITALY, JAPAN, MEXICO, THE NETHERLANDS, SINGAPORE, SOUTH AFRICA, SWITZERLAND, AND TAIWAN:** *WTO General Agreement on Trade in Services*

JAPAN: *May 1998 U.S.-Japan Deregulation Joint Statement*

Dear Ms. Blue:

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 3106 ("Section 1377"), the Competitive Telecommunications Association ("CompTel") hereby responds to the request of the Office of the United States Trade Representative ("USTR") for comments regarding compliance with certain telecommunications trade agreements. CompTel is the premier U.S. industry association representing competitive telecommunications carriers and their suppliers. CompTel has 22 years of experience working actively to advance telecommunications competition in the United States and other countries. With the development of liberalized regulatory regimes and competitive market conditions in a growing number of countries, many of CompTel's members have made significant investments in telecommunications facilities and services outside the United States. CompTel appreciates the opportunity to present its members' experiences in Australia, Brazil, China, France, Germany, India, Italy, Japan, Mexico, the Netherlands, Singapore, South Africa, Switzerland, and Taiwan.

In its 2002 Comments, CompTel noted in particular two important trade concerns that arise in most of the countries discussed in those Comments: (1) pricing and provisioning of local access leased lines; and (2) excessive fixed-to-mobile termination rates. Unfortunately, little progress has been made in many countries that CompTel cited in its 2002 submission. Because these issues continue to be of concern in so many of the countries discussed in these Comments,

CompTel again includes a general overview of these issues. In addition, CompTel highlights the fact that, in many cases, the incumbent fixed network operators and mobile network operators have been taking advantage of their significant market power in the provision of local access leased lines and mobile services to engage in anticompetitive price squeeze practices.[1] We also note, however, that there are a number of other countries not specifically discussed in these Comments in which many of the same concerns exist, including, Belgium, Ireland, Sweden and Spain.[2] CompTel's members will keep a close watch on developments in these countries in the coming year.

PRICING AND PROVISIONING OF LOCAL ACCESS LEASED LINES

Due to the lack of a competitive supply of local access alternatives across Europe and Latin America, the incumbents' local access lines remain the principal bottleneck facing emerging competitors. The successful delivery of global services to customers in the U.S., Europe, Latin America and the rest of the world will require competitively priced, carrier-grade broadband local access leased lines that are delivered on a timely basis, particularly in large markets like Germany and Brazil.

U.S. emerging competitive carriers procure local access leased lines from incumbents to link their customers to their global networks. Local access leased lines are the major local access facilities utilized by competitive telecommunications providers in Europe and in every competitive market throughout the world. Although it is true that some European countries are taking the right steps, in most countries rates continue to be well above cost-oriented rates, and provisioning of local access leased lines is not done in a timely manner. In Germany, for instance, the incumbent refuses to provide local access leased lines in a timely, non-discriminatory manner and to provide a viable leased line interconnection product, in violation of European Union ("EU") practice. Germany's telecommunications regulatory authority's ("RegTP") positive decision that would resolve this situation was blocked when it was appealed by Deutsche Telecom ("DTAG"). Similarly, incumbents in other regions have refused to offer cost-oriented and timely provisioning of local access leased lines.

[1] "Price squeeze" is a practice whereby incumbent operators use their market power over key inputs to discriminate in favor of their own operations. They offer better terms and conditions to their own competitive downstream operations, thus undermining new entrants' ability to compete. Incumbent retail offers continue to be significantly lower than wholesale offers and/or contain more attractive terms and conditions including delivery time and guaranteed repair times. Competitive providers are unable to compete because of high wholesale rates.

[2] In Belgium, the independence of the regulator needs to be strengthened in order to resolve price squeeze cases. In Ireland, despite significant progress on leased line provisioning as a result of actions by the Commission for Communications Regulation ("COMREG"), the pricing for access leased lines is still among the highest in Europe. The absence of cost-oriented rates facilitates Eircom's discriminatory practices on pricing. In Spain, even though its regulator, Comision del Mercado de las Telecomunicaciones ("CMT"), made important decisions on fixed-to-mobile termination rates and access leased lines prices, these decisions only resulted in partial rate reductions. Rates continue to be well above cost orientation and Telefonica remains able to price squeeze its competitors. In Sweden, although Sweden fixed-to-mobile rates are among the best practices in Europe, Telia appears to be selling calls to mobiles significantly below the going interconnection rate. Skanova (Telia's wholesale arm) appears to be undercutting interconnect prices when it is bidding against carriers in wholesale offerings.

The timely availability of local access leased lines is critical for the development of an effective competitive market for broadband services within the EU Member States, Latin America, and elsewhere. Whereas local loop unbundling will enable residential customers and small and medium enterprises ("SMEs") to achieve cost-effective, high speed access to the Internet, leased lines and bitstream access are vital for government agencies and businesses of all sizes to conduct their internal communications, business-to-business applications and interconnection among operators and service providers. European Commission ("EC") law recognizes the importance of leased lines in both the Leased Line and Interconnection Directives and the 2001 Telecom Review.[3]

Anticompetitive Impact: Incumbents in many markets continue charging prices that are far above cost for leasing local access lines to their competitors. Increasingly, however, incumbents are engaging in both non-price and price abuses in the market for local access leased lines. Incumbents in many markets charge prices that are far above cost for leasing local access leased lines to their competitors.

Non-price abuses can be as powerful as pricing abuses but typically are more difficult to detect and to prove. They can be used for both discriminatory and exclusionary purposes. Moreover, they have the cumulative effect of undermining the value of U.S. telecommunications investment abroad. Non-price abuses may take different forms. Such abuse might be implemented in the form of discriminatory provisioning (*e.*g., the incumbent provisions to its affiliates or retail customers more quickly than it provisions to wholesale customers that compete with the incumbent or its affiliates) or in the form of "rising rivals' costs" (*e.g.*, the incumbent provisions to its affiliates or retail customers in the same, slow time as it provisions to its wholesale customers, but the delays are felt more substantially by the wholesale customers who in turn are trying to win new customers, in part, by offering superior services).

Compliance: In order to comply with their World Trade Organization ("WTO") *General Agreement on Trade in Services* ("GATS") commitments and the *Reference Paper* ("*Reference Paper*") negotiated as part of the WTO *Basic Telecommunications Agreement*, CompTel submits that the relevant national regulatory agencies ("NRAs") should require incumbent carriers to promptly and fully comply with regulations on nondiscrimination and anticompetitive practices and adopt reporting and monitoring measures with respect to incumbents' provisioning of local access leased lines. Specifically, the NRAs should: (1) require incumbents to report data on leased line provisioning (*e.g.*, cost provisioning times, quality of service standards) in a uniform, transparent and auditable way to permit comparison of incumbents' provisioning of leased lines to their affiliates, retail customers and wholesale customers/competitors; (2) analyze such data on a regular basis to identify any anticompetitive practices and develop a European "best practice"

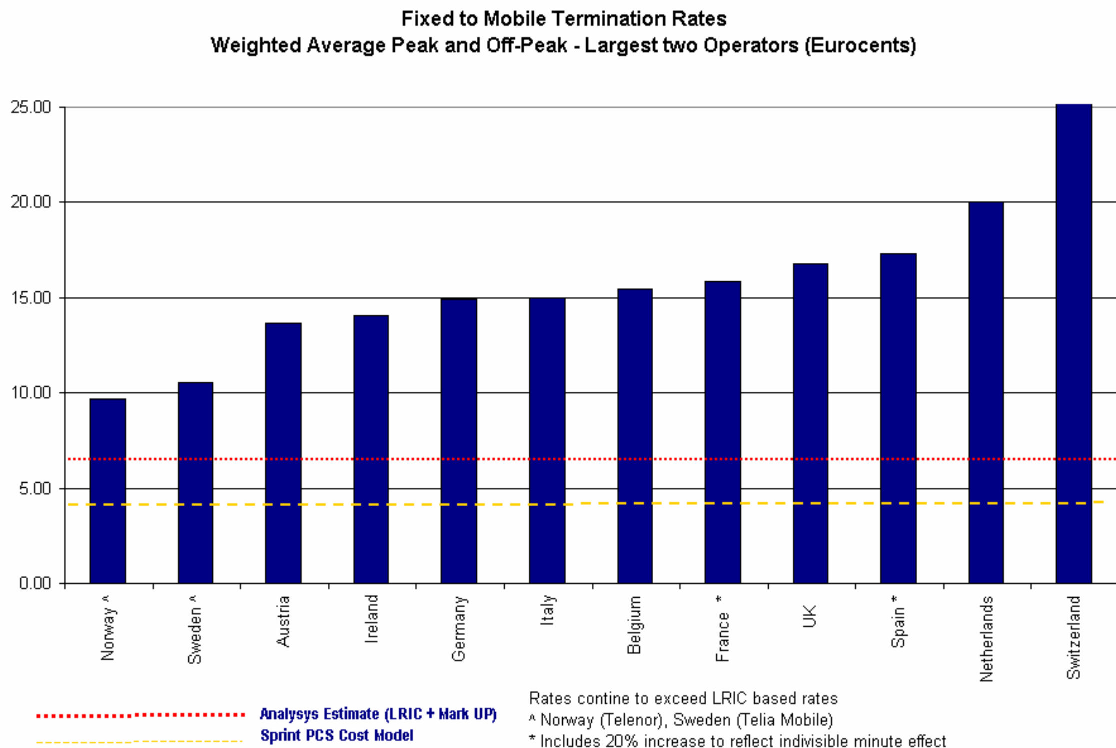
[3] European Commission, Recommendation on Leased Lines Interconnection Pricing in a Liberalised Telecommunications Market, C(1999)3863, 24 November 1999; European Commission, Recommendation Amending Commission Recommendation 98/511/EC of 29 July 1998 on Interconnection Pricing in a Liberalised Telecommunications Market, 20 March 2000; European Commission, Communications from the Commission to the Council, the European Parliament, the Economic and Social Committee and Committee on Regions, Seventh Report on the Implementation of the Telecommunications Regulatory Package, COM(2001) ("Seventh Implementation Report").

for leased lines; (3) determine appropriate standard delivery intervals based on European best practices; and (4) impose uncapped penalties to deter anticompetitive practices in provisioning.

