

**Competitive  
Carriers'  
Coalition Inc**

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**January 9, 2006**

Level 7  
54 Marcus Clarke St  
Canberra  
ACT  
Australia, 2602

**BY ELECTRONIC MAIL**

Ms. Gloria Blue  
Executive Secretary  
Trade Policy Staff Committee  
ATTN: Section 1377 Comments  
Office of the United States Trade Representative  
1724 F Street, N.W.  
Washington, DC 20508

**Re: Primus Representation on Australian Telecommunications USTR  
Compliance Concerns**

Dear Ms. Blue:

The Competitive Carriers' Coalition is an industry association registered in the Australian Capital Territory representing the interests of non-dominant telecommunications carriers. These members include Primus Telecom Australia. The CCC's members participate in all the main markets for communications services in Australia, including retail, wholesale, fixed line, mobile, fixed wireless, residential and commercial, regional and metropolitan.

The CCC has read the comments in the filing from Primus Telecommunications Group Inc to the USTR and concurs broadly with the concerns raised therein.

Some of the recent developments in the Australian market that the CCC would specifically like to highlight are:

- The on going campaign by Telstra to move pricing for the unconditioned local loop service from a de-averaged to an averaged basis,
- The threat Telstra has made to not invest in upgrading its network, specifically, deploying an extension of fibre to deeper in its network, without regulatory relief in the form of an “Access Holiday”,
- The stripping back of powers and functions from Telstra’s wholesale business, and
- The particulars of the operational separation plan requirements presented to Telstra by the Government in December 2005.

Attached to this document by way of further information are copies of letters sent to the secretary of the Department of Communications by the CCC in November and December of 2005 outlining some of these concerns.

### *ULLS De-Averaged Pricing*

Telstra has been relentlessly lobbying for Government intervention to force the competition regulator, the Australian Competition and Consumer Commission, to reverse the practice of pricing access to the unconditioned local loop service on a basis reflecting the cost in different geographic areas. This practice was introduced with the support of Telstra when the service was first defined in 2000.

Despite the near universal opposition to the Telstra proposal from the industry, media commentators and senior Ministers, the Government on December 19 deferred making a decision on the issue and instead ordered the ACCC to report back to it on this issue, with an emphasis on the impact of the policy on Telstra.<sup>1</sup>

The confusion has caused enormous disquiet in the communications industry, and in particular to the members of the CCC, which have led the introduction of infrastructure-based competition to Telstra through the utilization of the ULLS. It seems likely that this issue will now not be resolved before March at the earliest, with a consequent on going disruption to the business plans of other investors in other carriers.

### *Fibre to the Node Access Holiday Threats*

Telstra has been extremely vocal in its attempts to threaten the government with the prospect of not rolling out a Fibre to the Node upgrade to its network unless it first obtains an “Access Holiday”, preventing competitors from gaining equitable access to the prevailing access network of the future.

The CCC has repeatedly called for a universal rejection of Telstra’s overtures in this respect and has called on both the government and the regulator to exercise more scrutiny

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<sup>1</sup> Ministerial Media release December 19, 2005 *Wholesale Access Prices for ULL and Retail Price Parity*  
[http://www.minister.dcita.gov.au/media/media\\_releases/wholesale\\_access\\_prices\\_for\\_ull\\_and\\_retail\\_pricing\\_parity](http://www.minister.dcita.gov.au/media/media_releases/wholesale_access_prices_for_ull_and_retail_pricing_parity)

on Telstra's access arrangements and mandate access through the Declarations process. The CCC believes it is clear that the extension of fibre to deeper in the Telstra network does not represent investment in a new network per se, and in fact has the potential to represent a serious abuse of market power. Telstra campaign is clearly intended to remove any effective regulation from its continuing bottleneck infrastructure. The ACCC has announced an inquiry into the adequacy of regulatory arrangements to deal with this network change, and the Government has indicated it is not inclined to intervene. But Telstra clearly believes it can continue to use the investment threat to effect a change in government policy.

