December 21, 2007

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Attn: Section 1377 Comments
Office of the Unlisted States Trade Representative
1724 F Street, NW
Washington, DC 20508

Re: AUSTRALIA: *U.S. - Australia Free Trade Agreement; WTO Violations -- Reference Paper and GATS Telecom Annex*

Dear Ms. Blue:

Primus Telecommunications Group, Incorporated ("Primus") takes this opportunity to make a submission in response to the request of the Office of the United States Trade Representative ("USTR") for comments pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C 3106, concerning U.S. trading partners' compliance with U.S. telecommunications trade agreements.

Primus has pressing concerns about the ability of competitive carriers like Primus to operate in the Australian telecommunications market. The current situation poses a real threat to the ability of Primus to continue offering competitive telecommunications services in Australia. The Australian Government needs to take decisive action to address the current imbalance and to ensure Australia's compliance with the U.S.-Australia Free Trade Agreement ("FTA") and its WTO commitments made in the 1997 WTO Basic Telecommunications Agreement ("GATS Telecom Annex") and Reference Paper on Pro-Competitive Regulatory Principles ("Reference Paper"). Critically, the telecommunications regulatory regime has proven unable to deliver on timely access and interconnection to the public telephone network for foreign competitors such as Primus. Furthermore, in circumstances where access is mandated, the telecommunications regulatory regime has failed to deliver timely on the expectation of reasonable and non-discriminatory terms and conditions of access and interconnection. The competition notice regime has recently been declared inoperable. Put frankly, the telecommunications regulatory regime set out in the *Trade Practices Act 1974* is in need of a major overhaul in order to avoid a collapse in the competitive marketplace. While this has largely been brought about by the actions of the incumbent monopolist, Telstra Corporation Ltd ("Telstra"), the present situation is also a direct consequence of an imperfect industry structure dominated by a structurally integrated Telstra, and a weak regulatory framework.

With the introduction of a newly elected government, Telstra continues to advance its interests in seeing the further weakening of the telecommunications regulatory regime. Telstra also continues to use threats and legal action as a tactic to unsettle government officials, and given that Telstra has previously succeeded in exercising political influence to sideline the independent regulator, the Australian Competition and Consumer Commission ("ACCC"), it is anticipated that Telstra will soon resume this activity targeting the newly elected government. There is no doubt Telstra will continue to engage in campaigns of mistruths and secret negotiations to obtain concessions from government officials. In the

context of an aggressive Telstra and a weak regulatory regime Primus remains concerned about the prospects for foreign firms like Primus to maintain a competitive presence in the Australian market. While it is clear that urgent and decisive action on the part of the Australian Government is needed to address the structural and regulatory failings of the industry it is not clear how the newly elected government will respond. Therefore, Primus urges the USTR to pay close attention to developments in Australia, and take what steps are necessary to encourage the newly elected government to take the actions necessary to address the present inequalities and discrimination and give effect to compliance with Australia's FTA and WTO commitments.

Background. Primus is a U.S. based telecommunications company with approximately $1 billion in annual revenues and has subsidiaries operating throughout the world. In Australia, Primus' subsidiary, Primus Telecom, first began operating following its acquisition of Australian-based telecommunications reseller Axicorp. The acquisition of Axicorp allowed Primus to obtain its carrier's license and begin operating in Australia as a fully fledged carrier on July 1, 1997. Primus Telecom has since grown into one of the largest fixed-line and ISP telecommunications carriers in Australia. Primus Telecom offers a comprehensive range of voice, data, Internet and web hosting products, servicing both residential and business sectors. The Primus Telecom network offers nationwide coverage through its own backbone and its own extensive DSLAM network with facilities to be based in 260 exchanges across Australia. The network enables Primus Telecom to provide nationwide long distance services and local call Internet access. Primus Telecom operates its own fiber network in the five major capital cities, delivering a range of business direct-connect services including ISDN, frame relay, ATM, telephone line and Broadband DSL, as well as telephone line and broadband DSL services direct to residential customers. Global connectivity is provided through an extensive voice, IP, wireless and ATM network operated by its U.S. parent company.

