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January 24, 2008

VIA ELECTRONIC MAIL
Ms. 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, DC 20508

Re**: Australia: Reply Comments of Telstra Corporation Ltd**

Dear Ms. Blue:

These reply comments are filed on behalf of Australia's Telstra Corporation Ltd. (Telstra) 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 Competitive Act of 1988, 19 U.S.C. 3106, concerning U.S. trading partners' compliance with U.S. telecommunications trade agreements.

Primus Telecommunications Group Incorporated (Primus) has docketed comments concerning Australia. In its filing dated December 21, 2007, Primus alleges that Australia has failed to keep commitments made in the U.S.-Australia Free Trade Agreement (FTA), the World Trade Organization (WTO) Basic Telecommunications Agreement and the related regulatory Reference Paper. In addition, Primus makes numerous allegations regarding Telstra's conduct and attributes blame to Telstra for every flaw that it alleges in the Australian regulatory regime.

In these reply comments, Telstra addresses the primary allegations made in the Primus filing to correct the many factual inaccuracies and misstatements that have been made.

Introduction

Contrary to what is suggested by Primus, the Australian regulatory regime is fully compliant with the FTA. It has provided timely access and interconnection to Telstra's public telephone network on reasonable and non-discriminatory terms by Primus as well as

many other competitors. Moreover, in doing so, the Australian regime often imposes more intensive regulation on Telstra than that faced by incumbent telecommunications carriers in the U.S.

At the outset, it is disappointing that Primus has repeated erroneous statements it has previously made about Telstra and the state of competition in the Australian telecommunications industry. In its filing, Primus repeats its claim that Telstra does not face competition from cable networks.[1] This is simply not the case. Telstra does face extensive infrastructure-based competition from cable networks, as well as from newer technologies such as 3G High Speed Packet Access (HSPA) mobile networks and other types of wireless broadband. This competition was previously detailed in our Reply Comment to USTR of January 2006,[2] and the extent of competition has only increased since then. For example, Vodafone recently announced the acceleration of its plans to upgrade its 3G mobile network to deliver high-speed coverage to 95% of the Australian population.[3] A similar expansion of 3G HSPA coverage has been announced by Singtel Optus, which additionally plans to upgrade the speed of its cable network that is available in Sydney, Melbourne and Brisbane.[4] The Seven Network, the highest-rating of Australia's three free-to-air commercial television networks[5] which controls consumer VoIP provider "engin"[6] and is the exclusive distributor of TiVo in Australia,[7] has recently acquired the wireless broadband operator Unwired[8] giving it exclusive rights to WiMAX spectrum covering close to two-thirds of the Australian population.[9]

In addition, on June 18, 2007, it was announced that OPEL, a joint venture between Singtel Optus and Elders, had secured AUD958m funding from the Australian federal government, to build, manage and promote a broadband infrastructure network composed of

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[1] Primus filing, p2.
[2] Telstra Reply Comment, January 13, 2006, at pp3-4.
[3] Vodafone media release, December 11, 2007. *Available at* www.vodafone.com.au
[4] Singtel Optus media release, December 17, 2007. *Available at* www.optus.com.au
[5] "Seven wins television ratings year," *Sydney Morning Herald*, December 2, 2007, www.smh.com.au/news/National/Seven-wins-television-ratings-year/2007/12/02/1196530472321.html
[6] Engin claims the largest market share of consumer VoIP providers in Australia, see: www.engin.com.au/about/about.aspx
[7] "Seven and TiVo Inc Sign Strategic Partnership to Distribute TiVo Products and Services in Australia and New Zealand," May 30, 2007, www.mytivo.com.au/resources/press/tivopressrelease.pdf
[8] Letter from Seven Network Limited to the Company Announcements Office, Australian Stock Exchange, "Takeover bid for Unwired Group Limited ABN 85 008 082 737 Close of offer period and notification of relevant interests," December 19, 2007, available from www.asx.com.au; and "Seven Network Limited - proposed acquisition of Unwired Group Limited," Australian Competition and Consumer Commission, www.accc.gov.au/content/index.phtml/itemId/801936/fromItemId/751046
[9] See www.unwired.com.au/about/background.php

a regional transmission backbone as well as ADSL2+ wireline and WiMAX wireless technology, that is intended to provide broadband services to rural and regional areas of Australia.[10]

In short, contrary to the impression delivered by Primus in its filing, Telstra is facing ever-increasing broadband competition in the Australian telecommunications market. Telstra uses the remainder of this filing to address each of the eight major claims made by Primus in its December 21 filing.