EXCESSIVE FIXED-TO-MOBILE TERMINATION RATES

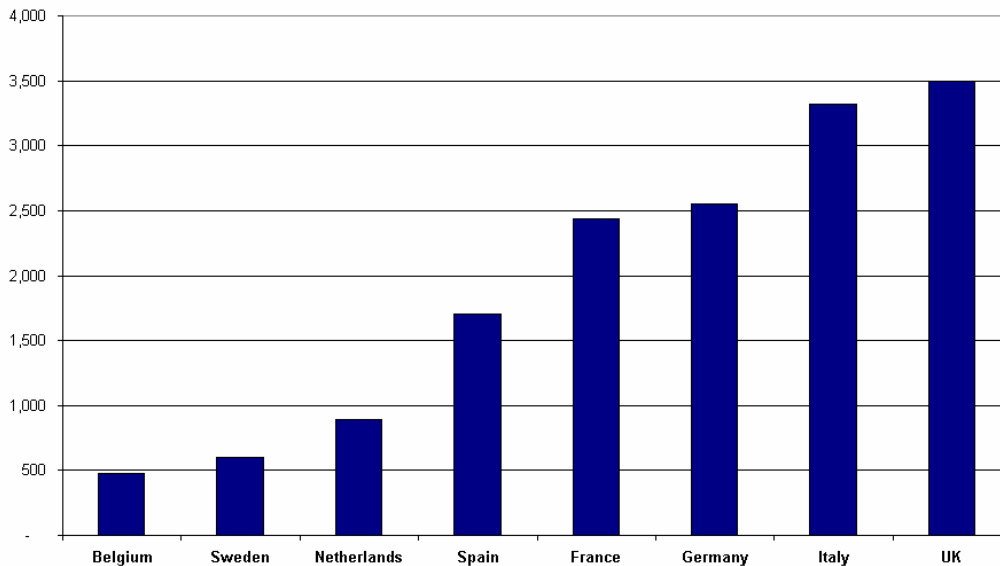
As CompTel outlined in its 2002 Comments, fixed-to-mobile termination refers to the rates charged by mobile operators to fixed network operators to terminate voice traffic. Due to poor policy and a lack of regulation, mobile operators have abused their dominant position to turn mobile termination into a "cash cow." Specifically, regulators have failed to ensure that fixed-to-mobile termination rates are "cost-oriented," transparent and reasonable, as required by Section 2.2(b) of the *Reference Paper*.

Mobile operators across Europe have used the abusive and excessive margins they earn on fixed-to-mobile termination to cross-subsidize other activities and to discriminate against fixed network operators. These practices have resulted in significant harm to the business of competitive fixed line operators. Many of the fixed network operators most heavily penalized by this system are U.S. operators or European operators with substantial U.S. investment. As indicated by the chart below, the European countries listed in these Comments (Germany, France, Italy, The Netherlands, and Switzerland) all suffer from high domestic fixed-to-mobile termination rates. High mobile termination rates also are a problem in Japan.



Also among the losers are the fixed network operators, who currently are facing severe financial challenges in a difficult market. The fixed network operators not only bear the high termination cost, but are forced to sell to their own customers at a loss as they compete directly with mobile network operators and vertically integrated fixed-mobile operators who sell fixed-to-mobile calls at prices which are below the cost of termination.

CompTel estimates that in 2001 alone, mobile network operators reaped over **15.4 billion Euros** in excess charges in France, Germany, Sweden, the United Kingdom, Belgium, Italy, Netherlands and Spain.[4]



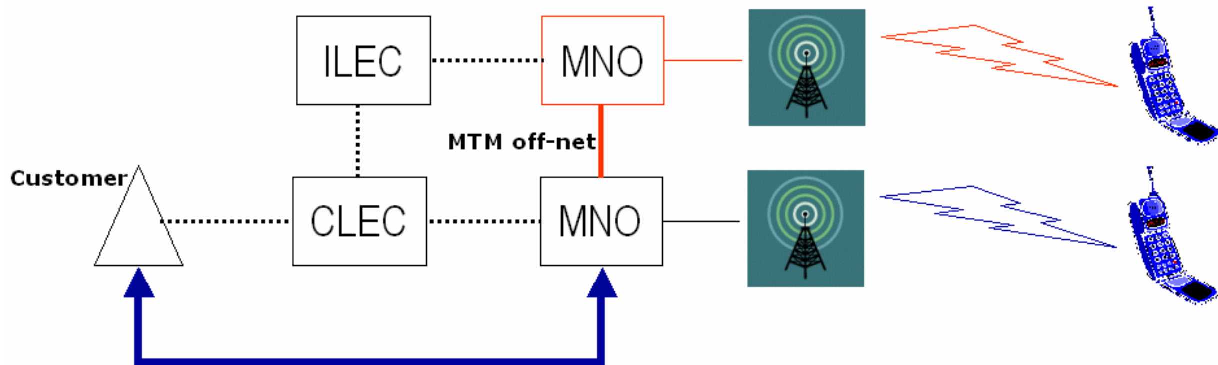
The fixed-to-mobile termination rate problem also adversely affects international traffic terminating in mobile networks. Mobile network operators abuse their respective dominant positions by imposing extremely high fixed-to-mobile termination rates for international traffic. Europe's mobile termination rate problem affects consumers and operators in the United States and other regions as mobile surcharges proliferate - as high as 25 U.S. cents per minute on calls from the United States to Europe. U.S. consumers today pay two to three times more per minute for calls made to mobile phones in Germany and throughout Europe as compared to calls made to fixed line phones. The impact to U.S. consumers is very apparent. Indeed, in some cases, the termination rate for an overseas fixed-to-mobile call could be up to 1585% higher than the cost

[4] This calculation was derived by comparing the termination rates charged with publicly available (and highly conservative) cost estimates and multiplying by volume.

of terminating a call to a fixed telephone overseas as a result of excessive surcharges imposed for mobile termination traffic.

The excessive international fixed-to-mobile termination rates cost U.S. consumers more than $368 million a year. The subsidies transferred from the U.S. to carriers in Germany, France, the United Kingdom and Japan ranges from $14-25 million a year for each route.

Anticompetitive Impact: Discrimination also is a significant problem. Mobile network operators effectively raise their fixed network operator rivals' costs, while unaffiliated mobile network operators take advantage of the price umbrella for fixed-to-mobile termination, and mobile network operators charge their customers far less for "on-net" mobile-to-mobile termination than they charge fixed network operators for fixed-to-mobile termination. Moreover, mobile network operators offer retail fixed-to-mobile prices to corporate Virtual Private Network ("VPN") customers at rates substantially lower than the fixed-to-mobile "interconnection" rate charged to fixed operators.



Compliance: In order to comply with their WTO obligations, CompTel submits that NRAs in their respective markets should implement effective regulatory controls, including cost-oriented pricing and price squeeze tests, over fixed-to-mobile termination. Such measures are required to adjust for market failures and anticompetitive practices imposed by the mobile operators. To establish cost-oriented fixed-to-mobile termination rates that comply with the relevant WTO commitments, a Long Run Incremental Cost ("LRIC") model should be developed and reductions imposed as a result of the LRIC model should be implemented immediately.

AUSTRALIA

CompTel believes that certain anticompetitive practices exist in the Australian market to the detriment of new entrant carriers. Specifically, the incumbent fixed and mobile network operators are charging excessive rates for last mile access and fixed-to-mobile termination. Such practices violate Australia's commitment to WTO principles.

WTO Violations – *Reference Paper and GATS Telecommunications Annex*

Local Access Leased Lines – Excessive Prices: Despite the requirements of Section 2.2(b) of the *Reference Paper* for cost-oriented rates, Australian rates for local access leased lines are excessive. Even the Australian Government's National Office for the Information Economy ("NOIE") seems to agree. In a recent report, it set forth Organization of Economic Cooperation and Development ("OECD") data that shows Australia as ranking tenth of the eleven countries surveyed for "charges for a basket of national leased lines of 2 Mbs per second."[5] Telstra's leveraging of its control of the local loop is considered to be the most significant barrier to the development of competition in the Australian market. According to industry information, Telstra's charge of approximately US$14,000 for a 5 km, 2 Mbs local access circuit is:

- 4 times greater than in Sweden (EU best practice)
- 3 times greater than in the U.S. and Taiwan; and,
- US$5,000 more expensive than its domestic competitor, Optus.

Using its authority to declare[6] certain access services to be essential services, the Australian Competition and Consumer Commission ("ACCC") has deemed certain local tail circuit services to be essential.[7] Despite the requirement that the rates for these tail circuits be cost-oriented, the ACCC does not publish the cost data provided by Telstra that is used to establish the indicative prices that the Commission has set for these services. The lack of transparency in the process makes it extremely difficult for Telstra's competitors to gather meaningful data to present to the Commission to arbitrate disputes involving predatory pricing and price squeezes.

Excessive Fixed-to-Mobile Termination Rates: Fixed-to-mobile termination has been determined to be a "declared service" but is regulated under an ineffectual retail-minus methodology. This approach has resulted in excessive fixed-to-mobile termination rates in Australia, in violation of Section 2.2 (b) of the *Reference Paper* and Section 1 of the *Reference*

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[5] NOIE, "Charges for a Basket of National Leased Lines of 2 megabits/second", at: http://www.noie.gov.au/projects/framework/progress.ie_stats/CSOP_April2002/CSOP_pages/basket_natio.