Telstra is a highly vertically and horizontally integrated telecommunications carrier with not only control and ownership over the copper customer access network monopoly, but it also is the controlling shareholder of the major pay TV network, Foxtel, through which it controls the great majority of commercially valuable pay TV content. Hence in Australia, unlike all other countries, the incumbent carrier does not face competition from cable networks and is therefore unique in the manner in which it must be regulated. Further, Telstra is one of the most, if not the most profitable telecommunications companies in the world.

Primus takes this opportunity to set out some specific trade concerns that arise as a consequence of the breakdown of the telecommunications regulatory framework in Australia. These concerns implicate several commitments made by the Australian Government in the context of the FTA, the GATS Telecom Annex, and the Reference Paper. In particular, Australia has failed to keep its commitments by allowing the following: 1) the flawed and inherently anticompetitive industry structure; 2) the failure of operational separation to provide for non-discriminatory outcomes; 3) the failure of the competition notice regime as a means to discipline Telstra's anticompetitive behavior; 4) the threat of anticompetitive ULL pricing; 5) the contrived failure of the negotiate-arbitrate regime to lead to timely and reasonable access and interconnection outcomes; 6) Telstra's denial of access to public exchanges; and 7) the impending threat of Telstra's FTTN deployment which is designed to destroy ULL and DSL based competition. In addition, the government has failed to respond

quickly to mitigate Telstra's abuse of the judicial system where it regularly launches speculative and vexatious legal challenges.

In light of these matters, and the failure of the telecommunications regulatory regime, Primus requests that the USTR take all necessary steps to encourage the Australian Government to honor its FTA and WTO commitments and restore balance and confidence in the industry, enabling a future competitive environment for those foreign companies such as Primus that choose to conduct business in Australia.

Violations of the U.S.-Australia Free Trade Agreement and the GATS Telecom Annex and Reference Paper

FTA Article 12.7 : Treatment By Major Suppliers

> *Each Party shall ensure that major suppliers in its territory accord suppliers of public telecommunications services of the other Party treatment no less favorable than such major suppliers accord in like circumstances to their subsidiaries, their affiliates, or non-affiliated service suppliers, regarding:*
> *(a) the availability, provisioning, rates, or quality of like public telecommunications services; and*
> *(b) the availability of technical interfaces necessary for interconnection.*

The flawed and inherently anticompetitive industry structure. As noted above, Telstra is a highly vertically and horizontally integrated telecommunications carrier with not only control and ownership over the copper customer access network monopoly, but it also is the majority shareholder of the major pay TV network, Foxtel, through which it controls the majority of pay TV content. Hence in Australia, unlike all other countries, the incumbent carrier does not face competition from cable networks and is therefore unique in the manner in which it must be regulated. Further, fully exploiting these unusual advantages, Telstra has become one of the most, if not the most profitable telecommunications companies in the world.

There is currently considerable debate in Australia and around the world with respect to the merit of a more robust separation of incumbent monopolist telecommunications companies. Early indications from the newly elected government are that it is cognizant of the consequences of Telstra's dominance in Australia, which is starkly reflected through broadband retardation and pricing. The government appears mindful that the key to resolving the industry and consumer issues is to impose a more distinct separation of Telstra's wholesale business from its retail interests. In the face of opposition from Telstra executives it remains to be seen whether the government will ultimately act on its convictions. Globally, experience does suggest such a separation is likely to be the only way to introduce a fair, non-discriminatory and genuinely competitive telecommunications environment, which is a necessary prerequisite for the advancement of the interests of Australian communications consumers.[1]

[1] Many jurisdictions around the world are presently exploring, or putting into effect, structural separation as a solution to industry and competition issues; for example the United Kingdom, the European Union, New Zealand and Singapore.

The failure of operational separation. Having effective operational separation of Telstra is important to ensure that it treats other carriers fairly with regard to services and interconnection. Safeguards must be in place to ensure that dominant carriers like Telstra cannot unfairly discriminate in favor of affiliates. The Australian Government passed legislation that introduced an operational separation plan for Telstra. As previously advised[2], due to Telstra's intense lobbying, Australia's plan is woefully inadequate, and as forecast previously sets the stage for unmitigated abuse by Telstra of its market position to provide anti-competitive favorable terms to its affiliates in the various markets in which they compete. As detailed below, the outcomes have now been proven and the regime has proved unenforceable.