Australia's Industry Structure Is Not Flawed Or Inherently Anticompetitive

Primus again claims that Telstra is in a unique position, compared to former incumbent operators in other countries, by being a majority shareholder of the Foxtel pay TV network.[11] Telstra has already addressed this statement in a previous filing to USTR detailing why the Australian situation is by no means unique,[12] and does not repeat its statements here, except to make it clear that Primus has again misrepresented the factual situation. Furthermore, contrary to the impression given by Primus, other Australian telecommunications companies can and do participate in pay TV services.

The Australian Competition and Consumer Commission (Australia's independent competition regulatory body) (ACCC) has accepted court-enforceable undertakings from Telstra, Singtel Optus, Foxtel and Austar, to ensure that Pay TV operators have access to content, Telstra's cable network and Foxtel's set-top boxes. For example, Foxtel has agreed not to licence 3G wireless distribution rights for pay content exclusively to Telstra or its other major shareholders, and has agreed that it will not acquire exclusive rights to a broad array of premium content.[13] For its part, Telstra undertook to make ten additional channels on its cable network available for use by parties other than Foxtel or Telstra.[14] For example, in October 2007 the well-known international sports content provider, Setanta, launched a sports channel on Foxtel cable by means of this access regime.[15] Singtel Optus and Austar similarly provided undertakings to the ACCC. These undertakings ensure that Pay TV content is freely available to channel operators wishing to supply it.

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[10] See for example the summary of the funding, its purpose and OPEL's plans, at www.optus.com.au including the media releases by Optus of June 18, 2007 and June 27, 2007.
[11] Primus filing, p3.
[12] Telstra Reply Comment, January 13, 2006, p5.
[13] See the ACCC's summary and related links at: www.accc.gov.au/content/index.phtml/itemId/754959/fromItemId/754957
[14] See the ACCC's summary and related links at: www.accc.gov.au/content/index.phtml/itemId/754961/fromItemId/754957
[15] See: http://au.setanta.com/

Second, it is fallacious for Primus to suggest that global experience demonstrates that the only way to address the alleged market power of Telstra is through structural separation. To the contrary, the Organisation for Economic Co-operation and Development (OECD) has studied the risks and benefits of structural separation and recommended against it being used as a regulatory remedy.[16] In the recent policy reform package proposed by the European Commission (EC), the EC clearly indicated that functional separation is only a remedy of last resort.[17] National Regulatory Authorities (NRAs) will be required to obtain the Commission's approval before its imposition, for which they will have to submit evidence that all other regulatory remedies have persistently failed to achieve effective competition. The EC openly states that functional separation is not appropriate in many cases. For example, the EC has drawn attention to a recent case in the Netherlands where the Dutch NRA considered that functional separation would be inappropriate for that country in view of evolving infrastructure competition. Contrary to an implication contained in the Primus filing, there is no current proposal to structurally separate SingTel either.[18]

There is nothing to suggest that a situation exists in the Australian telecommunications market requiring a regulatory measure of last resort such as that advocated by Primus. Instead, the focus should be on the existing regulatory regime which gives access to bottleneck services. As mentioned above, Australia's regulatory regime provides such access, and in fact is more onerous than that provided in other countries.

U.S. carriers other than Primus that are active in the Australian market praise Australian regulation. For example, in September 2007, the trade journal *Communications Day* quoted a Verizon Business executive as saying that it had launched its managed Voice over IP (VoIP) services in Australia ahead of any Asian market because of Australia's favourable regulatory environment for VoIP.[19] The following month, under the headline "Australia top investment destination for Verizon Business," *Communications Day* reported that Verizon was increasing its Australian presence. It quoted a senior Verizon executive as saying, "We have a lot of scale, the country is big, there is continuing economic growth and we have a big share of customers."[20] The *Australian Financial Review* reported that Verizon's Australian business had achieved revenues of AUD 178 million in 2006 with an

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[16] OECD, "The Benefits and Costs of Structural Separation of the Local Loop," DSTI/ICCP/TISP(2002)13/FINAL, November 3, 2003, www.oecd.org/dataoecd/39/63/18518340.pdf

[17] See the home page for the EC's proposed reforms and the links on that page: http://ec.europa.eu/information_society/policy/ecomm/tomorrow/index_en.htm

[18] See the detailed discussion on p10 of this filing.

[19] Tim Marshall, "Australia first in line for Verizon managed VoIP services," *Communications Day* September 19, 2007, p4, quoting Verizon Asia Pacific Voice Solutions Manager Sean Barkley.