[6] Declaration ensures service providers have access to the inputs they need to supply competitive communications services to end-users and in accordance with the standard access obligations outlined in s.152AR of the *Trade Practices Act 1974.*

[7] An example is the ACCC adding the "Digital Data Service" ("DDS") to the public register of declared services. The DDS is a "point-to-point service" that can be used to connect a carrier's core network via Point of Interconnection ("POI") to offer customer data network solutions, such as Asynchronous Transfer Mode ("ATM"), Frame relay, Internet Protocol ("IP"), etc.

Paper. In particular, Telstra's current rate of A$0.245 (US$0.12936)/minute for fixed-to-mobile termination is more than 13 times higher than the rate it charges for fixed-to-fixed interconnection. Moreover, Telstra's rate for fixed-to-mobile termination is three to four times above LRIC-based rates and more than 30% higher than the "best practice" rates in OECD countries.

BRAZIL

WTO VIOLATIONS – *GATS Telecommunications Annex*

In its 2002 Comments, CompTel highlighted problems in Brazil relating to local access leased line pricing and provisioning, as well as a lack of transparency in the regulatory process. Unfortunately, little or no progress has been made on these issues over the past year. In addition, Brazil still has not ratified its commitments under the WTO *Basic Telecommunications Agreement*, including the *Reference Paper*.

Local Access Leased Lines – Excessive Prices: The rates charged in Brazil for local access leased lines continue to be excessive. The local incumbent operators, which are major suppliers, have been permitted to provide local access leased lines at rates that are far from cost-oriented. Moreover, discrimination by local incumbents is a serious problem, in violation of Section 5 of the GATS *Telecommunications Annex*. For example, it is not uncommon for a local incumbent to charge its wholesale customers 300% more than it charges its retail customers for a comparable 2Mbps local access circuit. Despite complaints filed by competitive carriers, the Brazilian Regulator, Agencia Nacional de Telecomunicacoes ("Anatel"), has made no progress in bringing these rates down to cost-oriented levels.

Local Access Leased Lines – Provisioning Delays: Local incumbent operators' local access leased line provisioning times are far longer than international best practices, in violation of Section 5 of the GATS *Telecommunications Annex*, which requires access to and use of public telecommunications networks and services on a reasonable and non-discriminatory basis. For some emerging carriers, provisioning times range from 80 to 400 days, with an average of approximately 100 days. By contrast, the best practice in Europe is 25 days, and the average of the three best countries is 28 days. The average provisioning time in the United States is 25 days for DS1 lines. These enormous provisioning delays are extremely damaging to emerging carriers' business in Brazil.

Lack of Transparency of Regulator: Anatel's official activities are not sufficiently open and transparent, in violation of the general principles of the GATS and Brazil's own Telecommunications Law (Art. 19 of Lei No. 9.472, July 16, 1997), which requires Anatel to adopt the necessary measures to address the needs of the public interest and the development of the Brazilian telecommunications market. There is a lack of sufficient transparency in the daily operations of the regulatory agency. For example: (1) failure to report (via its website or other public method) *ex parte* discussions with members of the agency regarding pending complaints or proposed regulations; and (2) failure to publish on the agency website any and all complaints

against licensees received by the agency. There also exists a public interest need for greater transparency in developing and drafting new regulations, including adequate time to receive and comment on proposed regulations to ensure that nondiscriminatory provisions are adopted. Lack of transparency is a detriment to the business of emerging carriers in Brazil.

CHINA

Upon its accession to the WTO on December 11, 2001, China undertook major commitments to liberalize telecommunications services. China agreed to a six-year schedule for phasing in direct foreign participation in value-added and basic services. China also agreed to be bound by the obligation in Paragraph 5 of the GATS *Basic Telecommunications Reference Paper* to establish an independent, impartial regulatory authority and pro-competitive regulatory regime. These commitments are strategically important for U.S. telecommunications operators, because China is already one of the largest telecommunications markets in the world, and is expected to be the fastest growing market for many years to come.

China has taken a number of positive steps to implement its WTO telecommunications services commitments. However, the Ministry of Information Industry ("MII"), the Chinese telecom regulator, has so far precluded the expected growth of a competitive market by applying a very narrow interpretation of value-added services, the first area that was to be opened to competition. As a result, few potential foreign entrants have applied for licenses; none has been approved; and the one known foreign entrant, still treated as an experiment, has been restricted to a portion of one city, in apparent contravention of China's schedule of commitments.

WTO CONCERNS – *Reference Paper*

CompTel recognized in its 2002 Comments that implementation of sweeping reforms would be difficult and inevitably would encounter domestic resistance in some quarters. This has apparently proven to be the case with respect to telecommunications services; thus, CompTel continues to urge the U.S. Government to place a high priority on working with China to ensure that it fulfills its commitment to establish a regulatory body that is separate from, and not accountable to, any basic telecommunications supplier, and that is capable of issuing impartial decisions and regulations affecting the telecommunications sector. The Chinese Government owns and controls all of the major operators in the telecommunications industry. Given the government ownership, it is important that the regulatory body be organizationally separate from telecommunications enterprises, as well as from government agencies that are specifically focused on developing the telecommunications industry. Also, it is important that this regulatory body establish and maintain its impartiality by adopting the following:

- Transparent processes for drafting, finalizing, implementing, and applying telecommunications regulations and decisions;

- *Ex ante* rules for designating major suppliers of telecommunications services and ensuring that those suppliers do not act in an anticompetitive manner (*e.g.,* in

addition to the rules on interconnection that the MII has issued, rules regarding collocation, local access, network unbundling, leasing of private lines, resale, and number portability);

- A defined process – as it has done for interconnection – to decide commercial disputes in an efficient and fair manner between telecommunications suppliers that are not able to reach mutually acceptable agreements;

- A legitimate process for administrative reconsideration of its decisions; and,

- Appropriate procedures and authority to enforce China's WTO telecommunications commitments (*e.g.,* the ability to impose fines, order injunctive relief or the payment of damages, and modify, suspend, or revoke a license).

CompTel notes that in the banking and power sectors, the Chinese Government has been moving toward the establishment of quasi-independent regulatory authorities – that is, government bodies that at least are separated organizationally from the state enterprises they regulate. Up to now, the telecom sector has been lagging in this respect. CompTel urges USTR to raise these problems with the appropriate Chinese authorities, and to urge the completion of a comprehensive Telecom Law.

FRANCE

WTO VIOLATIONS – *Reference Paper and GATS Telecommunications Annex*

In France, new entrants continue to face multiple barriers that are in clear violation of the WTO *Reference Paper* and GATS *Telecommunications Annex.*

Lack of Independence of the NRA: This situation has not changed since CompTel's 2002 Comments. Section 5 of the *Reference Paper* requires that the regulatory body be separate from, and not accountable to, any supplier of basic telecommunications services. However, the independent regulator established by the French Government to oversee telecommunications policy, L'Autorite de Regulations des Telecommunications ("ART"), effectively shares oversight with the Finance Ministry, which also is the majority owner of the major supplier, France Telecom ("FT"). This arrangement results in confusion and a lack of transparency, in violation of Section 5 of the *Reference Paper.*

Local Access Leased Lines – Discriminatory Pricing: In France, consistent with EC policy, local access leased lines are included in FT's Reference Interconnection Offer ("RIO"). RIOs are EU terminology used to describe the list of regulated interconnection services that incumbents are required to provide to new entrants pursuant to national and EU laws and regulations. Thus, leased lines are considered interconnection services. ART issued a decision in February 2002 on a number of leased line issues in dispute. This decision was designed to

require the incumbent to introduce interconnection leased lines into its RIO, and to modify the conditions for delivery, including applicable penalty clauses in order to end the discriminatory treatment of FT's competitors.

Unfortunately, FT has blocked the implementation of the ART's decision by refusing to implement LRIC pricing, providing critical data months late, imposing unreasonable penalties in its interconnection offer, and setting up a price squeeze situation vis-a-vis cheaper retail digital subscriber line ("DSL") access lines. Additionally, FT continues to stonewall on provision of an interconnection DSL bitstream offer, although an excellent retail offer (both in terms of price and quality of service) is available, in both asymmetric digital subscriber line ("ADSL") and soon symmetric digital subscriber line ("SDSL") variants. The poor regulation of data services, particularly access, was the chief complaint raised by all new entrants at the final meeting of the Interconnection Committee meeting of November 29, 2002.

The EU's 8th Implementation Report corroborates the claims of new entrants and in particular states that "tariffs for most retail leased lines have remained unchanged from last year with the result that France remains above the EU average for most types and lengths of leased line, with the exception of short distance high capacity lines (140/155 Mbits/s)."[8]

Local Access Leased Lines – Provisioning Delays: FT unilaterally has degraded the quality of service commitments contained in its local access leased line contracts with new entrants, and substantially stiffened the terms of such contracts. Such actions are highly detrimental to the businesses of emerging carriers. In particular, CompTel is concerned about the preferred treatment that FT is giving to its retail arm in the "premium" service that FT offers to its own clients covering repair times and guarantees on downtime, and which is not available for other operators. Such discrimination, lack of transparency and unreasonable delays in provisioning clearly violate Sections 2.2(a) and (b) of the *Reference Paper*.

In addition to the *Reference Paper*, Section 5(a) of the GATS *Telecommunications Annex* requires France to ensure that service suppliers of other WTO members have access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions for their provisioning of value-added services.

Excessive Fixed-to-Mobile Termination Rates: Regulation of the mobile sector in France continues to be insufficient, in clear violation of Sections 1.1 and 2.2(b) of the *Reference Paper*. The French regulator, ART, has taken some important measures, but the mobile operators still are engaging in anticompetitive practices. ART designated both Orange (France Telecom) and SFR (Cegetel) as having Significant Market Power ("SMP") in the national interconnection market, with a legal obligation to provide cost-oriented carrier grade interconnection (fixed-to-mobile termination) to fixed operators. In addition, ART mandated a 20% reduction in fixed-to-mobile rates in 2001, and announced a 40% reduction over four years, starting in March 2002.