Given the failure of the telecommunications regulatory regime and the industry specific anticompetitive conduct provisions set out in the *Trade Practices Act 1974* to discipline Telstra, it is particularly concerning that the operational separation rules have also proved impotent. These rules were intended to discipline Telstra in its wholesale dealings but have failed to achieve that objective. Primus has been subject to discrimination in both operational and commercial contexts. Telstra has imposed unreasonable commercial terms upon Primus. These have effectively been non-negotiable. Furthermore, on day-to-day operational matters Primus regularly suffers discriminatory treatment at the hands of Telstra. Furthermore, anecdotal evidence now suggests Telstra has been accessing privileged customer databases to assist with better targeting its consumer offers, therefore putting itself in a significantly more advantageous position than other industry participants, such as Primus, that do not have access to these databases. Questions about the misuse of this information need to be explored further.

The structure of the telecommunications industry in Australia, with the overwhelming dominance of Telstra, serves as an impediment and clear disincentive to open and fair competition. Telstra has no incentive to promote non-discriminatory access to access seekers. Contrary to this, Telstra has a clear incentive to impede and obstruct such an outcome. A workable, open and transparent wholesale telecommunications market threatens Telstra's retail dominance and therefore compromises Telstra's overall profitability. Telstra entertains aspirational EBITDA margins of between 46 per cent and 48 per cent by financial year 2010 - which may not be met in the face of a more robust competitive retail environment. In Australia, the problem is exacerbated by Telstra's ownership of the largest HFC cable network in Australia.[3]

The collapse of the competition notice and enforcement regime. It has been recently reported the ACCC will scrap use of competition notices after its last notice, issued two years ago, was defeated in the Federal Court.[4] Part XIB of the *Trade Practices Act 1974* sets out specific prohibitions against anticompetitive conduct in the telecommunications industry. One of the key components of that regime empowers the ACCC to issue a competition notice to a carrier in the event it considers the carrier is engaging in

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[2] *See* Letter to Ms. Gloria Blue, Executive Secretary, from Andrew D. Lipman, Counsel to Primus Telecommunications Group, Incorporated, dated Dec. 16, 2005.

[3] The Allen Consulting Group, *Australia's Broadband Future,* July 19, 2007, report to the Competitive Carriers Coalition; The Allen Consulting Group, Structural separation of Telstra - why it is needed, and what can be done, December 14 2006 (Copies available upon request).

[4] *Australian,* December 13, 2007 *Telstra snarls the fibre-optic network* - http://www.australianit.news.com.au/story/0,24897,22917968-15306,00.html.

anticompetitive conduct. This puts the carrier on notice to address the concerns and it puts industry on notice that the ACCC considers the conduct does raise a risk of contravention of the *Trade Practices Act 1974*. A direct consequence of such a notice is that in resultant proceedings there is an onus on the carrier engaging in the anticompetitive conduct to prove it has not engaged in such conduct. This regime is the ACCC's chief weapon against anticompetitive conduct and its reported breakdown was a consequence of Telstra challenging the process that underlies the making of such a competition notice. The competition notice regime was specifically enacted as a means to discipline Telstra in respect to anti-competitive conduct. Industry participants such as Primus rely on the authority and enforceability of the competition notice regime to ensure non-discriminatory access and interconnection, and given Telstra's substantial market power, to preserve an open and freely competitive market place. The breakdown of the competition notice regime leads to an environment where Telstra can engage in questionable and anticompetitive conduct unchecked. Hence the regime has again been marooned by Telstra's exploitation of legislation defects in order to legally challenge technicalities rather than the substance of competition outcomes.