[20] Tim Marshall, "Australia top investment destination for Verizon Business," *Communications Day*, November 9, 2007, p1, quoting Verizon Vice-President for Global Network Planning Ihab Tarazi.

after tax profit of AUD 12.4 million, and that AT&T's revenue from its Australian business had increased by 14 percent in 2006.[21]

Indeed, Telstra noted in its 2006 Reply Comment to USTR that Primus earns about 30 percent of its global revenues from its Australian business.[22] Primus' September 2007 filing with the U.S. Securities and Exchange Commission (SEC) depicts its Australian business as being in good health, with net income from its Australian operations, especially its DSL business, continuing to grow.[23] The U.S. SEC filing by Primus also detailed plans for "significant" additional capital spending in Australia, which is hardly consistent with the misleading and bleak picture of the Australian telecommunications market that Primus paints in its USTR filing.[24]

It is risible that Primus should allege "a collapse in the competitive marketplace" to USTR in its filing[25] and then, three weeks later, issue a release to its investors titled, "Primus Telecommunications Announces Favorable Regulatory Determinations In Australia." The release praises the ACCC's decisions in respect of "mandated competitive wholesale pricing … critical to Primus's ability to continue to offer Australian consumers a choice of outstanding high speed broadband services at attractive and affordable prices [and that] allow us to make investment decisions to expand our broadband service portfolio and coverage and offer higher speed broadband services."[26]

Telstra agrees with Primus that Australia has experienced "broadband retardation" (as Primus describes it). However, the reason for Australia's current mediocre 12th place in the OECD's international broadband penetration rankings[27] is attributable to the failure of the Australian regulatory regime to provide sufficient commercial incentive for any market participant to roll out a fibre-to-the-node or fibre-to-the-home network. It is the below-cost wholesale rates mandated by the ACCC which have distorted pricing signals, robbed the

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[21] Renai LeMay, "Departures hit big telcos' local operations," *Australian Financial Review*, July 5, 2007, p22.
[22] Telstra's Reply Comment, January 13, 2006, p7 and fn24.
[23] Form 10-Q filed with the SEC by Primus Telecommunications Group, Inc. for the quarterly period ended September 30, 2007.
[24] *Ibid.*, see also Tracy Lee, "Primus Telecommunications expands operations," *Australian Financial Review*, September 13, 2007; see also media release by Primus, "Primus Australia Boosts Fibre Optic Network Capacity Ten Fold," September 13, 2007, www.primus.com.au/PrimusWeb/AboutUs/News/Primus+Australia+Boosts+Fibre+Optic+Network+Capacity+Ten+Fold.htm
[25] Primus filing, p1.
[26] Media Release by Primus dated January 9, 2008, http://phx.corporate-ir.net/phoenix.zhtml?c=67300&p=irol-newsArticle&ID=1096207&highlight=
[27] Penetration per 100 inhabitants, see OECD Broadband Portal: www.oecd.org/sti/ict/broadband

market of its long-term incentives, and retarded broadband development.[28] The Australian Labor Party pledged to address the need for improved broadband as one of the major policy issues it put before the electorate in its successful election campaign,[29] and there is every indication that the new Australian government intends to follow through on this pledge. Telstra submits that it would be curious if USTR considered Australia's "broadband retardation" to be a matter for commentary under the rubric of Australia's FTA and WTO commitments: after all, the U.S. performs even more poorly than Australia in terms of broadband penetration as measured by the OECD. Earlier this month the Chairman of the U.S. Federal Communications Commission (FCC) attributed the poor performance of the U.S. to flaws in the OECD's methodology in adjusting for differences in size and population density.[30] If this analysis is correct, it would be all the more true of Australia.

In summary, the foregoing industry issues are matters of domestic regulatory policy in both the U.S. and Australia, and are not apt for USTR attention under the Section 1377 process. What is more relevant for USTR, is that U.S. (and Australian) telecommunications operators face perennial barriers to entry and discriminatory treatment in jurisdictions other than Australia, particularly developing countries as detailed for example in the filing by COMPTEL.[31] Telstra submits that Primus' fanciful allegations in regard to Australia in fact damage U.S. interests by diverting USTR attention away from those jurisdictions on which USTR should be focusing.

Operational Separation Has Not Failed

Primus again claims that Australia's operational separation plan is "woefully inadequate," and that it allows Telstra to abuse its market position to provide "anti-competitive favourable terms to its affiliates." This claim is false.