[8] 8th Implementation Report, Annex 3, Country Report, France, p. 76.

Despite these ART-mandated reductions on fixed-to-mobile termination rates, France remains an unhealthy marketplace for U.S. carriers due to price squeeze strategies executed by the vertically integrated SMP operators Orange (France Telecom) and SFR (Cegetel), and the discriminatory termination charges levied by all mobile operators in favor of calls from other mobile networks.

It is imperative that the French Government take immediate action to resolve this problem. The development of a price squeeze test with a comprehensive monitoring process should be implemented without delay.

In addition, U.S. telecommunications operators paid approximately US$14.7 million in above-cost subsidies to French mobile operators during 2001 for U.S.-originated traffic terminating on French mobile phones. As U.S.-originated traffic terminating on mobile phones continues to grow as a result of higher penetration rates, CompTel anticipates that this problem will only expand, unless the French government takes appropriate action.

State Aid: Finally, the French Government's decision to make available a 9 Billion Euros loan facility to FT may violate the national treatment obligation under the GATS. Further investigation may be warranted.

GERMANY

Unfortunately for competitors and consumers, the situation described in CompTel's Comments in USTR's 2002 Section 1377 Review has not significantly changed. Likewise, as noted in Comments of earlier years, the intermingling of interests between the German Federal Government, its telecommunications regulator ("RegTP"), and Deutsche Telekom ("DTAG") remains a serious problem.

Therefore, CompTel must once again express its concern about the lack of decisive improvements in the German market. Formidable barriers to entry remain, which bear directly on Germany's trade commitments under the GATS and *Reference Paper*. Moreover, in view of recent calls for the removal of Germany from USTR's periodic Section 1377 review process, CompTel maintains that the following observations are both timely and necessary.

Three of the most critical telecommunications policy issues in Germany that concern CompTel's members are: (1) leased line provisioning; (2) fixed-to-mobile termination rates; and (3) DTAG's broadband monopoly. CompTel's members face delays in provisioning of local access leased lines, local loops and excessive and discriminatory fixed-to-mobile termination rates, which undermine the competitiveness of competitive carriers vis-a-vis incumbent operators. With regard to fixed-to-mobile termination, fixed line customers in the United States and Europe are unfairly penalized by the high prices charged for this access service. As set forth below, the German Government has failed to properly deal with leased line issues, and has not dealt at all with the issue of fixed-to-mobile termination rates.

WTO VIOLATIONS – *Reference Paper and GATS Telecommunications Annex*

Local Access Leased Lines – Provisioning Delays: As CompTel has observed in earlier years, DTAG's obstructionism has burdened competitive carriers with serious obstacles as well as discouraged potential new entrants. The incumbent's delay tactics in provisioning leased lines, for instance, have persisted through all market segments, including mobile communications, Wireless Local Loop ("WLL") and online services.

As CompTel noted in its 2002 Comments, DTAG continues to treat its competitors less favorably than its affiliates and itself in the provisioning of local access leased lines. The local access bottleneck must be available to competitors on nondiscriminatory, reasonable terms. New entrants rely on DTAG's local access leased lines to connect business customers of all sizes to their networks.

Historically, delivery times for local access lines in Germany have been among the highest in Europe. In response, WorldCom/UUNET and BT Ignite initiated a RegTP discrimination complaint in October/November 2001. The complaint included requests for acceptable delivery times, service level agreements ("SLAs"), penalties, and DTAG reporting requirements for *all* DTAG leased line products. As a result, in May 2002, RegTP imposed the following requirements on DTAG:

(1) DTAG is subject to binding provisioning intervals for access leased lines (of 12, 15 and 30 working days, depending on bandwidth);

(2) DTAG must offer an option for express delivery (1 to 5 working days);

(3) DTAG must comply with a monthly reporting obligation to allow RegTP to monitor potential discrimination;

(4) DTAG must provide order confirmation with binding delivery times for each order (within 5 working days); and,

(5) DTAG is subject to uncapped penalties per day in delaying delivery of order confirmation, circuit installation or monthly reports.

DTAG appealed the ruling and sought suspension of the decision *(Verwaltungsgericht Köln,* Cologne Administrative Court), which was granted. As a result, the RegTP ruling is not in force, and the appeal is pending before the *Oberverwaltungsgericht Muenster* (Muenster Higher Administrative Court). RegTP has appealed, requesting that, the suspension be lifted. The expected timeframe for the court decision is 3 - 6 months, so that a decision can be expected some time after January 2003. Until this time, DTAG is not obliged to implement the RegTP decision.

The German Government's failure to resolve these issues places it in violation of several *Reference Paper* provisions and the GATS *Telecommunications Annex*. Section 2.2 of the *Reference Paper* requires Germany to ensure, among other things, that interconnection is

provided with a major supplier in a timely fashion and under terms and conditions that are non-discriminatory. The European Commission has recognized that local access leased lines – from the customer's premises to the new entrant's point of presence – are interconnection products. Germany has failed to require the incumbent to file a Reference Interconnection Offer ("RIO") containing adequate and nondiscriminatory leased lines offers. Germany therefore is in violation of the *Reference Paper*.

In addition, Section 1.1 of the *Reference Paper* requires Germany to maintain measures that prevent a major supplier from engaging in or continuing anticompetitive practices. In Germany, however, the Government (despite the RegTP's efforts) has thus far failed to ensure the prevention of anticompetitive practices by its major supplier, DTAG, in the provisioning of local access leased lines. DTAG has been formally designated to be the dominant operator in the German leased line market, and has the regulatory obligation to provide non-discriminatory provisioning of leased lines to other operators.

Finally, Section 5(a) of the GATS *Telecommunications Annex* requires Germany to ensure that service suppliers of other WTO members have access to and use of public telecommunications transport networks and services on reasonable and nondiscriminatory terms and conditions for their provision of value-added services. Germany, however, has failed to prevent DTAG from provisioning local access leased lines, a fundamental part of the public telecommunications transport network, to providers of value-added services in Germany on an unreasonable and discriminatory basis.

Excessive and Discriminatory Fixed-to-Mobile Termination Rates: Germany also has failed to ensure that fixed-to-mobile termination rates are nondiscriminatory, cost-oriented, transparent and reasonable as required by Section 2.2 of the *Reference Paper*. In Germany, there is no competition on termination tariffs: mobile network operators are not subject to competition as each mobile network operator is market dominant in its own network. Despite this dominance, neither DTAG's D1 nor Vodafone's D2 has been designated by RegTP as having Significant Market Power ("SMP") with a legal obligation to provide cost-oriented, carrier grade interconnection (fixed-to-mobile termination) to fixed operators. In France, by contrast, the major mobile providers have been declared SMP operators.

The data shows that German fixed-to-mobile rates are indeed excessive. German fixed-to-mobile rates are between 248-373% above LRIC cost model estimates, and approximately 154% above European best practice.

The consequences are both a weakening demand and lower investments in broadband infrastructure. Fixed network operators and retail customers also are harmed. The winners are the major suppliers, especially vertically integrated mobile network operators, which abuse their market dominant position to compete with fixed network operators by means of price dumping. The business situation facing fixed network operators with respect to fixed-to-mobile termination has deteriorated dramatically since January 2002. The retail price for fixed-to-mobile calls offered by vertically integrated fixed/mobile operators in the German market is close to or in some cases below the "wholesale" interconnection rate. For example, DTAG/D1 now offer

retail fixed-to-mobile minutes in the context of bundled offers to corporate closed user groups or large customers at rates below the interconnection rate. These practices distort the market in favor of mobile operators. Fixed operators, including some CompTel members, are required either to lose those customers or sell at a loss.

RegTP so far has consistently refused to regulate mobile network operators, despite opinions voiced to the contrary by the Monopoly Commission, the Federal Cartel Office, carriers' groups, and the EU Commission.

Fixed-to-Mobile Price Squeeze: Mobile Virtual Private Network ("MVPN"): So-called MVPN offerings are special retail tariffs, which are being offered by mobile network operators, or, as the case may be, by vertically integrated fixed/mobile network operators. In Germany, MVPNs are widespread: they are being widely deployed by vertically integrated and non-vertically integrated mobile network operators, e.g., T-Mobile, Vodafone, or E Plus.

As noted before, there is a price squeeze issue with MVPNs: the signficant difference between cost and termination rate charges enables mobile network operators to charge low MVPN prices to retail business users. MVPN Mobile-to-Mobile ("MTM") on-net rates are even considerably lower than fixed-to-mobile wholesale rates.

CompTel believes that there is also evidence that for purposes of MVPN arrangements, Germany has violated Section 1 of the *Reference Paper*, which requires the maintenance of appropriate measures "for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging or continuing anticompetitive practices." Under Section 1.2, "engaging in anticompetitive cross-subsidization" is specifically included as an anticompetitive practice.

Licensing Fees/Annual Contributions: On September 9, 2002, more than one year after German courts had rendered significant parts of the German license fee regime null and void, a new regulation on license fees entered into force. These new rules only cover the license fees for the award of the license. The new license fees are much lower than the ones under the old license fee regime. While this is a positive development to which USTR's involvement has contributed, it remains unclear what annual contributions RegTP will charge carriers to cover RegTP's costs. Competitors are concerned that they will be forced to bear the costs for RegTP's regulatory oversight of DTAG as part of the annual fees. CompTel urges USTR to monitor the development regarding the annual contributions closely.