#### *Stripping of Telstra Wholesale Functions*

The CCC has repeatedly sought to draw the attention of the Government to the implications of changes to Telstra Wholesale. In particular, it is apparent to those carriers that acquire access to the on going enduring monopoly network elements in the form of services sold by Telstra Wholesale that the nature of that business had profoundly changed.

Telstra has repeatedly made clear that it intends to reduce the number of services it makes available in wholesale markets, and has refused to continue to supply some services on the same basis as it has supplied them to particular customers in the past.

On December 20 2005, Telstra announced that the previous Group Managing Director of the Telstra wholesale business, Deena Shiff, would be moving to Group Managing Director, Small to Medium Enterprise. On December 22 Telstra announced that the previous Deputy Group Managing Director Public Policy and Communication, Kate McKenzie, would be moving to the position of GMD Telstra Wholesale. In her previous role, Ms McKenzie had been the leading advocate of Telstra's desire to reduce the requirements on it to supply wholesale services to other carriers. Ms McKenzie had also argued for ULLS averaging, a policy opposed near universally by those carriers that are her customers in her new role.

#### *Operational Separation Plan Ministerial Directions*

The Primus submission highlights the industry's concerns with inherent weaknesses in the operational separation plan proposed by the Government to deal with the on going difficulties faced by other carriers in accessing bottleneck services from Telstra. In particular, operational separation was proposed as a means of stopping Telstra providing access to itself on discriminatory and favorable terms, and to prevent anti-competitive conduct.

In December 2005, the Department of Communications published a draft and then a final version of the directive to Telstra to define the requirements of a key element of operational separation, the so-called operational separation plan. The CCC met with and wrote to the Department of Communications outlining its belief that this directive did not meet the requirements of the law passed by Parliament setting the legal framework for

operational separation. The CCC is aware that at least one other major carrier wrote to the department expressing the same opinion. The Department rejected these concerns outright. Copies of the correspondence between the CCC and the Department are attached.

The CCC would be pleased to provide further information if the USTR requires it.

Please contact:

David Forman

Executive Director

CCC Inc

At the above address or by telephone on 61-2-626285821

Or email [david@ccc.asn.au](mailto:david@ccc.asn.au)

# Competitive Carriers' Coalition

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December 19, 2005

Level 7  
54 Marcus Clarke St  
Canberra  
ACT 2600

Helen Williams  
Secretary, Department of Communications, Information Technology and the Arts  
38 Sydney Avenue  
Forrest  
ACT 2603

Dear Ms Williams

The CCC once again takes this opportunity to write to you in relation to the operational separation implementation process, specifically in relation to the Ministerial Directives released last week.

After a meeting between CCC representatives and department officials on Friday December 16, we believe there are still a large number of unresolved and unexplained issues that go to the core of the effectiveness of the operational separation proposals the Department has presented. It is the CCC's belief that unless the Department seriously considers the implications of these issues and acts appropriately, the operational separation regime will be ineffective in meeting not only the aims and objectives of the Act passed by Parliament in August, but will also fall far short of the expectations of stakeholders and industry participants.

Chief among these concerns are:

- The incentive for Telstra to unfairly discriminate against wholesale customers, when they are seeking legitimate access to Telstra's network, is untouched by these arrangements. This incentive to discriminate and the ability to act