The Australian Government's operational separation requirements are stringent, and compliance with them is a statutory condition of Telstra's carrier licence. Telstra is required to maintain separate staff, locations and functions for its wholesale and retail business units. In accordance with its Final Operational Separation Plan (OSP), Telstra has developed

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[28] These issues are discussed in detail at Telstra's *Broadband Australia Campaign* home page, which can be found at: www.nowwearetalking.com.au/Home/Page.aspx?mid=282

[29] See Australian Labor Party media release, "Building Australia's Prosperity - Federal Labor's New National Broadband Network," March 21, 2007, www.alp.org.au/media/0307/mscomfinloo210.php

[30] Kevin Martin quoted in his public appearance at the International Consumer Electronics Show, Las Vegas, by Benjamin J. Romano, "Broadband: unlocking access," *Seattle Times*, January 9, 2007, available from: http://seattletimes.nwsource.com/cgi-bin/PrintStory.pl?document_id=2004114889&zsection_id=2003907475&slug=cesmartin09&date=20080109

[31] Filing by COMPTEL, December 21, 2007.

comprehensive strategies for information security (Telstra's Information Security Strategy), the provision of services (Service Quality Strategy), the provision of information (the Information Equivalence Strategy), and customer response (Customer Responsiveness Strategy) to its wholesale customers. These strategies ensure that Telstra will provide the same level of response to its wholesale customers as it does to itself.[32]

Since the Operational Separation plan was approved by the previous Minister on June 23, 2006, Telstra has reported on its compliance with the requirements. The Operational Separation Annual Compliance Report for 2007 details Telstra's compliance with the ministerial requirements. In addition, Telstra's compliance with operational separation is subject to an external audit each year.

Contrary to Primus' unsubstantiated claims that it has been subject to discriminatory treatment, and that Telstra has imposed "unreasonable" terms and conditions upon Primus, the Operational Separation Plan ensures that Telstra supplies its services to Primus (and other carriers) on commercial terms equivalent to those upon which it supplies the same services to itself. For example, Telstra's Service Quality Strategy requires Telstra to provide equivalent services in relation to call traffic information, billing information, access to exchanges, fault detection, and service activation and provision. Moreover, Telstra's Price Equivalence Framework under operational separation ensures that efficient competitors can replicate Telstra's retail price offers. This is achieved through comprehensive imputation testing of Telstra's internet and voice telephony offers.[33]

In addition, as detailed in the Operational Separation Annual Compliance Report, Telstra has addressed any issues regarding the security of confidential wholesale customer information through its Information Security Strategy. The key obligations imposed by this strategy are that Telstra must ensure that confidential information relating to wholesale customers is not disclosed to others, and also to provide mandatory training to all Telstra staff in relation to the Information Security Strategy.

Telstra's operational separation requirements apply in addition to Telstra's pre-existing statutory obligation to provide access to numerous "declared services" to other companies in an equivalent manner to that which it provides those services to itself under the Standard Access Obligations (SAOs) in the Australian *Trade Practices Act*.[34] As pointed out

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[32] Details of Telstra's operational separation strategies are *available at* http://telstrawholesale.com/dobusiness/customer-commitment/operational-separation.htm

[33] Telstra's reporting on the price equivalence framework can be found at www.telstrawholesale.com.au/dobusiness/customer-commitment/operational-separation.htm

[34] Division 3 in Part XIC of the *Trade Practices Act* 1974 (as amended).

by Telstra in its 2006 Reply Comments to USTR, the SAOs of themselves ensured full compliance with Articles 12.7 and 12.8 of the FTA. There is nothing in Article 12.7 or any other provision of the FTA that requires Australia to impose an operational separation regime in respect of the former incumbent telecommunications operator.[35]

In sum, Australia's current regulatory regime is fully compliant with the non-discrimination provisions required by the WTO and FTA. Were USTR to credit Primus' claim that Article 12.7 of the FTA requires structural separation, which it plainly does not, then logically USTR should call for the U.S. Congress to impose identical remedies on U.S. telecommunications carriers – especially those that recently have been significantly enlarged and vertically integrated through merger activity.

Finally, it is not accurate to depict Telstra as earning supernormal profits, particularly compared to other sectors of the Australian economy to which investment is diverted when investment in telecommunications infrastructure is discouraged due to below-cost rate regulation by the ACCC. Comparing sectoral performance of S&P/ASX 2000 industries reveals that while telecommunications services rose by 12.88 percent in 2007, this was only slightly higher than the related industry of software and services (12.08 percent), but far lower than the energy industry (28.18 percent) or retailing (55.71 percent) to give just two examples.[36]

Telstra is far from being the indolent monopolist depicted by Primus. To the contrary, in 2007 Telstra continued its deployment of the world's largest and fastest HSPA 3G wireless network, the NextG™ network, a AUD 1 billion investment. The commercial risks taken by Telstra have been rewarded by a world-leading level of wireless data revenue growth.[37] Any profit that Telstra makes for its shareholders has been earned, in an aggressively competitive market.