DTAG's New Broadband Monopoly: As CompTel stated in its Comments in the USTR's 2002 Section 1377 Review Process, the German Government is in breach of Sections 1.1 and 2.2 of the *Reference Paper*, since DTAG essentially controls the terms on which its competitors may obtain unbundled local loops. The effect on competition of DTAG's strategy of delays and denial, almost two years after the EU's Unbundled Local Loop Regulation entered into effect, has been devastating: according to the EU's 8th Implementation Report (Annex 3.3, Section 2.5.1), DTAG had 2.5 million DSL lines ("T-DSL") installed as of October 1, 2002, while new entrants provided only 19,000 DSL lines on the basis of their own infrastructure, 161,000 DSL lines via full unbundling and a mere 13 DSL lines via line sharing. According to

the German Competitive Carriers Association, known as the Association of Telecommunications and Value-Added Service Providers ("VATM"), the number of T-DSL lines that DTAG has installed has now exceeded 3 million. This means that DTAG's overall market share in the broadband sector is above 96%. Broadband access via Wireless Local Loop, cable modem, satellite or through the electricity grids ("power line") that have been touted by the German Government as the access technologies of the future do not play a significant role in Germany, since most competitors have pulled out of these sectors or were forced to declare bankruptcy. As a result, it is no surprise that, according to a recent market survey of the VATM[9], competitors only generated 8 million minutes per day of traffic on the local level in 2002 (a slight increase from the 6 million minutes they provided in 2001), compared to 217 million minutes generated by DTAG.

This negative trend that CompTel had already forecasted in its 2002 Comments has strengthened DTAG's position as the quasi-monopolist in the broadband sector. It has left many rural areas in Germany without DSL access because DTAG deems these areas not lucrative. DTAG would not have reached this position without being allowed to undercut competitors' offers below costs to keep competitors out of this lucrative market. This market behavior also has a serious impact on other market sectors. For instance, while rolling out and marketing its T-DSL product successfully in almost all urban areas, DTAG has given its subsidiary T-Online a piggy back ride as the Internet Service Provider ("ISP") for DTAG's 3 million broadband customers. According to the EU's 8th Implementation Report (which is based on DTAG's own figures), as of July 2002 only 450,000 or 15% of DTAG's DSL customers have opted for an ISP other than T-Online.

Another reason that there is almost no competition in the broadband sector is that DTAG's competitors do not obtain timely access to DTAG's upstream products that would enable them to offer their services to their own customers at competitive rates. As of today, RegTP does not ensure as a pre-condition for approving DTAG's end user rates that DTAG offers competitive wholesale products to competitors on all "up-stream" levels where DTAG creates an additional value to a service. DTAG has largely failed to provide upstream or wholesale products in a timely manner and in a sufficient number and quality, with access to the unbundled local loop being only one example. DTAG's well-documented provisioning delays have not led to any regulatory consequences, allowing DTAG to use its delay tactics against competitors successfully. Recently, a RegTP decision on mandatory provisioning intervals and automatic penalties for late delivery of local loops that would have been a step in the right direction was put on hold by an injunction of the Cologne Administrative Court of November 12, 2002.

No Efficient Ordering System in Place: On July 1, 2002, RegTP issued a decision that called for DTAG to offer access to its electronic information system, to ensure that subscribers' addresses correspond with specific distribution areas of DTAG's network. The decision also required that DTAG provide competitors with information on the collocation sites, the availability of virtual collocation, etc. DTAG has appealed this RegTP decision and does not

[9] http://www.vatm.de/images/dokumente/jahrebericht2002_anhang.pdf.

offer access to an electronic information system for ordering. Even if this RegTP decision is implemented, it does not come close to the electronic access to the Operation Support System ("OSS") that ILECs in the U.S. must provide. Being deprived of this access, ordering of interconnection services, collocation and copper loops remains burdensome and prone to mistakes.

Lack of Efficient Regulatory Oversight to Prevent Dumping Prices: On a more general level, CompTel is very concerned about plans in Germany to abolish RegTP's *ex ante* control of DTAG's rates (meaning before the rates enter into force). As the European Commission has stated in its recent 8th Implementation Report, already under the existing regulatory regime "RegTP's lack of powers to set interconnection tariffs and to order interconnection agreements as part of a dispute settlement [. . .] seriously affects its powers to settle disputes in conformity with the [EU's] Interconnection Directive" (EU 8th Report, Annex 3.3., p.1.) Shutting down RegTP's *ex ante* price regulation mechanism will make it even more difficult for the regulator to keep the former monopolist in check. *Ex post* ("after-the-fact") regulation of DTAG's rates occurs too late.

Ex post proceedings at the German regulator take nine (9) months and longer before a RegTP decision is rendered. To make the situation even worse, under the current Telecommunications Act RegTP has large discretion whether to launch an *ex post* proceeding. Even if an *ex post* proceeding is launched, DTAG's pricing strategy demonstrates that it is very difficult to "recall" a dumping price once it is out in the market. As stated above, price dumping has given DTAG a head start to secure a quasi-monopolistic position in the DSL market within a short time period. T-DSL is not the only example since DTAG is using price dumping in other market sectors as well. In two recent decisions on December 9 and 16, 2002, RegTP found DTAG guilty of price dumping while offering Virtual Private Networks to large customers and municipalities below costs and required DTAG to modify its offer by April 2003. While this is a step in the right direction, it remains to be seen whether it will have a practical impact, since DTAG will almost certainly challenge these new RegTP decisions in court.

Appellate Proceedings: Competitors continue to have concerns about the lack of transparency in current German appeals court processes and their length. The effect of any appeal of a RegTP decision in Germany is to immediately eliminate any transparency from the action. All major decisions taken by RegTP become mired in the appeal process (in many cases for years), delaying application of German Telecommunications law and thus allowing DTAG to continue to pre-empt competition in the German marketplace. It is, therefore, crucial that competitors be afforded an opportunity to participate in any proceeding that will have a direct and substantial impact on their business plans. In many cases, with at least two courts involved even in a preliminary injunction proceeding, the final court decisions often come too late to make a difference.

Content Liability: There are several political and legal initiatives in Germany that make ISPs, including those ISPs that only provide access to the Internet ("IAPs"), liable for content that is accessible via the Internet. The main concerns regarding these initiatives relate to harmful content; however, these initiatives also cover other issues, such as copyright infringement.

Although most websites containing content considered illegal in Germany are hosted outside German borders, supervising authorities as well as politicians are seeking ways to ensure that German law is applied throughout the German Internet community. The method chosen for applying German law is to obligate hosting providers and IAPs (if the hosting provider is located outside of Germany) to block all illegal content. Nonetheless, blocking illegal content leads to serious risks for the future growth of the Internet in Germany as a whole, and especially for IAPs. The growth of the Internet would be inhibited due to: (1) technical inability to comply; (2) the economic inability of many smaller providers to shoulder an attempt at compliance; and (3) the chilling effect on content caused in other jurisdictions due to the extra-territorial reach of the relevant German law.

In principle, German law allows IAPs to be made liable if:

- IAPs are made aware of illegal content on their websites (e.g., through the reception of a formal letter by supervising authorities); and,
- Blocking content is technically possible and reasonable for the IAPs.

Whether blocking content is technically possible is subject to continued debate between industry and government. ISPs believe that there are detailed technical reasons why an effective blocking mechanism does not yet exist. Instead of blocking sites, content providers and ISPs should self-regulate and users should take advantage of filtering technologies and content rating schemes that can most effectively address the intent of local laws.

CompTel reiterates its concern about the lack of decisive improvements in the German markets. CompTel urges the USTR in particular to push for a revision of the German Telecommunications Act to implement an efficient system of regulatory sanctions and automatic penalties in the event that DTAG abuses its dominant market position. As an initial step, the USTR should ask the German Ministry of Economics to provide U.S. competitors with a draft of the planned revisions of the telecommunications law to enable competitors to review the modifications that the German Government intends to make to level the playing field.

INDIA

CompTel has been encouraged to see that India has accelerated the opening of its international long-distance market in 2002, two years ahead of the WTO commitment of 2004. Certain barriers to competition, however, continue to exist. For example, the exorbitant licensing fee, the build-out obligations, and other financial conditions applicable to international long distance operators constitute serious barriers for new market entrants. The current licensing fee is approximately $5.21 million. In addition, licensees will be required to post a performance bond of equal value ($5.21 million) and to pay an annual fee of 15% of net revenues. Moreover, new entrants will be required to install an international gateway switch and establish a minimum of four regional points of presence (“POPs”) within India. Switchless service resale will not be permitted for a minimum of three years after the international services market opens on April 1, 2002.

WTO CONCERNS – *Reference Paper*

Interconnection: Notwithstanding India's *Reference Paper* Section 2 commitments regarding interconnection, India does not have in place a regulatory regime that enforces non-discriminatory terms. Under the current regulatory regime, which does not mandate the commercial terms that major suppliers must offer competitive service providers, the incumbents regularly abuse their market power through both price and non-price practices. Further, India's regulator, the Telecom Regulatory Authority of India Establishment ("TRAI"), has failed to intervene in a meaningful manner to ensure that the incumbents do not discriminate against new entrants and in favor of their own like services, subsidiaries, or affiliates. To comply with WTO commitments, the TRAI must enforce competitive interconnection safeguards.

Competitive Safeguards: India must implement measures that will prevent major suppliers from engaging in anticompetitive practices, as committed to under Section 1 of the *Reference Paper*. Bharat Sanchar Nigam Ltd ("BSNL") it has market power in domestic long distance, fixed line services and mobile serves. Currently, sufficient rules are not in place to require structural and accounting separation of BSNL's multiple lines of business, nor are there safeguards in place to prevent anticompetitive pricing practices.