- accordingly was the primary problem identified by the ACCC over the past three years that led to the operational separation concept being first proposed.
- The proposal presented by the Department last week presents a set of requirements to Telstra to define how it will to treat its wholesale customers, and to establish processes for dealing with complaints. But it does not require Telstra to treat itself the same way. Put simply, other carriers don't buy what Telstra Retail buys on the same terms and arrangements. Somewhere in the course of the past six months, the core concept of equivalence seems to have disappeared.
  - Operational Separation has therefore been reduced to a new set of compliance measures. It does not affect incentives or equivalence, but merely creates new rules. History has shown that an approach to changing Telstra's behaviour that is based on requirements for it to act in compliance with rules rather than being based in creating incentives for Telstra to act commercially in line with desirable policy outcomes will simply be gamed and made meaningless.
  - Perhaps the CCC's gravest concern is that there is nothing in the directives that acknowledges, let alone responds to, the radically changed circumstances of past six months. The industry is presently facing the most serious attack on competition it has seen since the opening of the market in 1997. The industry is clearly in a state of distress, yet the Department has presented a set of requirements that continue to assume co-operation from Telstra. The Department has lost the opportunity to draw a line in the sand and present a defence to Telstra on behalf of competition.
  - The most obvious example of these changed circumstances has been the gutting from Telstra Wholesale of many of the core commercial functions necessary for this group to be considered a real commercial operation, as clearly envisaged in the aims and objectives of the amendments to the Act. Telstra will continue to wind back wholesale activities and wholesale product offerings, while leaving a shell that meets the weak demands of operational separation as defined by the Department in the directives.
  - There is no indication in the directives of how the Department will benchmark the suggested measures in the draft operational separation plan to determine if they are reasonable. There is insufficient detail about how Telstra Wholesale's activities will be benchmarked against Telstra Retail activities. While we are aware that it is intended that the draft plan will be available for comment, this will be pointless if the initiation direction is flawed.
  - The Department repeatedly sets benchmarks for Telstra so low as to be an invitation to gaming. For example, Telstra is to be required to tell customers about future network changes. This is a far cry from involving wholesale customers in developing plans, as would be expected in a genuine market. However, Telstra will be able to claim it has met its requirements under the plan by treating customers with little more than contempt.
  - The directives do nothing to deal with what are emerging as the areas of most protracted and important dispute in coming years, i.e. the new 3G and FTTN/FTTH network builds proposed by Telstra on the basis that access is forever locked out. It is clear that Telstra will make a mockery of these measures by simply building around them.

- The narrowness of the DSL service description specifying only layer 2 Wholesale ADSL means that this designated service will be made redundant by the creation of retail services that bypass it and are not offered as wholesale services. Wholesale ADSL has been the focus of repeated anti-competitive conduct actions by the ACCC, yet the department has not sought to impose a definition that will bring this to a close. This is reflected in the simple failure to capture layer 3 services, which have been subject of ACCC action in the past. Other types of layer 2 DSL services or any type of layer 3 service, including currently available or future variants, will fall outside this service description, allowing Telstra free rein to shift the bottleneck to another “flavor” of DSL without breaching its obligations under operational separation.
- The absence of other services that are declared and/or are the subject of continual dispute from the designated services list. For example, mobile termination and basic access are not listed.
- The absence of these core and declared services from the designated services list make it impossible to understand how the department believes these arrangements will prove of any value in providing the ACCC with transparency of price and non-price arrangements when it is investigating anti-competitive bundling.

Several of these issues were raised by the CCC in a letter addressed to you dated November 22, the receipt of which has not been acknowledged.

Further, many of these concerns have been raised repeatedly with the department in the course of the past year, yet we find ourselves continually disappointed that we see no evidence in the department’s published output that our input has been considered. Time and again, the CCC has pointed out flaws in the Department’s logic and processes, only to see this apparently ignored when the department publishes its proposals.

Based on the evidence to date the CCC has no confidence that any input it makes to the draft plan will be seriously considered. Further, we cannot see reflected in the directives any serious consideration of the input the CCC commissioned from independent experts, which addressed in some detail the fundamental issues of any operational separation model.

The CCC has attempted to be constructive and has largely refrained from public comment in relation to the many concerns that have arisen in the course of the Department’s conduct of the operational separation exercise. We have participated in every consultation process willingly and actively, investing substantial resources in providing our advice and that of independent experts, even when the timeframes for consultation have been unreasonably tight and inadequate to allow for proper consideration of all relevant matters.

However, we cannot at this late stage risk being seen as complicit in the development of a set of arrangements that we believe are doomed to fail to address the structural issues that have plagued this industry for a decade.

In short, we believe that the Department has continued to repeat the mistakes that reduced the accounting separation regime to a farce after it was legislated in 2001. That was the last occasion on which the Parliament tried to deal with the issues arising from the structural integration of Telstra. Once again, the Department has lost sight of the woods for the trees. One of the great disappointments of the past decade has been the way regulation has increased rather than reduced as was expected when competition was introduced. The CCC believes that the proposals presented as operational separation will inevitably lead to more regulation not less, a burden that will fall disproportionately heavily on competitors and consumers, as it has done in the past.