The Competition Notice and Enforcement Regime Has Not Collapsed

Primus relies on self-fuelled press speculation to make the claim that the ACCC will "scrap use of competition notices," following Telstra's successful challenge to the most recent competition notice issued by the ACCC.[38] This is no more than an unsubstantiated

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[35] For a fuller discussion of Australia's compliance with Articles 12.7 and 12.8, see Telstra's Reply Comments, January 13, 2006, pp8-9.
[36] "Performance of S&P/ASX 200 Industries," *Australian Financial Review*, January 2, 2008, p28.
[37] Brad Smith, "Data Booms Down Under," *Wireless Week*, January 1, 2008.
[38] Primus filing, p4.

rumor. There has been no formal statement or comment made by the ACCC that would provide any weight to Primus' claim.

Part IV of the Australian *Trade Practices Act* provides for firm sanctions against a business that engages in anti-competitive conduct. This Part applies to all corporations. However, Part XIB of the Act imposes even more stringent sanctions and additional anti-competitive conduct provisions upon firms operating in the Australian telecommunications sector. This includes the power of the ACCC to issue competition notices. The mere fact that Telstra successfully challenged a recent failure by the ACCC to properly exercise these powers in no way derogates from their general availability or enforceability. The Australian Federal Court ruled that Telstra had been denied procedural fairness and natural justice in a specific instance where the ACCC had issued a competition notice.[39] The fact that the ACCC, in this instance, failed to carry out its functions in accordance with the relevant principles of administrative law (which are similar to those applicable in the U.S.), does not in any way impugn the relevant provisions of Part XIB of the Act. Furthermore, the ACCC has published and maintains Telecommunications Competition Notice Guidelines on its website,[40] a clear indication as to the continuing relevance of this regulatory instrument.

Telstra's Proposed ULLS Prices Are Compliant With FTA And WTO Obligations

Primus has again claimed that an averaged Unbundled Local Loop Service (ULLS) price is somehow in violation of Australia's commitments to prevent anti-competitive cross-subsidisation under Article 12.8 of the FTA.[41] This is simply not the case. Telstra has already responded in detail to this allegation in its 2006 and 2007 Reply Comments to USTR, and has explained that seeking an averaged ULLS price is actually consistent with, and may even be required by, this Article of the FTA.[42] As a legal matter, Article 12.8 of the FTA does not mandate deaveraged pricing of access services; nor do the provisions in the WTO Reference Paper which this article reflects. By objecting to an averaged ULLS price, Primus is doubtless trying to ensure that it enjoys the continued benefit of below-cost access in metropolitan areas, without having to contribute to the cost of providing services to regional and rural Australia.

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[39] *Telstra Corporation Limited v ACCC (No 3)* [2007] FCA 1905; and *Telstra Corporation Limited v ACCC (No 2)* [2007] FCA 493. *Available at* www.austlii.edu.au/au/cases/cth/federal_ct/2007/1905.html and www.austlii.edu.au/au/cases/cth/federal_ct/2007/493.html respectively.
[40] See www.accc.gov.au/content/index.phtml/itemId/756884/fromItemId/756870
[41] Primus filing, p6.
[42] Telstra's Reply Comment, January 13, 2006, p10; and Telstra's Reply Comment, January 11, 2007, pp3-7.

Telstra's objective of seeking a nationwide averaged ULLS price is designed to ensure that those companies that enjoy the benefit of access to ULLS in urban areas, contribute towards the cost of providing services to remote customers. This is consistent with Telstra's obligation to provide basic telephone services (including line rental services) to its rural and regional customers at the same prices it provides similar services to its metropolitan customers. Telstra reiterates its concerns that the current approach of the ACCC to ULLS pricing does not address this issue, and that it allows others access to Telstra's infrastructure at below-cost prices. USTR itself suggested in its 2006 Section 1377 Report that Australia needed to review its approach to universal service.[43] The previous Australian government initiated a review of Australia's Universal Service Obligation in June 2007;[44] however this process is still ongoing. In the interim, Primus has been a recent beneficiary of the ACCC's below-cost pricing determinations, expecting to receive in excess of AUD 7.7m in payments by Telstra as a result of the ACCC's decision to determine final ULLS prices at AUD 14.30 per local loop per month in Band 2 metropolitan areas, and its decision to impose a price of only AUD 2.50 per loop per month for the Line Sharing Service (LSS).[45] Telstra notes that a ULLS price of AUD 14.30 for 2007/8 represents a reduction of almost 60% in the regulatory price of ULLS over seven years (a compound annual reduction of -12%).[46]

While it is unsurprising that Primus would seek to prolong this windfall commercial benefit gifted to it by the ACCC, it cannot place any reliance on Australia's FTA or WTO commitments to do so. Despite having had the opportunity to review Telstra's Reply Comments to USTR for the past two years, particularly Telstra's 2007 Reply Comment

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[43] As cited in Telstra's Reply Comment, January 11, 2007, p5.

