

December 15, 2006

**VIA E-MAIL**

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

**RE: AUSTRALIA, CHINA, COLUMBIA, FRANCE, GERMANY, INDIA, ITALY, JAMAICA, JAPAN, MEXICO, SPAIN AND SWEDEN: WTO General Agreement on Trade in Services**

Dear Ms. Blue:

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 3106 ("Section 1377"), COMPTTEL hereby responds to the request of the Office of the United States Trade Representative ("USTR") for comments regarding compliance with U.S. telecommunications trade agreements.

COMPTTEL has a 25-year history as the largest and oldest association in the United States representing competitive facilities-based carriers, providers using unbundled network elements and interconnection, global integrated communications companies, and their supplier partners. COMPTTEL has over 300 members of all sizes and profiles that provide voice, data and video services in the United States and around the world. COMPTTEL is headquartered in Washington, D.C.

COMPTTEL members share a common objective: to create and sustain true competition in the telecommunications industry, both domestically and internationally. With the development of liberalized regulatory regimes and competitive market conditions in a growing number of countries, many COMPTTEL members have made significant investments in telecommunications facilities and services outside the United States. COMPTTEL appreciates the opportunity to present its members' experiences in a number of countries which are members of the WTO or have a bilateral free trade agreement with the United States. The countries identified in this report represent places where COMPTTEL members are doing business and encountering market barriers. Many other countries present even more difficult entry problems for COMPTTEL members but are not included because they have no or extremely limited obligations under existing trade agreements.

Since last year, COMPTTEL members have seen significant improvement in some of the countries included in last year's 1377 filing. For example, we are pleased to report that the Spanish regulator has addressed all but one of the issues raised in our filing last year. In Australia, the government has gone through with its plans to privatize Telstra, and the regulator also has taken steps to address Telstra's anti-competitive conduct, though there are still some issues pending. In New Zealand, the Parliament amended the New Zealand Telecommunications Act to require Telecom New Zealand to reorganize itself into three operational divisions. The aim of the amendments is to promote competition by ensuring non-discriminatory access to Telecom New Zealand's wholesale services and network.

Unfortunately, there has been absolutely no movement on the Chinese market access issues highlighted last year and Germany has enacted amendments to its Telecom Law which violate its WTO obligations.

The two issues which COMPTTEL has highlighted for a number of years continue to adversely affect competition in the marketplace. In some countries, regulators have acted to bring fixed-to-mobile termination rates closer to cost but this problem has not disappeared. In fact, Mexico has changed its mobile charging regime to a calling-party-pays system with charges that far exceed cost and are discriminatory. Mobile carriers are able to extract above-cost charges because of their monopoly on termination with the end-user. Mobile termination rates continue to be significantly above cost in most of Europe, in Japan and in Peru, Chile and Uruguay and Australia, even though the regulator in Australia has moved to bring these charges more in line with underlying costs. As described in COMPTTEL's 2005 filing, above-cost mobile termination rates violate the Reference Paper obligations of these countries.

Similarly, some regulators have acted to curb excessive pricing and discriminatory provisioning of local access leased lines and require access to unbundled high speed network elements. But this remains a fundamental problem in Germany. Local leased lines are the critical path that U.S. carriers need to reach their customers around the world. Competitive carriers continue to experience difficulty obtaining local access lines from dominant carriers in a timely manner at cost-oriented prices and on non-discriminatory terms and conditions (including provisioning and service levels). This problem continues to exist in France, Germany, Italy, Spain, Portugal, Indonesia, China and India. As described in COMPTTEL's 2005 filing, failure to provide local leased lines on reasonable and non-discriminatory terms and conditions is a violation of these countries' obligations under Section 5 of the GATS Telecom Annex.