The current industry structure is inconsistent with the prospect of a genuinely competitive outlook. The breakdown of the competition notice regime and the failure of the regulatory regime in general to discipline Telstra has lead to a situation where decisive action on the part of the government is now necessary to ensure the future of a truly competitive telecommunications industry. It is incumbent on the Australian Government to establish and foster a competitive industry that reflects and adheres to the WTO and FTA principles of ensuring dominant carriers like Telstra cannot unfairly discriminate in favor of affiliates. The current operational separation regime is not consistent with those objectives. A failure to deliver on these commitments constitutes a violation of trade commitments. Experience to date demonstrates that an outcome consistent with trade commitments can likely only be achieved through a more robust form of separation. In fact, it has reached the point where in order to meet its WTO and FTA obligations, the Australian Government may need to mandate Telstra not only engage in structural separation, but divest ownership of the public access networks. Primus urges the USTR to pay close attention to the government's actions in the near future to ensure that it either strengthens the current separation regime, or mandates divesture in order to give effect to its trade obligations.

FTA Article 12.8 : Competitive Safeguards

> *Each Party shall maintain appropriate measures for the purpose of preventing suppliers who, alone or together, are a major supplier in its territory from engaging in or continuing anti-competitive practices, including in particular:*
> *(a) engaging in anti-competitive cross-subsidization;*

The threat of anticompetitive ULL pricing. The lack of an effective structural separation and regulation of Telstra has also led to other violations of Australia's commitments under the FTA and WTO. For a number of years Telstra has sought to engage in nationwide price averaging for ULL services, averaging access charges across metro and non-metro areas. This would raise wholesale rates in the metro areas far above cost, resulting in an anti-competitive cross-subsidization. As previously advised, this would seriously undermine the business operations of all Telstra's competitors, particularly where those

competitors have based their investment decisions on well-established regulatory decisions which advocated cost-based geographic pricing.

Telstra will seek to impose such a pricing regime in 2008. It will lodge an access undertaking with the ACCC and in the face of objection of the pricing construct will inevitably initiate legal proceedings. Previously, Telstra has applied substantial pressure on government officials to seek the government to influence the outcome of the independent regulator in respect to this flawed pricing construct. Whilst the newly elected government has not yet demonstrated any tendency to submit to misplaced lobbying on the part of Telstra, the USTR should nevertheless monitor closely the situation to ensure the Australian Government does not seek to exert pressure on the ACCC to compromise its legislated decision criteria. If the Australian Government does seek to interfere with the ACCC 's decision it will constitute a violation of Australia's commitments to prevent anti-competitive cross-subsidization under Article 12.8 of the FTA.

GATS Telecom Annex Section 5
FTA Article 12.10 : Unbundling Of Network Elements

> *Each Party shall provide its telecommunications regulatory body with the authority to require that major suppliers in its territory provide suppliers of public telecommunications services of the other Party access to network elements for the provision of public telecommunications services on an unbundled basis, and on terms and conditions, and at cost-oriented rates that are reasonable, non-discriminatory, and transparent.*

The failure of the negotiate-arbitrate regime. In addition to the FTA requirements of Article 12.10, Section 5 of the GATS Telecom Annex specifically mandates that governments ensure local leased lines and unbundled network elements be available on reasonable and non-discriminatory terms and conditions. As with other entrants to the telecommunications industry in Australia, Primus commenced its business on the expectation that the Australian Government would impose and enforce regulatory rules that delivered fair and reasonable access to the essential monopoly components of the public telephone network. This has not proven the case. The negotiate-arbitrate regime introduced in Australia has proved a clear failure. Some many years after initially seeking access to declared services, there still remains considerable uncertainty about the terms and pricing on which access is to be granted to Primus. Genuine negotiation has been totally absent from the process, and the conduct of the arbitrations themselves has been subject to considerable delay and expense.[5] These delays have significant impact on an access seeker's cash flow because, during the time a pricing dispute remains unresolved, Telstra typically imposes substantially inflated access charges. By serially challenging technical matters, Telstra is able to delay such an arbitration, and the ability of the access seeker to invest, for as long as several years. These inflated charges are designed to place competitors in a commercially disadvantageous position, and clearly impact marketing budgets and suppress investment programs. The

[5] For example the Primus/Telstra ULLS dispute concerning connection charges for the ULLS service was notified in June 2005 and currently remains unresolved.

impact on margins can critically challenge the ability of competitors to sustain a viable market presence.[6]