[44] See: www.dbcde.gov.au/communications_for_consumers/telephone_services/fixed_telephone_services/industry_issues_policies_and_legislation/the_universal_service_obligation_uso

[45] Primus media release, "Primus Telecommunications Announces Favourable Regulatory Determinations in Australia," Wednesday January 9, 2008. *Available at* http://phx.corporate-ir.net/phoenix.zhtml?c=67300&p=irol-newsArticle&ID=1096207&highlight=

[46] See ACCC, "Unconditioned Local Loop Service - Access Dispute Between Telstra Corporation Limited (access provider) and Primus Telecommunications Pty Ltd (access seeker) (monthly charges) - Statement of Reasons for Final Determination" - Version published under section 152CRA of the *Trade Practices Act* 1974, December 2007, p2. *Available at* www.accc.gov.au/content/item.phtml?itemId=808322&nodeId=4e4d1bc1ac88ac46d7ad12d84cd69051&fn=Primus-Telstra%20ULLS%20(monthly)%20final%20determination%20-%20Dec%2007%20-%20Statement%20of%20reasons.pdf. In March 2002 the ACCC estimated that an appropriate price for Band 2 ULLS in 2000/01 was $35 per month. See: ACCC, "Pricing of unconditioned local loop services (ULLS)," Final Report, March 2002, p49, *available at* www.accc.gov.au/content/item.phtml?itemId=753844&nodeId=67d981616f9b33f50cb4fa62d116638b&fn=Pricing%20of%20unconditioned%20local%20loop%20services%E2%80%94final%20report.pdf

which cited the relevant portions of the U.S.-Mexico Panel decision addressing the meaning of "cost-oriented" pricing, Primus has made no attempt to address those points. Telstra submits that Primus' repeated regurgitation of the same allegations in respect of Articles 12.7 and 12.8 of the FTA, year after year, without making any effort to anchor those allegations in the relevant FTA and WTO obligations or to address Reply Comments submitted in previous years disproving any trade law basis for such allegations, amounts to an abuse of the Section 1377 process by Primus.

Access To Services Is Available On Reasonable Terms And Conditions

The Australian regulatory regime ensures that Primus has access to numerous "declared services" on reasonable terms and conditions. The access regime for telecommunications ensures that, if parties are unable to agree to the terms and conditions upon which access to declared services are supplied, then they have easy access to arbitrated determinations of the terms before the ACCC.

In resolving disputes subject to arbitration, the ACCC is able to make interim determinations, and in fact is even allowed to make such determinations without observing the requirements of procedural fairness in relation to price-related terms and conditions.[47] Terms and conditions of this kind have been made by the ACCC for the majority of regulated services acquired by Primus. The ACCC frequently uses this power to impose at or below cost access prices on Telstra while the dispute is being determined. In addition, the ACCC can and usually does back-date final determinations under section 152DNA of the Australian *Trade Practices Act*, as it did recently for Primus in the LSS and ULLS disputes against Telstra (mentioned above).

There is simply no basis for alleging that the Australian regulatory regime is stifling competition or even threatening the existence of competing ISPs, as claimed by Primus. The ACCC maintains firm oversight of access prices; disputes are resolved by arbitration (often in the access seeker's favor); and Telstra's competitors routinely take full advantage of ACCC-determined price and non-price terms and conditions. The substantial number of access disputes filed in the last three years also evidences competitors' faith in and ability to use the regulatory framework.

[47] Section 152CPA(3) of the Australian *Trade Practices Act* 1974.

Telstra Provides Competitors Access To Its Exchanges

Telstra has taken considerable steps to allow competing carriers to collocate their equipment at its local exchanges. A standard process has been developed, which is well known and understood by carriers, and which ensures Telstra complies with its regulatory obligations. The process is speedy and reasonable in managing requests by all parties for collocation of facilities. Within a matter of days after receiving an initial request, Telstra initiates the process, which generally culminates in a settled position on collocation within approximately three months. Telstra provided weekly reports to the ACCC over a period of seven years from August 2000 and during this time no issue was raised by the ACCC regarding inadequacies or problems with Telstra's process.[48]

However, space within buildings is always limited in nature. This is no different for Telstra's exchange buildings. Demand for space within Telstra's exchanges has been very strong in many areas, and as a result, a small number of exchanges are either full, or nearly full. For further details, see Telstra Wholesale's website (www.telstrawholesale.com.au), where lists of exchange buildings that are known to be at capacity are updated on a monthly basis.[49] However, lack of space in an exchange does not prevent Telstra's competitors from obtaining access to nearby sites as an alternative solution.