As described above, the CCC has refrained from making these concerns public up to this point, preferring to attempt to demonstrate how deep and numerous are the flaws in its thinking through providing comments directly to the Department. However, we have concluded that the Department has no intention of changing its course. As a result, the CCC feels compelled to make this correspondence public to avoid being seen as having some responsibility for the arrangements that the Department has proposed.

Yours Sincerely

David Forman  
Executive Director  
CCC Inc



## Competitive Carriers' Coalition

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22 November 2005

Level 7  
54 Marcus Clarke St  
Canberra  
ACT 2600

Helen Williams  
Secretary, Department of Communications, Information Technology and the Arts  
38 Sydney Avenue  
Forrest  
ACT 2603

Dear Ms Williams

I write to bring to your attention changes made in recent weeks to the structure of the Telstra Wholesale division. The CCC believes that these changes have profound implications for the implementation of the operational separation regime in a form that is consistent with what we believe was envisaged by the Parliament when the legislation was passed in August.

As you know, the aim of the Telecommunications Legislation Amendment (Competition and Consumer Issues) Act is to promote “the principles of transparency and equivalence in relation to the supply by Telstra of eligible wholesale services”. We note that the objects of Part 8 of the Act include requirements for Telstra to: maintain one or more wholesale business units; promote a substantial degree of organizational and operational separation between wholesale and retail business units, and; meet the needs of wholesale customers to be kept informed of Telstra’s network, insofar as it relates to the supply of eligible services. Compliance with Part 8 and the objects should also not impair Telstra’s ability to compete on a fair and efficient basis (my emphasis).

These parts of the Act clearly envisage that there will be a viable, and substantial wholesale business unit inside Telstra that functions in ways consistent with what is commonly understood to be a wholesale business. Clearly, it is the intention of the Act

that this requirement on Telstra to maintain separate wholesale and network business units is the mainstay of the operational separation requirements.

The CCC believes that the changes that have taken place with Telstra Wholesale mean that an operational separation model implemented on the basis of the business as it is now organized cannot satisfy the aims and objects of the Act.

These changes pre-empting the implementation of the provisions of the amendments suggest a systemic undermining of the Government's policy in relation to regulatory reform. Telstra has repeatedly made it clear that it does not accept the principles of operational separation, with the chairman of the company going so far as to publicly call operational separation "a nonsense". It is hard to conclude that Telstra has anything but contempt for the policy and is making these internal changes to prevent it ever being effectively implemented.

In recent weeks, Telstra Wholesale has lost or is expected to lose numerous functions that are fundamental to a genuine wholesale enterprise.

These include:

- The functional areas of pricing and marketing, which are now conducted centrally in Telstra.
- Operations, which controls the provisioning, customer care and fault rectification functions, which it is understood is likely to be also moved to a central corporate unit,
- Business strategy, moved to a central corporate unit, and
- Business and Product Development, moved to a central function.

This has reduced the Wholesale division to a sales office, with no control over the products that are offered for sale, no authority to negotiate a meaningful variation in prices or terms of sales, and no ability to create products for wholesale customers.

In such circumstances, it cannot be said to be representative of a genuine wholesale business. Nor does it provide an organizational basis upon which operational separation requirements can be imposed. Most obviously, the prospect of equivalence being deliverable, or measurable, under such arrangements is nil.

The CCC urges you to require Telstra to reinstitute these basic wholesale business functions as part of any proposed operational separation plan, and to recommend that the Minister reject any draft operational separation plan that does not include these basic elements.

These and other developments in the market, such as pricing disputes that have emerged in relation to ADSL and line rental, and the comments that Telstra has made about access to a potential future fibre to the node and fibre to the home network architecture, give us

deep misgivings about whether the policy intentions can be achieved through a continuation of the present process. We would be pleased to meet you to discuss these issues further and consider how things can be progressed.

Yours Sincerely

David Forman  
Executive Director  
CCC Inc

Cc: Richard Windeyer; Andrew Madsen