The problem of leased lines and broadband access is not just a problem overseas. It is a problem in the United States. The Federal Communications Commission ("FCC") has slowly removed interconnection and access obligations from the incumbent network owners, shutting off network access by permitting incumbent providers to act as network

gatekeepers.<sup>1</sup> Actions by the FCC should not act as a restraint on USTR's ability to vigorously enforce the obligations of our trading partners. Instead, USTR should use the firm legal ground provided by the U.S.-Mexico Panel Report<sup>2</sup> to push for removal of illegal barriers to competition and active implementation of WTO and other trade obligations. At the same time, USTR should exercise its authority as the U.S. government agency charged with interpreting and enforcing trade obligations to provide guidance to the FCC on U.S. obligations.

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

COMPTEL is pleased to report that the Australian Government has successfully implemented its plans to privatize Telstra, and no longer holds a controlling share. In addition, the Australian Competition and Consumer Commission ("ACCC") this past year rejected Telstra's attempt to seek nationwide wholesale price averaging for unconditioned local loops (ULL). Price-averaging would have resulted in prices in urban areas that were not cost-oriented in violation of the FTA and Reference Paper obligations for cost-oriented interconnection. Telstra appealed the ACCC's decision, but so far no decision has been issued. If the ACCC's decision is reversed, Australia would be in breach of its obligations under the FTA and the Reference Paper. At this juncture, though, no action is needed by the USTR.

COMPTEL members are closely watching development in Australia regarding regulation of Telstra's roll-out of a Fiber-to-the-Node (FTTN) network. Telstra has been seeking a regulatory holiday, similar to that sought by Deutsche Telekom. Telstra recently announced that it could not reach agreement with the regulator on the terms and conditions for access to the new network and therefore had decided not to proceed with its FTTN plans. COMPTEL is concerned that Telstra's threat to cancel the FTTN build out is merely a ploy to put pressure on the government to lighten and even remove regulation of that network.

If the ACCC gives in to this pressure and fails to require Telstra to offer interconnection and unbundled network elements on the FTTN network at cost-oriented wholesale prices to its competitors, then Australia would be in violation of the FTA and the Reference Paper. Both require a major supplier to provide interconnection to essential facilities on a cost-oriented basis and also to provide unbundled network elements on the same basis.

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<sup>1</sup> A newly published study by the U.S. General Accounting Office details competitive problems in the U.S. market. "Telecommunications: FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services," GAO-07-80 (November 2006).

<sup>2</sup> Mexico - Measures Affecting Trade in Telecommunications Services, WT/DS/204/8 (June 9, 2004) ("U.S.-Mexico Panel Report").

COMPTEL urges the USTR to pay close attention to the government's actions in the near future to ensure that it does not take actions contrary to its trade obligations that give Telstra an unfair competitive advantage.

### **CHINA WTO VIOLATIONS GATS, Reference Paper and GATS Telecom Annex**

There has been absolutely no progress made in addressing the issues raised by COMPTEL last year. Even though the six-year phase in period for China's WTO commitments will shortly expire, there is still no telecommunications law, no independent regulatory authority -- and tellingly, little foreign investment owing to the substantial market access barriers that exist.

Specifically, COMPTEL is concerned about the burdensome licensing requirements imposed on foreign carriers that wish to enter China's telecom market, the apparent unavailability of resale service and the lack of an independent regulator.

All of these concerns are exacerbated by the fact that the WTO commitments signed in late 2001 only provide for limited market access and national treatment. Even if China fully complies with its existing WTO commitments, foreign service providers can only own 50% of a value-added service provider, while they are limited to 49% of a fixed-line basic services provider. China has no binding commitment to further market liberalization beyond December 2007.

China's market-segmented WTO commitments are particularly restrictive in a sector characterized by convergence of technologies and the disappearance of service distinctions. Frustration is compounded by the inability of the Chinese Government to enact the long-promised telecommunications law. Thus, the market is without a legal framework for telecommunications regulation and potential market entrants are faced with limited entry options and outdated services classifications.

In addition to COMPTEL's concerns about market entry, COMPTEL is equally concerned that China is not requiring its incumbent suppliers to provide access to leased lines at reasonable and non-discriminatory terms and conditions as required by the GATS Telecom Annex. China's non-liberalized market is characterized by inflated costs for international bandwidth, local loops and other parts of the network and inefficient provisioning. COMPTEL respectfully requests that the USTR encourage the Chinese government to implement the pro-competitive regulatory policies that will promote U.S. entry into the Chinese telecommunications market, thereby ensuring open markets in accordance with GATS, GATS Telecom Annex, and the Reference Paper.