It should also be noted that the process for collocation at an exchange is largely a self-build process for Telstra's competitors: that is, the access seeker (not Telstra) is responsible for the design and construction elements of the process. Delays in fulfilling an access request are more frequently caused by the access-seekers themselves, rather than by discovery of a capacity constraint.

Primus' filing contains a specific complaint regarding Telstra's apparent denial of access to approximately 30 exchanges. However, these complaints have largely arisen because Primus has been slow to take advantage of the opportunity to collocate its equipment, with the available space already being provided to many other carriers who acquired space ahead of Primus. Telstra's process for providing access to its exchanges

[48] This reporting was pursuant to a mandatory obligation to provide the ACCC with details regarding access to Telstra's exchanges pursuant to the ACCC's Unconditioned Local Loop Access Record-Keeping and Reporting Rules, dated August 2000. These Record-Keeping Rules were repealed effective from August 2007. A copy of the RKR is available on the ACCC's website at www.accc.gov.au

[49] Note that Telstra does not and cannot reasonably be expected to audit each of its many thousands of exchanges on a monthly basis for capacity constraints. Notification of an exchange being "capped" (to use the industry terminology) may in some instances only occur once an access request has been received and the available space in the exchange checked – noting that an exchange may be "capped" for either rack space or main distribution frame space or both.

employs a strict queuing policy: parties wishing to gain access are treated on a "first come first served" basis. Telstra can hardly be held responsible for Primus' tardiness in acquiring space at premises where there has already been strong demand, and where space is necessarily limited.

Telstra's FTTN Proposal Will Not Destroy Competition

Primus makes numerous unfounded, inappropriate and incorrect allegations regarding Telstra's proposal to deploy fibre to the node (FTTN).

It is clear that if FTTN is introduced, then there will be a resultant change in technology that will affect the ability of Telstra and its competitors to use copper-based technologies such as xDSL and ULLS in the FTTN footprint. This does not differ from the situation that other countries are facing.

However, Telstra's FTTN proposals include a commitment to provide competitors with access to a bitstream service on terms equivalent to those available to Telstra's own retail business unit. The details of the proposed "High-speed Access Service" (HAS) were set out in Telstra's Reply Comment to USTR in January 2007,[50] and hence need not be repeated here. Telstra has no intention of seeking to stifle or prevent competition in an FTTN world, and has made this abundantly clear. Nor however does Telstra require the assistance of its competitors in building an FTTN. Telstra's competitors are welcome to build competing networks. In this respect though, while Primus supports a competing consortium (the Group of Nine or "G9") FTTN proposal as "pro-competition" and "consumer oriented,"[51] the G9 proposal would compulsorily cut over all of Telstra's copper lines at the point of interconnection. This would force Telstra to obtain access from the G9 in order to provide services back to Telstra's own customers. It would also prevent Telstra from being able to effectively manage and enhance its own network. Primus' pleas to ensure an appropriate process and outcome regarding any FTTN deployment by Telstra are based on a gross misrepresentation of Telstra's proposal.

The Singapore government has never considered nor is currently considering structural separation of SingTel, as Primus implies;[52] instead, the current Singapore government project to which Primus appears to refer, the Next Generation National Broadband Network or "NextGen NBN," envisages a new standalone fibre network which does not rely on compulsory acquisition of the existing public switched telephone network up

[50] Telstra's Reply Comment, January 11, 2007, pp8-10.
[51] Primus filing, p9.
[52] Primus filing, fn1 on p3.

to the point of interconnection, as Primus is seeking in Australia.[53] If Primus' arguments about the inherently anti-competitive nature of vertical integration of the former incumbent were true, then this requirement for structural separation of the new infrastructure-based competitor would in fact act to SingTel's benefit – since it can continue with business as usual while its new competitors operate on a structurally separated model.

It is ironic that Primus should accuse Telstra of engaging in "campaigns of mistruths"[54] when it is Primus that has misled USTR in its current and previous filings, most notably Primus' outrageous claim that Telstra "does not face competition from cable networks" when, as noted, more than 2.2 million Australian households are passed by competing cable networks. USTR may also recall Primus' astonishing statement in its December 2005 filing that it was "the only global telecommunications company in Australia."[55] Equally specious is Primus' claim that Telstra will engage in "secret negotiations to obtain concessions from government officials." The Minister, Senator Conroy, has stated that, "We expect that there will be much public commentary, jockeying and lobbying from parties as they work to convince the Government that they are best placed to build the new network and seek the terms that are most favourable to them."[56] Primus appears to have no difficulty in gaining access to the Minister and officials of the Department of Broadband, Communications and the Digital Economy. It is an extraordinary slur on the probity of the new Australian government to suggest that it would provide "concessions" in "secret negotiations."