This policy of inflated access pricing during arbitrations has threatened the continued existence of many ISP's currently operating in Australia. While the arbitration process purports to provide some protection in the form of interim pricing, this has failed to deliver the necessary relief to Primus and other ISP's.[7] To date the regulatory regime has not delivered any certainty around access to some of the key services such as the spectrum sharing and ULL services. Despite many years of activity and expense on the part of industry participants and the ACCC, in the face of repeated legal challenge from Telstra, there still remains significant uncertainty about the terms of access to these key services. The fact that the ACCC may eventually make a determination in a dispute does not necessarily provide the necessary certainty given Telstra's practice of routinely initiating speculative and unsettling legal challenges against any such determinations. The absence of non-discriminatory terms of access for these services clearly disadvantages foreign and domestic competitors in competing with Telstra in the retail telecommunications markets. Therefore, the USTR is encouraged to advocate that the Australian Government give serious consideration to its WTO and FTA obligations to ensure local leased lines and unbundled network elements be available on reasonable and non-discriminatory terms and conditions, and consider more timely and fairer alternatives to the current negotiate-arbitrate model. This current model has only served to expose US-owned competitor access seekers like Primus to unnecessary expense, uncertainty and unwarranted vulnerability.[8] Recognizing the experience and expertise the ACCC has with regard to access pricing for monopoly infrastructure, the USTR should encourage the government to give consideration to empowering that specialist and independent body, to establish access charges unchallenged, which would lead to a more efficient, timely, and reasonable outcome.

Reference Paper Section 2 -- Interconnection
FTA Article 12.11 : Interconnection

> *Each Party shall ensure that major suppliers in its territory provide interconnection for the facilities and equipment of suppliers of public telecommunications services of the other Party:*
> *(a) at any technically feasible point in the major supplier's network;*
> *(b) under non-discriminatory terms, conditions (including technical standards and specifications), and rates;*
> *(c) of a quality no less favorable than that provided by such major suppliers for their own like services, for like services of non-affiliated service suppliers, or for their subsidiaries or other affiliates;*
> *(d) in a timely fashion, on terms, conditions (including technical standards and specifications), and cost-oriented rates, that are transparent, reasonable, having regard to economic feasibility, and sufficiently*

[6] *Australian, Telstra keeps rivals out of the loop*, December 07, 2007. http://www.theaustralian.news.com.au/story/0,25197,22883048-5013584,00.html.

[7] Given the design of the arbitration regime, interim pricing can be contested and can take many months to obtain, is not backdated to address historic price gouging and cash flow consequences, and can typically expire prior to a Final Determination being made.

[8] *Australian, Telstra keeps rivals out of the loop*, December 07, 2007. http://www.theaustralian.news.com.au/story/0,25197,22883048-5013584,00.html.

> *unbundled so that suppliers seeking interconnection need not pay for network components or facilities that they do not require for the service to be provided; . . .*

Telstra's denial of access to exchanges. In the evolution of telecommunications competition worldwide, the unbundled local loop ("ULL") and related collocation obligations are the basic sustenance of that competition. To deploy DSLAM equipment throughout Australia, Primus requires access to public exchanges operated by Telstra. Telstra has outrightly denied Primus access to many of these exchanges.[9] On other occasions the denial has taken the form of unworkable conditions or unreasonable delays associated with access to the public exchanges. Furthermore, Telstra has caused delay to exchange access through refusing permission for access seekers to undertake parallel or combined deployment, restricting access seekers in terms of contractors they can use to undertake power work, and has also failed to enforce appropriate timelines that would serve to expedite access to the physical exchanges. These contrived access impediments serve only to deny competitors and delay competition.

The current regulatory regime does not provide any prospect of a timely solution. Telstra has been permitted to engage in conduct with its clear intention being to deny Primus from deploying its own network in these exchanges. The regime urgently needs to be strengthened. Furthermore, in the absence of the structural separation of Telstra's retail business from its wholesale business the incentives to advance Telstra's retail interests over the interests of competitors such as Primus will remain. This is a clear violation of the government's obligation to ensure interconnection for the facilities and equipment of competitors like Primus at any technically feasible point in Telstra's network under non-discriminatory terms, conditions, and rates. The USTR should advocate for the Australian Government to quickly redress this imbalance.