TRAI Engaging in Discriminatory Licensing Regulation: India committed under Sections 4, 5, and 6 of the Reference Paper to offer publicly available licensing criteria, to issue regulatory decisions and procedures that are impartial with respect to all market participants, and to allocate scarce resources in an objective manner. India is not complying with these commitments. Although the National Telecom Policy in India has migrated all licenses to a technology neutral regime, the TRAI continues to engage in technology specific regulation that favors some market participants over others. A primary example is the discriminatory treatment harming existing cellular mobile operators, and benefiting the established fixed line service providers who have been allowed free entry into mobile services under code division multiple access based ("CDMA") "Limited Mobility" licenses. The licensed allocation of this free spectrum to the fixed line service providers has not been done in a non-discriminatory fashion, which would have been consistent with the bidding/auction recommended for cellular mobile, in a clear and objective manner. Further, TRAI's discriminatory regulation on interconnection, access and entry fees is resulting in tariff differentials between similar mobile services, depending upon the technology utilized, rather than on efficiency, market performance or other parameters. The TRAI must ensure objective and impartial license regimes and procedures for all types of mobile operators.

ITALY

WTO VIOLATIONS – *Reference Paper and GATS Telecommunications Annex*

Excessive and Discriminatory Mobile Termination Rates: With respect to fixed-to-mobile termination rates, the situation has changed little since last year. In September 1999, the Italian Regulator, Autoria per le Garanzie nelle Comunicazioni ("AGCOM"), designated two

Italian mobile operators, Telecom Italia Mobile S.p.A. ("TIM") and Omnitel Pronto Italia S.p.A. ("OPI" now called "Vodafone") as having Significant Market Power ("SMP"). In December 1999, AGCOM reduced mobile termination rates by 29% for TIM and by 34% for OPI. This action was intended simply as a first step to address the extremely high level of fixed-to-mobile termination rates. In August 2000, 19 operators filed a request with AGCOM to investigate the excessive fixed-to-mobile rates continuing to be charged by Italy's mobile operators. Specifically, the operators asked for immediate reductions to reduce the charges to cost-oriented levels. Following this complaint, AGCOM decided to open an investigation in December 2000. In January 2002, AGCOM closed the investigation without making any changes in the rate structure.

In another decision released in July 2000, AGCOM required TIM and OPI to adopt by September 2000 an accounting system based on 1999 accounting data. Other operators, however, were not permitted access to any information regarding the data that may have been provided by the mobile operators to AGCOM. During 2002, AGCOM conducted a LRIC cost-model that will be used to determine the level of price caps that will apply to fixed-to-mobile termination rates that will be effective in January 2003. However, this project was conducted behind closed doors and only the two SMP mobile operators were invited to participate. None of the fixed line operators, which bear the burden of unreasonable and discriminatory fixed-to-mobile rates, were permitted to participate. Given that only one party was allowed to participate in this process, fixed network operators cannot anticipate that appropriate remedies will be implemented.

As a result, fixed operators in Italy continue to be at a severe disadvantage given AGCOM's foot-dragging and ultimate refusal to make any decision on excessive fixed-to-mobile rates. Other European countries have taken at least some action. Italian fixed-to-mobile termination rates are between 250 and 375% above LRIC cost model estimates and 155% above the European best practice.

Discriminatory practices remain in clear violation of Section 1 and 2 of the *Reference Paper*. Mobile operators in Italy discriminate against fixed network operators by charging their own customers far less for "on-net" mobile-to-mobile termination than they charge fixed network operators for fixed-to-mobile termination. The average per minute fixed-to-mobile rate in Italy is about 15 Eurocents, whereas the average mobile-to-mobile rate ranges from about 6 – 9.5 Eurocents. The European Commission recognizes this problem in the 8th Implementation report and acknowledges that *"the level of mobile termination charges and the regulatory regime remain the subject of much discussion, with fixed operators contesting the level of 'on-net' call charges applied by the mobile operators, which they believe point to clearly discriminatory practice.[10]"* The only conclusion that can be reached is that mobile operators are discriminating in favor of themselves vis-à-vis fixed operators.

In sum, the current situation causes serious harm to U.S. companies seeking to compete in the Italian market and to U.S. consumers, who are forced to pay high rates for calls to mobile

[10] 8th Implementation Report, Annex 3, Country Report, Italy, Page 98.

users in Italy. Indeed, there are estimates that fixed network operators made well over 3.3 billion Euros in excess charges in Italy during 2001.

Italy continues to fail to ensure that fixed-to-mobile termination rates are non-discriminatory, cost-oriented, transparent and reasonable, as required by Section 2.2 of the Reference Paper and as required by the GATS *Telecommunications Annex*. Moreover, Italy has failed to maintain measures to prevent a major supplier from engaging in or continuing anticompetitive practices, as required by Section 1.1 of the *Reference Paper*.

Lack of Transparency of the Regulatory Process: As demonstrated in the mobile termination cost study review, AGCOM regulatory proceedings are not sufficiently open and transparent, in violation of the general principles of the GATS. There is a lack of sufficient transparency in the daily operations of the regulatory agency, and in particular in the analyses conducted to determine the termination charges for fixed-to-mobile termination.

CompTel believes that the Italian Government should live up to its telecommunications trade commitments by ensuring transparency in the regulatory process, implementing a reduction of at least 55 percent in the current fixed-to-mobile rates and, equally important, implementing a price squeeze test to eliminate the discriminatory practices pursued by mobile network operators.

JAPAN

Japan has made significant strides in market liberalization and development since the *May 1998 U.S.-Japan Deregulation Joint Statement*, and the entry into force of its WTO Commitments. However, more work needs to be done to: (1) effectively regulate Nippon Telegraph and Telephone Corporation ("NTT") as dominant; (2) remove burdensome regulation on non-dominant carriers; (3) reduce excessive fixed-to-mobile termination rates; and (4) introduce a truly independent regulator.

WTO VIOLATIONS - *Reference Paper, GATS Telecommunications Annex and May 1998 U.S.-Japan Deregulation Joint Statement*

Failure to Deter Anticompetitive Practices: The Ministry of Public Management, Home Affairs, Posts and Telecommunications ("MPHPT") and the Japan Fair Trade Commission ("JFTC") issued guidelines in 2001 to promote competition in telecommunications reflecting the "pro-competitive" principles set forth in the Revised Telecommunications Business Law (June 2001) and the Anti-Monopoly Act ("AMA"). Although the new Law authorizes MPHPT to apply "asymmetrical regulation" on NTT because of its control of bottleneck facilities, there is strong political pressure to minimize actual restraints on NTT's activities.

The MPHPT's focus concerning anticompetitive practices is targeted virtually solely at the possession of essential facilities. As a result of this focus, however, all facilities-based carriers, regardless of their market power, are required to submit the terms and conditions for their pricing of data, Internet, and leased line services to MPHPT. What is lacking in the present

approach is that the MPHPT is not required to take into consideration the capability of NTT to leverage its dominance in the local access market to other upstream service markets. So long as asymmetrical regulation is poorly enforced, NTT is able to enter new markets with little or no regulatory hurdles. Equally, the MPHPT has not recognized that the mobile carriers control bottleneck facilities in the termination services they provide to their customers, and so there are no regulatory obligations on them of any kind (e.g., cost-based termination rates). The MPHPT does not judge mobile termination to be a bottleneck. The most critical need is for a stronger commitment on behalf of both MPHPT and the JFTC to enforce the rules in a manner that promotes effective competition.

Lack of Regulation of the Major Supplier: The MPHPT does not regulate all NTT Group members as dominant carriers. DoCoMo is not considered to be dominant because the MPHPT claims the presence of several nationwide competitors means DoCoMo does not control any bottleneck facilities. In addition, the MPHPT does not classify NTT Communications as dominant because it does not control any access lines. This issue is becoming increasingly critical as NTT Group members establish themselves in long distance and data markets. The opportunities for NTT to leverage market power from its local network facilities and ubiquitous customer base are, therefore, taking on greater significance. It is now essential that regulation of NTT Coms and NTT data services reflect this fact. The MPHPT must establish a clear and detailed regulatory environment. Such guidelines must regulate how the NTT companies trade among themselves and with competitors. These guidelines must be sufficiently detailed (e.g., on cross-subsidy, on tests for predatory pricing, on transparency of accounts, on misuse of customer information, on dominant carriers) and published by the MPHPT.

Excessive Fixed-to-Mobile Termination Rates: Currently, fixed network operators subsidize NTT DoCoMo's mobile network through excessive mobile termination fees. Japanese fixed-to-mobile rates are more than 300% above LRIC cost study estimates, and more than 130% above best practices. Moreover, the surcharges assessed to U.S. carriers to terminate fixed-to-mobile traffic in Japan is several hundred percent above the termination cost. To ensure competition, MPHPT must effectively regulate NTT DoCoMo as a dominant carrier. The current rate structure for fixed-to-mobile termination is inconsistent with the obligations taken by Japan in Section 2.2(b) of the *Reference Paper* to ensure "cost-oriented" interconnection rates. Although a designated carrier under the revised Telecommunications Business Law, DoCoMo does not have to cost-justify its termination rates, nor have its interconnection agreements approved by the regulator. As more international telephone calls from the United States terminate on a Japanese cellular network, the effect of such excessive rates inflicts significant economic harm on U.S. carriers and their customers.

Excessively High Interconnect Charges from NTT to Japanese Carriers: Interconnection charges remain excessive, and it appears that planned revisions for next year will only exacerbate this situation (as some charges may actually rise).

There is continued concern that the work of the LRIC Model Review Working Group will not result in a true LRIC computation that complies with Japan's obligation to ensure cost-oriented rates. For example, there is concern that the Working Group is not adequately

addressing the improper inclusion of non-traffic sensitive costs that are more appropriately attributed to the provision of access lines rather than the transport and termination of traffic. Due to the inappropriate inclusion of non-traffic sensitive costs, the LRIC model will cause NTT's interconnection rates to be significantly higher than comparable rates in the United States and Europe. Without a meaningful reduction in interconnection charges and efforts to ensure unbundling of local loops, competitive carriers will have little success in challenging the dominant market position of NTT, thus stifling competitive entry to the Japanese market and preventing Japanese consumers from reaping the benefits of a fully competitive telecommunications marketplace.