**Excessive Domestic Regulation and Invalid Market Entry Restrictions -- Burdensome Licensing Requirements.** China's existing licensing requirements effectively prevent members of COMPTEL from entering the Chinese market through excessive capitalization requirements, extremely long approval processes and limited access to joint venture partners. China requires foreign-invested telecom companies

wishing to engage in “basic telecom services” to have a minimum registered capital of RMB 2 billion (about \$240,000,000 USD). In its 2006 Report, USTR said China had begun discussing changes to this requirements but nothing has happened. COMPTTEL notes that, in addition to being a serious bar to entry, the requirement makes little sense with the new technology available. COMPTTEL members appreciate the efforts of USTR and the Department of Commerce to work with the Chinese Government to lower the capitalization requirements and urge continued effort.

While the capitalization requirement for value-added services is much less, entry is still exceedingly difficult. U.S. carriers (like all other non-Chinese providers) must enter into joint venture agreements in order to provide value-added services in China. Yet the existing process for applying for an equity joint-venture is tedious, requiring at least four different government agency approvals over a 12 month period.

China’s existing licensing requirements also provide that a foreign carrier wishing to provide “basic telecommunications services can only do so by entering into a minority partnership with one of the six state-owned Chinese telecommunications providers.” This limitation on joint venture partners, however, does not appear in China’s Schedule of Specific Commitments under GATS Article XVI and is therefore invalid. This requirement effectively limits market entry to six foreign carriers, as there is little evidence that Chinese carriers intend to enter into partnership with multiple foreign providers. This requirement presents an unreasonable barrier to marketplace entry and competition and it should be eliminated.

**Failure to Allow Resale.** The apparent prohibition on resale remains a concern. When China joined the WTO, its value-added services commitment included resale. China cannot simply reclassify services to avoid its WTO obligations.

Members of COMPTTEL prefer to enter foreign markets in the most commercially reasonable manner – either via use of their own facilities or via resale. In many countries, resale is the most efficient means of entry and for China, some members of COMPTTEL believe that, at least initially, resale presents the most commercially viable means of entry. It is critical, then, that the regulatory ambiguity regarding the status of resale should be clarified and foreign operators be allowed to provide service through resale as initially envisioned by China's WTO commitments.

**Lack of Independent Regulator.** Many of the concerns COMPTTEL has raised in these comments are exacerbated by the lack of an independent regulator. The sector is regulated by the Ministry of Information Industry (“MII”). Under China’s WTO commitments, China is required to establish an impartial regulatory authority that is independent from any telecom operator. However, as COMPTTEL has previously argued in its 1377 filings, the MII is not “independent” because one of its primary functions continues to be operational oversight of the state-owned enterprises, and the senior regulatory officer and the Chairman/CEO of the enterprises are appointed by the Chinese Government. Absent an independent regulator, COMPTTEL does not believe the specific concerns raised in these comments, as well as COMPTTEL’s broader concerns - to ensure

fair and equal treatment of foreign-based telecom operators – can ever be adequately addressed. Accordingly, COMPTTEL urges USTR to encourage the Chinese government to implement a regulator that possesses the independence required by the WTO and necessary to implement the commitments which China undertook upon joining the WTO.

The lack of independence is demonstrated by the total absence of transparency in the operation of MII in policy-making, licensing and operational terms.

**Inflated Costs.** As a consequence of the lack of competition and absence of beneficial regulation in the China market, U.S. carriers face inflated costs for international bandwidth, local loops and other parts of the network, and inefficient provisioning. For example, for leased lines, carriers must rely on the two dominant carriers of domestic fixed line infrastructures - China Netcom and China Telecom. These carriers do not have a provisioning and pricing regime with clearly defined and measurable service targets. As a result, leased line provisioning is costly, subject to lengthy and inconsistent lead times, and provisioned without service level assurances for reliability. Moreover, the costs are unreasonable: local loops cost more than international private line circuits. COMPTTEL urges the USTR to encourage the Chinese government to implement the pro-competitive regulatory policies that will promote U.S. entry into the Chinese telecommunications market, thereby ensuring open markets in accordance with GATS, GATS Telecom Annex, and the Reference Paper.