Telstra's FTTN Plans to destroy DSL based competition. One of the more significant threats to the sustainability of a competitive telecommunications industry in Australia concerns Telstra's plan to unilaterally eliminate DSL based competition through execution of its proposed FTTN network plan. In 2005, Primus notified the USTR that Telstra had sought to deploy an FTTN network subject to the former government sidelining the independent regulator from exercising its legislative pricing oversight role. Sidelining the ACCC from that oversight role has the potential to cripple broadband competition and substantially increase consumer pricing for broadband services. While initially resisting the threats, Telstra's campaign of mistruths, political influence and secret negotiations eventually saw the former government acquiesce in offering Telstra the prospect of a regulatory holiday through establishing an expert task force to consider FTTN bids that supplanted the ACCC's pricing oversight role. Early indications from the newly elected government are that the ACCC will retain its specialist access pricing role, unfettered by political influence. However it clearly remains to be seen how the government responds in the face of Telstra's anticipated strong-armed threats and negotiating tactics. Any new broadband bidding process must be conducted in an open and transparent manner. The Australian Government should

[9] To date Telstra has denied Primus access to approximately 30 exchanges, and in response to requests for access to another 30 exchanges, some of the requests being particularly long-standing over many months, Telstra has to date not provided any indication as to when access will be granted, and indeed, Primus has some doubts as to whether access will actually be granted.

remain cognizant that any move to sideline the independent regulator from exercising its proper functions would be a violation of Australia's WTO and FTA commitments.

It should be noted that industry participants, including Primus, have expressly welcomed Telstra to work cooperatively with the rest of the industry in respect to its network modernization. Telstra has however resisted all such invitations and has shown no inclination to cooperate with the rest of the industry or provide any assurance with respect to the sustainability of a genuinely competitive industry. It is a real concern that Telstra has already covertly deployed cabling and equipment integral to a future FTTN network. Telstra is clearly aware of the impact its proposed FTTN deployment will have on facilities based competition and the only interpretation open at this time is that Telstra's FTTN deployment strategy is specifically intended to eliminate DSL based competitors.

As indicated above, the newly appointed government has stated it will initiate a revised bidding process for the deployment of a high speed broadband network. The G9 consortium, of which Primus is a member, will submit a bid. Contrary to Telstra's FTTN ambitions which are clearly only motivated by monopoly returns, the G9 will be submitting a pro-competition and consumer oriented bid for modernizing the fixed line network, and has had largely favorable responses from the ACCC in respect to the proposed structure and pricing of its bid. Based on current industry understanding there remains a serious threat to the telecommunications industry if Telstra's FTTN bid is successful. Any bid that fails to provide market incentives and preserve competition should be dismissed for threat of violation of trade commitments. It is essential that any future network be deployed subject to a pro-competitive ownership structure and be operated independent of any perception of monopoly profit agenda or interests. Any shortcomings against this criterion will compromise the competitive performance and price expectations that can be achieved through a next generation fiber network deployment. Furthermore, it is critical that all bids provide industry with a mutually acceptable transition process to a modern fiber network, thereby ensuring current industry participants are not disadvantaged in the course of migrating their current DSL based business models to an FTTN environment – particularly given that the government of the day, in inviting a competitive marketplace, encouraged such participants to invest in their DSL networks. To allow those participants to be left with a stranded investment in the context of a new FTTN network would undermine credibility in the government's encouragement of private investment. It is clear that the hopes of a future competitive industry rest on decisions made by the government in respect to the deployment of any FTTN network. The government must remain mindful of the impacts on current facilities-based competitors, consider the incentives that underlie individual deployment bids, and give weight to the objects of ensuring a transparent, fair and non-discriminatory, competitive business environment.

Telstra's use of speculative and vexatious legal challenges. As previously described, the current legal and regulatory framework has permitted Telstra to misuse the judicial system in pursuing speculative legal actions designed to jeopardize regulatory proceedings, delay regulatory outcomes, impose costs upon industry participants, and undermine investor and industry confidence. More recently Telstra has sought to draw industry and the government into novel legal proceedings in the High Court of Australia