An additional concern going forward is that, to the extent that NTT's local network cost structure is inflated by inefficiency, allowing NTT to reclaim part of these costs through high interconnection charges provides NTT with little economic incentive to achieve an efficient cost for its dominant local network facilities. As a result, competitors are over-paying for local network services, and suffer harm.

Burdensome Licensing Regime: Japan's licensing regime is based on whether a service provider owns its facilities ("Type I") or leases facilities ("Type II") to provide services. Such a regime makes it difficult for a new entrant carrier to offer end-user services by using a combination of its own infrastructure and leased facilities from other providers. Under the present system, a Type I carrier is authorized to lease services from other Type I carriers to serve customers within its approved "operational areas." For customers whose place of business is outside an approved "operational area," a new-entrant Type I carrier must submit for approval detailed documentation to the MPHPT that includes business plans, financial information, and network topology. This review process is time consuming, non-transparent, and does not meet the needs of the Japanese market.

The Type I and Type II licensing regime currently in place is likely to be eliminated in the new legislation that will be introduced in 2003. CompTel will be following this issue very closely, with the strong desire that these changes indeed will be implemented.

Absence of Independent Regulatory Authority: Japan committed under the *Reference Paper* to establish an impartial regulatory body to implement the pro-competitive regulatory principles set forth in that document. Although Japan played a leading role in promoting international support for the *Reference Paper*, the Japanese Government has failed to create an independent regulatory body with sufficient autonomy to exercise effective oversight over the sector. The fact that both telecommunications policy and regulatory responsibilities reside in the same Cabinet Ministry, the MPHPT, raises questions regarding the transparency of the regulatory process when dealing with the dominant carrier, NTT, in which the government remains the major shareholder.

A particular example of the lack of independence over the last 12 months has been the manner in which revision of interconnection charges has been dealt with, to the advantage of NTT over competitors. Two interconnection costing options were considered: Case A (under which interconnection charges contribute to NTT's non-traffic sensitive local loop costs), and

Case B (based solely on interconnection traffic-related costs). Contrary to both economic rationale and international best practice, the MPHPT appears determined to adopt Case A on the basis that Case B would cause excessive economic harm to NTT. This argument, however, ignores the impact on competitors of having to pay in excess of the underlying economic cost for interconnection services, and demonstrates a lack of regulatory independence.

In November 2002, the Liberal Democratic Party passed a party resolution, later adopted by the full Diet, setting forth a position on the long run incremental cost exercise. The LRIC exercise was the subject of a final report previously published by the Telecommunications Council in September. The resolution takes several positions directly counter to the recommendation in the final report. The positions, if adopted by the MPHPT, all will benefit NTT and disadvantage the interconnecting carriers. CompTel is extremely concerned about political interference in the policy-making process for the explicit benefit of a single company. Under the 'national treatment' principle, the Japanese regulator has an obligation to treat all companies equally. The Nihon Keizai Shimbun reported on December 5, 2002, that the MPHPT would find it 'difficult' to ignore the wishes of the Diet.

MEXICO

CompTel's 2003 submission on Mexico is very similar to its 2002 Comments, reflecting the lack of progress by Mexico on both domestic and international issues.

WTO VIOLATIONS – *Reference Paper*

International Services: Mexico continues to maintain barriers protecting its high settlement rates. Alternative commercial arrangements are still prohibited, and the existing approved settlement rate of $.19/minute is further above cost (which is no higher than $.04/minute) now than it was last year, which is a clear violation of Mexico's *Reference Paper* commitments. Furthermore, Telefonos de Mexico ("Telmex"), Mexico's dominant carrier, still controls the settlement rate negotiation process, which also gives them control over the rates themselves. CompTel applauds USTR for its efforts to bring Mexico into compliance with its international commitments via the formal dispute settlement proceeding currently underway at the WTO.

Domestic Services: Mexico's Competition Commission ("CFC") has again found that Telmex possesses market power. Unfortunately, this positive step has not yielded positive results because the Mexican regulator, Comision Federal de Telecomunicaciones ("Cofetel"), has not issued new dominant carrier rules to prevent anticompetitive conduct. Telmex still maintains above-cost rates for domestic on-net, off-net and local interconnection, and has failed to provide unbundled interconnection. These measures violate Mexico's *Reference Paper* commitments.

Foreign Ownership Restrictions: Mexico currently prohibits foreign control of carriers authorized to own and operate basic telecommunications facilities ("Concessionaires"). This prohibition violates Mexico WTO obligations, and should be removed.

THE NETHERLANDS

WTO VIOLATIONS – *Reference Paper and GATS Telecommunications Annex*

Excessive Fixed-to-Mobile Termination Rates: The Netherlands has failed to ensure that fixed-to-mobile termination rates are non-discriminatory, cost-oriented, transparent and reasonable as required by Section 2.2 of the *Reference Paper*. In the Netherlands, KPN Mobile and Libertel-Vodafone each has a market share of respectively 42% and 27% in the retail mobile market and therefore also in the market for interconnection to mobile networks. In addition, each operator holds "single market dominance" over its respective customer base. Despite this dominance, neither KPN Mobile nor Vodafone's Libertel has been designated by the Netherlands NRA, Independent Post and Telecommunications Authority ("OPTA"), as having Significant Market Power ("SMP") with a legal obligation to provide cost-oriented, carrier grade interconnection (fixed-to-mobile termination) to fixed operators.

Although OPTA has expressed for many years its view that fixed-to-mobile termination rates are excessive, it has not succeeded in bringing these rates down. The attempt of OPTA in 2000 to create a "soft" incentive for mobile operators to reduce fixed-to-mobile termination rates by the introduction of differential retail pricing for fixed-to-mobile calls that are offered by the incumbent operator, KPN Telecom, did not succeed.

It then took almost two more years before OPTA initiated a renewed approach by which it tried to enforce reductions for fixed-to-mobile termination rates, based on the notion that interconnection rates must always be reasonable. OPTA finally conducted a market consultation in the beginning of 2002 and concluded that the rates still are at an unreasonably high level and that the rates should be reduced in two phases: a first step reduction in May 2002, followed by another reduction in December 2002. This conclusion was included in Guidelines that were published in March 2002. However, a recent court ruling suspended all OPTA's decisions that were taken during the summer, and a final court ruling that is expected in the beginning of 2003, may completely overrule OPTA's intervention in fixed-to-mobile termination issues.

As shown in the chart on page 4, however, fixed-to-mobile termination rates in the Netherlands are 334% to 501% times above LRIC-based prices, and more than 207% higher than the "best practice" rates.

In addition, anticompetitive subsidization occurs in the Netherlands. The business situation facing fixed network operators with respect to fixed-to-mobile termination has further deteriorated after KPN Mobile increased its termination rates in April 2002. Furthermore, the "retail" price for fixed-to-mobile (on-net) calls offered by mobile operators in the Netherlands via so-called mobile VPNs is substantially below the "wholesale" interconnection rate that other providers of fixed-to-mobile traffic must pay. For example, KPN Mobile offers retail fixed-to-mobile minutes in the context of bundled mobile VPN to corporate closed user groups or large customers at flat rates of 7 Eurocents, while the wholesale interconnection rate is around 19 Eurocents. These practices distort the market in favor of mobile traffic and effectively exclude fixed network operators from the Dutch market for the provisioning of fixed-to-mobile voice

services to business customers. As a consequence, fixed operators, including some CompTel members, are required either to lose those customers or sell at a loss.

In sum, CompTel believes that there is evidence that, for purposes of fixed-to-mobile termination, the Netherlands has violated Section 1 of the *Reference Paper*, which requires the maintenance of appropriate measures "for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging or continuing anticompetitive practices." Under Section 1.2, "engaging in anticompetitive cross-subsidization" is specifically included as an anticompetitive practice.

SINGAPORE

CompTel applauds the U.S. and Singapore Governments for proposing to include in the U.S.-Singapore Free Trade Agreement ("FTA") the important principle of ensuring that new entrants have the right of access to and use of any public telecommunications network or service, including leased circuits, on reasonable, transparent, and non-discriminatory terms and conditions. Nonetheless, CompTel believes that there are certain anticompetitive and discriminatory practices at play in the Singapore market that require immediate, remedial action before the FTA comes into force.

WTO Violations – *Reference Paper and GATS Telecommunications Annex*

Local Access Leased Lines – Pricing: Notwithstanding the requirements of Section 2.2(b) of the *Reference Paper* for cost-oriented rates, Singapore's NRA, the Infocomm Development Authority of Singapore ("iDA"), thus far has not required Singapore Telecom ("Singtel") to file cost-oriented tariffs for its wholesale offer of local access leased lines nor directed Singtel to include this service in its Reference Interconnection Offer ("RIO") at cost-based prices.

Currently, Singtel's rates for local loop access are among the highest in the world. For example, Singtel's annual charges for an E1 (2 Mbps structured) circuit for a distance of 5 kilometers runs approximately 6 times higher than the global best practice rate for the comparable bandwidth and distance.

The dominant carrier has been able to charge its competitors nearly double what its retail customer pay for local access leased lines. This practice is an example of Singtel's continued ability to abuse its dominant position and to engage in anti-discriminatory activities. Such anticompetitive activity on the part of Singtel imposes a price squeeze on any competitor hoping to offer competitive prices to end-users.

SOUTH AFRICA

WTO VIOLATIONS – *GATS Value-Added Commitments and Telecommunications Annex*

Amendment to the Telecommunications Act of 1996 (Amendment Bill): In November 2001, President Thabo Mbeki executed an Amendment Bill to the Telecommunications Act of 1996 ("Amendment Bill") that significantly reduces the current rights of competitive valued added network services ("VANS") and increases the power and control of the government-owned monopoly incumbent public telephony operator, Telkom. Additionally, the Amendment Bill reduces the powers of the independent regulator, Independent Communications Authority of South Africa ("ICASA"), in favor of the Ministry of Communications – the government entity responsible for the government's 70% equity ownership interest in Telkom.