#### **COLOMBIA WTO VIOLATIONS GATS**

**Unreasonable Domestic Regulation.** COMPTTEL members continue to be prevented from entering the Colombia market for international service as a result of the immense licensing fee of approximately \$150 million. As explained in previous COMPTTEL filings, the size of this fee is inconsistent with Colombia's GATS obligations.

COMPTTEL members understand that USTR is negotiating a free trade agreement with Colombia and, in this context, the licensing fee might be reduced. Those negotiations should not keep USTR from pressing Colombia for immediate repeal of the licensing fee. The fee keeps competitors out of the market and is a WTO violation. USTR should take action now to make Colombia remove such a barrier.

#### **FRANCE WTO VIOLATIONS Reference Paper and GATS Telecom Annex**

The situation in France has not improved since COMPTTEL's filing last year. New entrants continue to face multiple barriers that are in clear violation of the WTO Reference Paper and GATS Telecom Annex. For the past year, France Telecom ("FT") has been publicly discussing the need for a regulatory holiday, such as the one promised to Deutsche Telekom, although FT has not officially asked the regulator for such a decision.

**Lack of Independence of the Regulator.** COMPTTEL remains concerned that the L'Autorité de Régulation des Communications Electroniques et des Postes ("ARCEP"), is not independent of the government. It effectively shares oversight of telecommunications

with the Finance Ministry, which continues to be the largest single shareholder in FT. This arrangement results in confusion and a lack of transparency, in violation of Section 5 of the Reference Paper.

The lack of independence is demonstrated by the way the regulator acts. In order to approve a FT retail offer, the regulator bases its judgment on information, such as costs, provided by FT. Unlike other regulators, ARCEP does not use standard industry assumptions in its analysis. Another example is the delay in proceedings necessary to establish accounting separation. While a public consultation is on-going, accounting separation will not take effect until sometime in 2007.

ARCEP's failure to act quickly on accounting separation creates numerous problems. It makes it impossible to arrive at cost-oriented pricing, as required by the Reference Paper. With FT's acquisition of Wanadoo, an ISP, and Transpac, a leased line provider, an absence of accounting separation also makes it impossible to determine whether these subsidiaries are receiving preferential pricing.

**Discriminatory and Burdensome Interconnection Requirements.** FT has not changed its significant build out requirements for all of its wholesale offers. Specifically, operators need to have a point of presence in several regions (between 18 and 22) in order to benefit from a national offer. Operators that are focused on business customers and that do not need to cover all the French territory cannot make use of the "national" offer and are therefore charged significantly higher prices. So while FT and its affiliates can serve all customers in all regions at "national" prices, competitive carriers must pay higher -- and therefore discriminatory -- prices for the same wholesale services.

**Lack of Access to and Discriminatory Pricing and Provisioning of Leased Lines.** In France, consistent with EC policy, local access leased lines are included in FT's Reference Interconnection Offer ("RIO"). Under the Reference Paper, interconnection to these leased lines should be at cost-oriented rates and on non-discriminatory terms and conditions. As noted in COMPTTEL's comments for the past two years, onerous migration conditions and price squeeze effects still result in no viable local access interconnection offer in France. Additionally, FT continues to stonewall on provision of a wholesale interconnection offer for DSL bit stream. In contrast, FT has made available an exceedingly attractive retail offer both in terms of price and quality of service in both asymmetric digital subscriber line ("ADSL") and soon symmetric digital subscriber line ("SDSL") variants. FT's failure to offer the wholesale variation puts the competitive carriers even further behind. In some case, FT justifies its price differentials as a result of volume discounts. But since such information is unavailable, it is impossible to know whether price differentiation results from volume discounts or cross-subsidization.