challenging the authority of the regulatory regime itself.[10] This type of aggressive and speculative challenge is highly irregular in the context of industry regulation in Australia. Although clearly fanciful in conception, Telstra has committed substantial resources to this legal challenge and, as is the nature with such proceedings to the highest court of the land, there remains the real risk of success, by way of technicality rather than substance. One such procedural rather than substantive challenge also threatens to undermine the competition regime across other network industries. This matter has lead to considerable uncertainty in the industry. In a similar vein, Telstra has also challenged the validity of telecommunications declarations in the Federal Court.[11] With these significant decisions currently outstanding, it is incumbent upon the Australian Government to provide assurance to industry that – even if Telstra were to prevail in its legal challenges - its priority is to enact and enforce laws that promote a competitive environment providing for non-discriminatory, and fair and open, access to essential monopoly infrastructure and services. Legal proceedings of this nature clearly compromise the confidence in, and prospects of, such a future.

Furthermore, Telstra has demonstrated a penchant for initiating numerous vexatious and speculative judicial review proceedings, routinely targeting regulatory determinations. Much of this activity is ill-considered, wasteful and particularly speculative. The conduct is a clear abuse of legal process and is designed to distract the regulator from its functions while dragging industry participants into expensive and drawn-out litigation. These type of proceedings are intended to challenge the authority and process of the independent regulator, and inherently create an environment of uncertainty in relation to industry investment. The proceedings are largely counter-productive, serving only to delay final outcomes in the regulatory processes. However the unpredictable nature of legal decision making at times does mean the legal challenges also serve to stifle and suppress competitor's investment and business programs. Currently there are close to 40 access disputes before the ACCC and it is anticipated that if left unchecked Telstra will initiate more than a dozen judicial review challenges over the coming six months against various pricing determinations, and will also likely initiate numerous unwarranted challenges against impending regulatory decisions regarding speculative exemptions Telstra has sought from regulatory obligations.[12] In the opinion of Primus and other industry participants, it is clear that Telstra has embarked on an intentional tactic of misusing legal process in order to unsettle the independent regulator and distract industry participants with the object of suppressing investment and deferring competition. Therefore, the USTR should encourage the Australian Government to act quickly to address these legal disputes as they arise by imposing and holding fast to quick time limits on the ACCC in making decisions, and providing ACCC the resources it needs to act quickly.

Conclusion. The regulatory regime contained in the *Trade Practices Act 1974* was largely intended to address issues of anticompetitive conduct and provide for non-discriminatory access and interconnection on fair and reasonable terms. Unfortunately, the

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[10] Telstra Corporation Limited v Commonwealth of Australia & Ors, High Court of Australia, Proceeding No S42 of 2007.

[11] Telstra Corporation Limited v ACCC and Ors, Federal Court of Australia, no. NSD 1744 of 2007, NSD 1560 of 2007, and 1743 of 2007; which proceedings all include a claim by Telstra that the LSS telecommunications declaration that underlies the regulatory process is invalid.

[12] Fixed Line Services exemption application (Dec 07), LCS/WLR exemption application (July 07), PSTN OA exemption application (Oct 07), Transmission exemption application (Aug 07), LCS and WLR exemption application (Oct 07).

regime has proven ineffective. As recently reported, the ACCC will now scrap use of competition notices which are its chief weapon against anticompetitive conduct in the telecommunications industry. This is in response to Telstra's speculative and aggressive legal challenges which have now effectively blunted the enforcement powers of the ACCC and left the competition notice regime unworkable. It is also particularly troublesome that many years after seeking access to declared services under the regulatory regime Primus finds itself in a position where the terms of access to key services such as the spectrum sharing service and the ULL service still remain uncertain. Furthermore, despite making significant investments to date in advancing its business interests in Australia – which have benefited the Australian consumer through providing competitive choices in the marketplace - Primus now finds itself in an extremely vulnerable position awaiting various legal judgments which threaten to overturn the very existence and authority of the regime.

In conclusion, in our view it is critical that the USTR use the Section 1377 process to encourage the Australian Government to take the actions necessary to restore balance and confidence in the industry and safeguard a future competitive environment for those foreign companies willing to commit to conducting business in Australia. Primus urges the USTR to pay close attention to the government's actions in the near future to ensure that it does take the necessary decisions to give effect to its trade obligations and address the current industry structural failings and regulatory failings, which presently place foreign businesses like Primus in a disadvantageous position.

Yours sincerely,

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