Telstra Has Not Engaged In Speculative Or Vexatious Legal Challenges

Primus makes numerous allegations regarding the legal challenges Telstra has invoked in respect of the Australian regulatory regime: it claims that the litigation is "designed to jeopardize regulatory proceedings"; that Telstra's actions "serve to stifle and suppress competitor's investment and business programs," and that Telstra is "misusing the legal process in order to unsettle the independent regulator."[57] These allegations are false.

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[53] The key features of the proposed NextGen NBN are set out in a media release by the Singapore Infocomm Development Authority, "Singapore's Ultra-high Speed Digital Highway Ready by 2015 - Next Generation National Broadband Network Will Spur Flourish of Services," December 11, 2007, www.ida.gov.sg/News%20and%20Events/20071211184512.aspx?getPagetype=20

[54] Primus filing, p1.

[55] As referenced by para 2.3 of Telstra's Reply Comment, January 13, 2006.

[56] Media release by the Minister, "Government committed to FTTN national network," December 7, 2007, www.minister.dbcde.gov.au/media/media_releases/2007/government_committed_to_fttn_national_network

[57] Primus filing, pp9-10.

Telstra has commenced legal proceedings in the High Court of Australia, arguing that Part XIC of the *Trade Practices Act*, as it applies to the ULLS and LSS, is invalid because Part XIC does not contain an effective right to "just terms" compensation for the acquisition of ULLS and LSS. Telstra, and everyone else in Australia, is guaranteed the constitutional right not to have their property acquired under Commonwealth laws without being paid just terms compensation. Telstra believes that the prices set by the ACCC under Part XIC for ULLS and LSS are significantly less than just terms compensation for those services. Telstra further believes that the current mechanisms in Part XIC do not even enable Telstra to seek the just terms compensation to which it is entitled under the Constitutional guarantee.

These proceedings are neither speculative nor vexatious. They are based on sound legal arguments regarding the nature of Australia's constitutional safeguards – safeguards which Telstra believes are simply not provided for in the telecommunications access regime in respect of the ULLS and LSS. The fact that Australia has a rule of law underpinned by a written Constitution is no different to many other countries, including the U.S. That the Australian Government legislation must find its ultimate authority for legislation in the Constitution is bedrock to such a system. USTR should applaud Australia's commitment to a legal system of this nature.

Telstra has also sought judicial review of several of the ACCC's final determinations in arbitrations. Judicial review is an important mechanism to ensure the quality and transparency of administrative decision-making. As a matter of principle, any firm subject to economic regulation, particularly rate of return regulation, should be given the opportunity to seek review of a regulatory determination from a court of competent authority. This is to ensure, amongst other things, that the independent regulator has been careful and thorough in its application of the criteria and requirements set out in the legislation. It is about ensuring correct decisions and correct processes. Anything to the contrary would expose the regulated firm to arbitrary and unjustifiable administrative decision-making.

Accordingly, Telstra's decision to bring these actions can only be regarded as reasonable and balanced, and reflects no more than the operation of a workable judicial system and the appropriate separation of powers that is enshrined in Australian legislation.

It would be absurd for USTR to credit Primus' allegations given the level of judicial scrutiny to which administrative action by the FCC is subject in the U.S. Indeed, as USTR is well aware, U.S. local exchange carriers – both incumbents and new entrants – have routinely challenged the FCC's actions in federal court since the passage of the 1996 *Telecommunications Act*.

It is also telling that Primus confines its business operations to jurisdictions such as the U.S., Canada, Western Europe and Australia, where the rule of law applies and recourse to the courts to review administrative action is taken for granted. For Primus to now criticise Australia's constitutional and legal system, simply because Telstra has availed itself of the same protections available to Primus under that system, demonstrates the hypocrisy of the Primus submission.

Conclusion

Telstra thanks USTR for the opportunity to address the inaccuracies contained in the comments docketed by Primus. Telstra regrets that Primus has chosen to again use the forum provided by the Section 1377 proceedings to make numerous unsubstantiated allegations against Telstra, as well as to generally bring into question the conduct of the newly elected Australian government in setting policy for regulation of the Australian telecommunications market. Telstra is even more disappointed that Primus has repeated some of the allegations it had made in previous filings and, in so doing, has wholly disregarded Telstra's previous submissions correcting Primus' misstatements. The inaccuracies and speculative allegations made by Primus in its filing are so extensive that Telstra has not sought to correct each and every one in this filing, but instead has confined itself to merely addressing Primus' most egregious allegations.

At bottom, Primus has not submitted any factual or legal basis for thinking that Australia has failed to meet its telecommunications trade obligations under any provisions of the FTA or the WTO agreements.

Sincerely,

/s/
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