Lack of Resale in South Africa: Section 32A of the Amendment Bill states that resale of basic telecommunications services will not be authorized until 2005 at the earliest. This effectively establishes exclusivity for the partially government-owned second public switched telephone network ("PSTN") operator ("Second National Operator") - to be licensed after May 2002 - to resell Telkom's facilities until 2005 at the earliest. This clearly violates an explicit commitment by South Africa in its schedule of basic telecommunications commitments (GATS/SC/78/suppl.2, April 1997), to permit resale by 2003. Lack of a resale alternative for VANS prolongs the current high costs for both leased lines and international bandwidth incurred by VANS competitors in South Africa.

Lack of Independent Regulator: Several provisions in the Amendment Bill compromise the independence of the regulator and the likelihood of it making impartial decisions by: (1) transferring regulatory functions from ICASA to the Ministry of Communications; and (2) reversing prior ICASA rulings. Under Sections 35 and 35A, the Ministry of Communications replaces the impartial regulator, ICASA, as the entity responsible for all licensing decisions. Section 65(4) transfers administration of the Universal Service Fund from ICASA to the Ministry. Under Section 43(10), the Bill limits the mandate for interconnection agreements to 5 years by authorizing a single party to the agreement to trigger a renegotiation of some or all of the terms of the agreement – such a provision ignores the interconnection guidelines adopted by the regulator in 2000. Overall, Sections 43 and 44 of the Amendment Bill override the Interconnection Regulations that were approved previously by the South African Telecommunications Regulatory Authority ("SATRA") (the regulatory agency that preceded ICASA).

This transfer of key regulatory functions from ICASA to the Ministry seriously damages the existence of an independent and impartial regulator, in violation of South Africa's *Reference Paper* commitments.

Potential Re-monopolization of CPE in South Africa: Section 36A(1)(h) of the Amendment Bill expands the definition of Public Switched Telecommunication Service ("PSTS") to include "the provision, repair and maintenance of equipment located on a

customer's premises ("CPE") and any other telecommunications apparatus of any kind." Although VANS suppliers have received assurances that this language does not give Telkom and the Second National Operator exclusive rights to provide CPE, there is a danger that this language could lead to the re-monopolization of CPE, in violation of South Africa's commitment to ensure access to and use of terminal or other equipment that attaches to the public telecommunications transport network under section 5(b)(i) of the GATS *Telecommunications Annex*. South Africa must ensure that this provision of the Amendment Bill is not used to impede VANS suppliers in South Africa from providing equipment and services that are necessary to the provision of their services.

SWITZERLAND

WTO VIOLATIONS – *Reference Paper and GATS Telecommunications Annex*

As Switzerland is not an EC member, EC directives and regulations are not binding for Switzerland. However, EC directives are often used as guidelines to amend and revise Swiss law.

Local Access Leased Lines – Pricing: Despite the requirements of Section 2.2(b) of the *Reference Paper* for cost-oriented rates, the rates charged in Switzerland for local access leased lines are extraordinarily high. In October 2000, the Swiss NRA, Federal Communications Commission ("ComCom") ordered Swisscom to provide local access leased lines at LRIC-based rates, and on a non-discriminatory basis. Swisscom appealed this decision, and the Federal Court ruled one year later (October 2001) that the NRA did not have the authority to take such a decision. Because of this decision by the Federal Court, the NRA sees an urgent need for legislative action on the high prices of leased lines. The end result is that Switzerland is failing to comply with its WTO obligations.

Currently, an amendment to the Swiss telecommunications law is pending. The consultation closed on October 15, 2002. The proposed amendments address unbundling the local loop and the non-discriminatory availability and pricing of leased lines either through a change in the Telecommunications Decree, which can be implemented in 2003, or via amendment of the Telecommunications Act, which can take several years to pass through Parliament. The Federal Council must decide which method is appropriate, and a decision is expected in late January or February of 2003.

Unbundled Local Loop: Under Section 2.2(b) of Switzerland's Schedule of Specific Commitments (GATS/SC/83/Suppl.3/Rev.1 (28 Jan 98)), interconnection is to be ensured "in a timely fashion... and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided...."

Nonetheless, despite the best efforts of the NRA, which issued an injunction in November 2000 and ordered the incumbent to immediately implement bitstream access and draft a full unbundling Reference Interconnection Offer ("RIO"), the Federal Court overruled this

injunction in March 2001. Although the Swiss NRA has continued to energetically promote unbundling as a key step towards greater competition and towards strengthening Switzerland's position as a business location, the NRA decided in another case in February 2002 against an unbundling obligation by accepting the Federal Court's position regarding leased lines, claiming that the NRA does not have the authority to take this decision.[11] The NRA continues to push for rapid implementation of unbundling via changes to decrees. This is in contrast to Swisscom's arguments that unbundling and leased lines regulations can only be introduced by changes to the Law – a process that can be expected to take many years.

Emerging carriers believe that these decisions reflect bias on the part of the Government towards Swisscom, which is, even after a buyback of 10% of its shares, still 62.7% government-owned. Although the decisions relied on Article 11 of the Swiss Telecommunications Act ("Telecoms Act"), which requires dominant operators to provide interconnection to other operators without discrimination and in accordance with the principles of a transparent and cost-related price policy, it appears that the Federal Court continuously chooses to interpret the Telecoms Act in the incumbent's favor. In December 2000, the Swiss parliament rejected a motion by one of its members to introduce in the Swiss Telecommunications Act an explicit obligation on the incumbent, Swisscom, to unbundle the local loop.

Given the fact that the Swiss parliament already has rejected a motion for such an amendment in December 2000, and the ongoing review of the Swiss telecommunications law and ordinances and decisions that must be made in that context, CompTel submits that Switzerland is in clear violations of its WTO commitments to ensure that it mandates cost oriented leased line prices and local loop unbundling through a change of the Telecommunications Decree.

Ex ante regulation: According to the law in force, in the case of market dominance in specific markets, the Swiss NRA can only take action as the result of a request from a telecommunications services provider within the framework of a formal interconnection procedure (*ex post* regulation). This procedure has proven to be unwieldy and protracted, and it does not encourage competition to a sufficient extent. Many of the interconnect disputes run for several years. The currently pending amendment of the Swiss Telecom legislation would provide the NRA with firmer regulatory instruments and bring the Law on Telecommunications into line with that of the EU. One of the instruments is the introduction of *ex ante* regulation. If *ex ante* regulation is introduced, the NRA should examine the relevant markets to see whether competition is effective.

CompTel welcomes the introduction of these changes and encourages Switzerland to enact the draft laws in a timely fashion.

Excessive Fixed-to-Mobile Termination Rates: Fixed-to-mobile termination rates in Switzerland are far from cost-oriented, in violation of Section 2.2(b) and Section 1 of the *Reference Paper*. In particular, Swisscom's mobile affiliate, the largest mobile network operator

[11] See press release: http://www.fedcomcom.ch/comcom/e/communiques/2002/198.html.

in Switzerland, charges fixed operators approximately 23 Eurocents - four to five times the LRIC rate - to terminate calls on its mobile network. The absolute level of the termination rates is among the highest in Europe. Additionally, mobile operators in Switzerland discriminate against fixed network operators by charging their own customers far less for "on-net" mobile-to-mobile termination than they charge fixed network operators for fixed-to-mobile termination. The per minute fixed-to-mobile rate in Switzerland varies from 23 to 25 Eurocents, whereas the mobile-to-mobile rate in the context of closed user group offers ranges from about 5 to 15 Eurocents. The only conclusion that can be reached is that mobile operators are discriminating in favor of themselves vis-à-vis fixed operators.

In sum, the current situation causes serious harm to U.S. companies seeking to compete in the Swiss market and to U.S. consumers who are forced to pay excessive charges for calls to mobile users in Switzerland. CompTel believes that Switzerland should live up to its telecommunications trade commitments by taking appropriate actions with respect to the current fixed-to-mobile rates to bring Switzerland more in line with its neighbors. This discrimination against fixed network operators results in significant financial harm to U.S. network operators and customers.

TAIWAN

WTO VIOLATIONS – *Reference Paper*

Restrictive Licensing Conditions: During the second half of 2002, the Directorate General of Telecommunications ("DGT") issued a consultation document on the policy regarding the re-opening of the market with respect to fixed telecommunications licenses. This ongoing consultation focuses on the changes in the minimum criteria that must be met in order to apply for an integrated network license. CompTel welcomes the relaxation of some of the criteria relating to the integrated network license, although our members continue to believe that, in accordance with Taiwan's Protocol commitments, Taiwan cannot maintain any capitalization and buildout requirements. In addition, however, and critical to developing a competitive telecommunications market in Taiwan, is the international submarine cable leased circuit license. CompTel urges USTR to encourage the DGT to alter and/or eliminate certain criteria that are applicable to international submarine cable leased circuit licensees, in particular the minimum capitalization requirement that is currently NT$800 million. This level of required tied-in capital acts as a significant barrier to entry to potential new entrants.

Lack of Transparency: Finally, CompTel continues to be concerned over the lack of transparency of the regulations that will apply to the licensing of Type I licenses, in particular the integrated network license and the international submarine cable leased circuit license. CompTel has understood from the DGT that draft regulations will be published prior to their coming into force (currently scheduled for March 2003) and we hope that this will be the case. It is critical that potential new entrants know, with certainty, the timeframe and criteria for entry into the Taiwanese market prior to establishing their business models.

CONCLUSION

For the reasons described above, CompTel urges the U.S. Government to work aggressively with the Governments of Australia, Brazil, China, France, Germany, India, Italy, Japan, Mexico, The Netherlands, Singapore, South Africa, Switzerland, and Taiwan to open their markets for competition and to ensure fair and non-discriminatory market conditions in accordance with their respective international trade commitments.

Sincerely,

Carol Ann Bischoff
Executive Vice President &
General Counsel