FT appears to favor Wanadoo and Transpac in terms of quality of service commitments and provisioning times. FT is able to offer its retail customers repair times and guarantees on downtime, which it does not make available for wholesale services and therefore to competitive carriers. The French regulator has failed to act to prevent FT from engaging in these kinds of discriminatory practices, in contravention of France's WTO obligations under the Reference Paper and the GATS Telecom Annex.

## **GERMANY WTO Violations Reference Paper and GATS Telecom Annex**

Germany continues to present one of the most difficult markets for competitive carriers, largely because of the German Government's inability (or lack of desire arising from its continuing ownership interest) to impose full interconnection and access obligations on Deutsche Telekom ("DTAG"), the major supplier in almost all the relevant telecommunications services markets. Totally disregarding Germany's WTO obligations, on November 30, the Lower Chamber of the German Parliament ("Bundestag") and on December 15, the Upper Chamber ("Bundesrat") approved, changes to the German Telecommunications Law that allow DTAG to refuse access to its competitors to its new high-speed network. As described below, this new law could violate Germany's WTO obligations.

In the meantime, because of the possibility of legislative action, the German Federal Network Agency ("BNetzA") has failed to take any action to compel DTAG to provide interconnection and unbundled network elements to its optical fiber network, in violation of its WTO obligations.

Last year, COMPTTEL asked USTR to take more decisive action to address the widespread failure of the German Government to live up to its WTO commitments. USTR should make it clear to the German Government that if the amendments are implemented, USTR will seek consultations with Germany under Section XXII of the GATS. In addition, COMPTTEL urges USTR to consider whether the four-year delay in implementing WTO obligations regarding access to bitstream access and leased lines has nullified and impaired the benefits expected by the United States at the time the WTO entered into force with respect to the Telecom Annex and from January 1, 1998, when Germany's Reference Paper obligations entered into force.

### **Failure to Provide Interconnection and Unbundled Network Elements to DTAG's Broadband Network**

Over the past four years, DTAG has enjoyed a *de facto* regulatory holiday on wholesale access to its broadband network. This has resulted from BNetzA's failure to impose on DTAG, with respect to its high-speed broadband network, the Reference Paper obligation to provide interconnection (including access to unbundled network elements) to that network on cost-oriented and non-discriminatory terms and conditions.

**VDSL "Regulatory Holiday."** DTAG's high-speed optical fiber network has been operational in a number of metropolitan areas since August -- and announced more than one year ago. While BNetzA identified the market as subject to *ex ante* regulation and DTAG as dominant in that market, it has failed to order DTAG to offer interconnection and unbundled network elements on that network at cost-oriented wholesale prices to its competitors. This failure to act -- by itself -- constitutes a violation of Germany's obligation under Section 2 of the Reference Paper to provide interconnection to essential facilities on a cost-oriented basis and also to provide unbundled network elements on the same basis.



This failure stems from political pressure which seeks to establish a more favorable regulatory framework for DTAG. Political pressure prevailed in late November, when the German Parliament adopted a number of amendments to the German Telecommunications Law that will effectively exempt DTAG from *ex ante* regulation of its optical fiber network (referred to as "VDSL"). The amendments create a definition of "new market" and go on to state that "new markets" should not be subject to *ex ante* regulation. While the definition of "new market" is not entirely clear, it appears to focus on the ability of the provider to reach large user groups or the mass market. The amendments give BNetzA the power to decide if a "new market" exists in light of goals to promote efficient infrastructure and support innovation. But the criteria for determining the existence of a new market are skewed in favor of a finding that benefits DTAG.

These amendments, if implemented, could violate Germany's WTO commitments. Section 2 of the Reference Paper -- and the obligation to provide interconnection and unbundled network elements at cost-oriented rates. In determining whether a carrier is a major supplier, the WTO member must first identify the relevant market. The WTO Panel in the Mexico - Measures Affecting Trade in Telecommunications Services<sup>3</sup> clearly stated that a WTO Member must apply a "demand substitution" test in drawing the market boundaries.<sup>4</sup> The amendments would change the analysis so it focuses instead on the provider and takes into account social policy goals. For instance, if BNetzA concludes that VDSL will "enhance" DTAG's "ability to perform" or will extend the "reach" of the services, this would be sufficient to establish that a new market exists.<sup>5</sup> This is not a WTO-compatible analysis. By applying such an analysis, BNetzA would violate Germany's WTO obligations.

