

Ms. Gloria Blue
Executive Secretary
TPSC
Office of the USTR
600 17th Street, NW
Washington, DC 20508

January 9, 2003

Re: USTR Section 1377 Request for Comments Concerning Compliance with Telecommunications Trade Agreements

Dear Ms. Blue:

AOL Time Warner is pleased to have this opportunity to submit comments on the operation and effectiveness of U.S. telecommunications trade agreements pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1998 (19 U.S.C. Section 3106). The effective implementation of telecommunications trade agreements is important for our company's ability to operate in markets around the world.

We are members of several associations that will be submitting detailed comments on a number of countries where there are on-going problems with compliance with existing telecom trade agreements. In this submission, however, we wanted to highlight problems in two countries that are of particular concern to AOL Time Warner.

Under Canadian law, the networks used to provide wholesale and retail Internet access constitute a public telecommunications transport network, and the Canadian Radio-television and Telecommunications Commission ("CRTC") has ruled that incumbent cable companies are subject to regulation as common carriers when they use their networks to provide non-programming services and must provide access to unaffiliated entities, including independent internet service providers ("ISPs"). Despite this clear requirement, we have encountered a number of barriers to competition in the basic and value added telecommunications markets. For example, telcos and incumbent cable operators are offering "lite" broadband services at predatory prices while denying competitors the right to obtain these services at non-discriminatory wholesale rates. By failing to ensure that independent ISPs have access to these networks on reasonable terms and conditions and/or by failing to prevent these companies from engaging in anticompetitive conduct, Canada is violating its obligations under Section 5 of the GATS Annex on Telecommunications and Section 1 of The Reference Paper on Telecommunications Services and/or under Chapter 13 of NAFTA to enforce non-discriminatory access to public telecommunications networks.

In Germany, basic telecommunications carriers have complained of high prices and lengthy provisioning delays for leased lines, refusals to provide interconnection services necessary for competition, and a variety of other tactics designed to frustrate competition. The methods used by Deutsche Telekom ("DT") to foreclose competition by independent ISPs illustrate the kinds of behavior encountered by new entrants. Specifically, DT:

- Offers retail DSL packages at prices below the wholesale rates available to competitors.
- Denies competing ISPs the opportunity to market resold or unbundled DSL services directly to consumers and uses its customer service arm to win back customers who attempt to order DT's DSL service to use an unaffiliated ISP's high-speed offering.

- Unfairly uses information it generates in the course of providing voice telephony (a market it dominates) to build its Internet-related businesses such as DSL.
- Refuses to tariff wholesale circuit capacity at cost-oriented rates.
- Refuses to provide a true partial private circuit offering.

While the German telecommunications regulator (RegTP) has issued a number of important pro-competitive decisions, it has not been able to enforce its rulings in a timely and effective manner. RegTP lacks basic tools, such as the ability to levy meaningful fines for violations of its orders. Moreover, German law gives competitors no opportunity to examine the evidence DT presents to RegTP to justify telecommunications rates, and RegTP's capacity to scrutinize this information with appropriate rigor is constrained. In addition, the absence of effective ex-ante pricing authority severely limits RegTP's ability to order DT to offer circuit capacity and leased lines at cost-oriented rates. Even where RegTP is able to act, German law affords opportunities for DT to use the courts to tie up unfavorable decisions for years. The current backlog of lawsuits challenging RegTP rulings runs to more than 900 cases in the telecom and postal sectors. Although the law dictates that rulings by the RegTP are effectively immediately, even the most recent rulings by the regulation authority have been contested over many months or even years by DT, including:

- introduction of a wholesale flat rate
- element-based charging (EBC), i.e. cost-oriented pricing for DT inputs,
- line sharing
- resale obligations
- leased lines

Germany is in the process of amending its telecommunications law. In this context, it is critical for RegTP to have the legal tools and political authority to act independently against anticompetitive abuses by DT. In the future, innovation will hinge primarily on stronger and more efficient monitoring of wholesale products offered by DT. To create a forward-looking, pro-competitive telecommunications market, the statute must be made sufficiently broad to reach new products and services, such as "bitstream" access for broadband internet connections. The supply and timely provision of wholesale products is essential if a dominant provider plans to introduce new retail services, and the obligation to provide key services should apply even if the dominant provider offers no equivalent retail product and/or uses a special wholesale offer internally, or innovation will not be driven by competition. In particular, this involves considering taking the problem of anticompetitive bundling tactics into account in regulatory practice in order to prevent DT from extending its market power in basic telecommunications to Internet content and services.

We hope these comments are helpful and we look forward to working with USTR staff in addressing these problems in Canada and Germany through this year's 1377 process.

Regards,

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