In its 2006 Review, USTR noted with concern the possibility of a "regulatory holiday" for DTAG, calling it an "apparent endorsement of temporary monopoly power." That "apparent endorsement" is now law in Germany. USTR must strenuously object to implementation of the amendments and seriously consider requesting consultations with Germany under Article XXII of the GATS.

**Bitstream Access to DTAG's DSL network.** While much of the focus has been on the Parliamentary regulatory holiday granted to DTAG for its VDSL network, BNetzA has effectively provided an additional regulatory holiday to DTAG with respect to its broadband network. In late 2005, BNetzA finally completed its market review of the wholesale broadband access market, concluding that DTAG had significant market power at both the ATM and IP interconnect level. Going further, BNetzA held that

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<sup>3</sup> U.S.-Mexico Panel Report.

<sup>4</sup> *Id.* at ¶ 17.152.

<sup>5</sup> The amendments are broad enough to permit DTAG to request a regulatory holiday for all network elements that it converts to IP-technology, since theoretically IP-technology "enhances" performance and reach of services. See Position Papers and releases of the German Competitive Carriers Association ("VATM") at [www.vatm.de/english/publications](http://www.vatm.de/english/publications). Such a conclusion would completely eliminate any interconnection obligations, in direct violation of the Reference Paper commitments.

DTAG was abusing its market power by refusing to offer a viable wholesale broadband product for bitstream access.

BNetzA issued a “remedies” decision in September 2006 with regard to IP bitstream, requiring DTAG to grant access to these unbundled network elements and publish a reference interconnect offer within three months. DTAG has appealed BNetzA’s decision to the Administrative Court of Cologne. On December 13, DTAG released a reference interconnect offer for IP bitstream access, which is woefully inadequate. Over a year late, the offer only enables carriers to use a small portion of bandwidth (up to 16 megabits) for their services and does not provide sufficient quality of service guarantees.

In addition, BNetzA has so far failed to issue a remedies decision with regard to the other access method, “ATM-Bitstream.” This means significant delay in implementation because any BNetzA decision on ATM-Bitstream still has to be reviewed by the European Commission.

It has been at least four years since competitive carriers have been asking for wholesale access to DTAG’s broadband products. Failure to gain such access results from Germany’s failure to cause DTAG, a major supplier, to provide interconnection to unbundled network elements at cost-oriented rates, as required by Section 2 of the Reference Paper. In fact, COMPTTEL members believe that even if Germany can be considered to have taken some of the actions required, the failure to produce the required result in a four-year period effectively nullifies and impairs the benefits the United States expected for its nationals from Germany’s inclusion of the Reference Paper in its GATS commitments and could give rise to action under Article XXIII (3) of the GATS.

**Excessive Fixed-to-Mobile Termination Rates and Anti-Competitive Pricing.** Germany has made some progress in lowering fixed-to-mobile termination rates but COMPTTEL members believe the rates are still not cost-oriented, as required by Section 2 of the Reference Paper. Moreover, the process by which the new rates were set was not transparent.

In 2006, BNetzA determined that all four mobile network operators had significant market power in the termination market. BNetzA further found that prices were in excess of cost and ordered operators to lower their prices. As a result, mobile termination charges were reduced between 15 and 25 percent to 0.088 EUR per minute (\$0.116) for GSM900 operators and 0.0994 EUR per minute (\$0.132) for GSM1800 operators.

BNetzA, however, did not arrive at these rates by reference to DTAG’s costs and did not follow the European Commission’s approach to create a cost-model to determine the rates. Instead it based its decision on rates charged by operators in other EU member states. However, many European regulators have determined that fixed-to-mobile termination rates are not cost-oriented. Using these rates as benchmarks, therefore, does not satisfy the Reference Paper requirement that interconnection prices be cost-oriented.

In addition to BNetzA's failure to mandate cost-oriented prices, the manner in which BNetzA conducts interconnection proceedings is totally lacking in transparency and predictability. Important factors, such as reference countries and weighting methodology change from proceeding to proceeding and from year to year. It appears at times, as if the countries and methodology change depending on the outcome that BNetzA seeks.

The USTR should continue to monitor BNetzA's progress in this area. While lack of transparency is not a WTO-violation *per se*, it makes it difficult to determine whether BNetzA's actions are WTO-compliant. USTR should encourage BNetzA to make its methodology clear and consistent and publish its reasoning.

### **Failure to Provide Access to Local Leased Lines on Reasonable Terms and Conditions.**

Despite statements by USTR in its 2006 Report that it would urge Germany to grant competitive carriers access to combinations of high-capacity trunk lines and lower capacity end-user links, such access is still not available.

In 2006, BNetzA finally completed its analysis of the market for leased lines, separately evaluating a market for trunk lines and access lines. The result, unfortunately, was a determination that DTAG did not have significant market power in either market for leased lines in excess of 2Mbit/s and therefore access was not required. This result was subject to extensive criticism from the European Commission and competitive carriers as not consistent with a proper competition analysis and BNetzA withdrew its decision. While the withdrawal of the decision is welcome, it means even more delay in forcing DTAG to provide access, as required by Section 5 of the Telecom Annex. It has now been nearly four years since competitive carriers have been seeking access to these leased lines.

As with bitstream access, year-after-year delay effectively nullifies and impairs the benefits that the United States expected to flow to its nationals from Germany's WTO commitments.

**Lack of Independent Regulator and Transparency.** BNetzA is subject to continuing political pressure, lacks independence from German government direction, is biased in favor of DTAG and fails to act in a transparent manner. The situation has not improved at all. The passage of the amendments to the Telecom Law noted above is a perfect example of the lack of an independent regulator and absence of impartiality.

The German government and DTAG remain strongly intertwined since the German Government still owns (directly and through a state-owned entity) 31.7%<sup>6</sup> in DTAG. Under German law, BNetzA is subordinate to the Federal Ministry of Economics and is bound by the Ministry's instructions, even if the decisions of its ruling chambers

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<sup>6</sup> At the time of COMPTTEL's 1377 filing last year, Germany owned a little over 38% of DTAG.

cannot be overruled by the Ministry. The appointment of the BNetzA president and the vice presidents is still a political decision of the German Government. In contrast, the Bundeskartellamt, the Federal Competition Authority, is not subject to directions from the Ministry. There should not be any difference in treatment of the Competition Authority, except for a desire to maintain control over the decisions of BNetzA.

## **INDIA WTO VIOLATIONS      GATS and GATS Telecom Annex**

COMPTEL applauds the Government of India's actions over the past year to allow foreign-owned carriers to enter the Indian market. For the first time ever, India has issued a National Long Distance/International Long Distance (NLD/ILD) license to a company that is majority foreign-owned. Nonetheless, India maintains market barriers that violate its WTO obligations. The licensing fee for long distance services of US\$550,000 is unreasonable. This is particularly the case because a carrier actually pays \$1.1 million since in practice it must obtain a national long distance license and an international long distance license and a separate fee is charged for each. With the exception of Colombia, COMPTEL members are not aware of any other WTO member that maintains such a high license fee.

While it is not a WTO violation, COMPTEL also notes that the cap of 74% foreign ownership in a holder of a NLD or ILD license places additional costs and burden on foreign carriers. It requires foreign companies to establish new companies and incur significant administrative costs and delays entry. COMPTEL hopes that as part of any new round of WTO negotiations, USTR encourages India to drop all foreign ownership limitations.

**Improper Market Access Restrictions.** The Government of India has imposed a number of conditions on licensees which raise significant competitive concerns and will inhibit rapid development of the telecom sector. COMPTEL believes that these conditions fall squarely within the category of "unreasonable" domestic regulation, in violation of Article VI of the GATS and of India's national treatment obligation because the conditions unfairly penalize foreign carriers. These conditions have been temporarily deferred and a decision is expected early in 2007 as to whether the conditions set out below will be modified. COMPTEL would encourage the USTR to urge the Indian government to modify the conditions in a manner that are "reasonable" and will not prevent competition in the sector or discourage foreign investment.

Among the conditions is a prohibition on managing the Indian portion of the network from outside India or transferring network, accounting and user information outside India. These conditions place foreign carriers at a commercial disadvantage relative to Indian operators since they will have to establish a network operations center exclusively for the Indian market at significant cost and maintain duplicate records in India. While the GATS permits a WTO member to adopt measures to protect its national security, these conditions are unreasonable. There is no possibility, such as in the United States, to demonstrate that the network configuration does not raise national security concerns.

Another condition relevant to the NLD/ILD licenses appears to violate India's WTO market access commitments by prohibiting international transit routing of domestic India traffic. Although India made minimal market access commitments, it did permit some competitive entry. India's WTO schedule, however, contains no restrictions on the manner in which service can be provided. In contrast, the schedule of Canada made clear that domestic traffic was subject to routing restrictions. In the absence of routing restrictions in its WTO schedule, India cannot now impose such restrictions. To do so would violate its WTO market access commitments.

There have been reports that licensing conditions will depend on the amount of foreign investment in the operator (with lesser conditions applicable if foreign ownership is less than 49%). Whether or not this kind of action actually violates India's WTO commitments, it is certainly discriminatory and not in line with WTO principles.

### **ITALY WTO VIOLATIONS      Reference Paper and GATS Telecom Annex**

**Failure to Provide Network Access at Cost-Oriented Prices.** The Italian regulator has failed to carry out the obligations in the Reference Paper with respect to ensuring that a major supplier provides interconnection on cost-oriented, non-discriminatory terms and conditions.

Access charges and the risk of margin squeeze in Italy remain extremely high compared to other countries thus making it extremely difficult for alternative operators to compete on an equal footing with Telecom Italia.

Although some players have substantially invested in providing service using unbundled local loop elements, significant barriers remain. The Italian regulator has failed to impose sufficient access regulation for other wholesale access products such as wholesale pricing for DSL circuits, line rentals, terminating circuits and ethernet access.

As noted in past COMPTTEL 1377 filings, a key contributing factor to the market access problems is the regulator's failure to implement an appropriate cost model for Telecom Italia. The current RIO for Telecom Italia is based on old audited regulatory accounts (the most recent audit of regulatory accounts made available by the regulator are from 2001). Although more recent audited regulatory accounts are available, the regulator has not yet acted on this new information. Competitive carriers have also been refused access to these most recent regulatory accounts, making it impossible to judge whether a finding of cost orientation is correct. Until the Italian regulator arrives at new pricing based on the most recent available information and that information is available for review, Italy is failing to abide by its Reference Paper commitment to require Telecom Italia to provide cost-oriented interconnection and unbundled network elements.

In addition, the regulator has decided that Telecom Italia only has to offer key products, such as wholesale line rental and bitstream access to DSLAM in areas where local loop unbundling is not available. This action allows Telecom Italia to decide

whether it wishes to allow competition through local loop unbundling or other wholesale access services. Giving Telecom Italia this decisional power does not comport with Italy's WTO obligations. Nothing in the Reference Paper allows a major supplier to pick and choose the kind of competition it allows.

**Lack of Access to and Discriminatory Pricing and Provisioning of Leased Lines.** Provisioning and quality assurance still remain significant issues for competitive providers in Italy. The quality of service supplied by Telecom Italia is insufficient, but more important it is below that which is offered to its own retail division. For example, Telecom Italia provides poorer quality service guarantees for its wholesale xDSL services than it provides to its retail customers. This discriminatory behavior violates Italy's obligation under Section 5 of the GATS Telecom Annex to provide access to leased lines on non-discriminatory terms and conditions.

#### **JAMAICA WTO VIOLATIONS      Reference Paper**

The surcharge imposed by the Government of Jamaica in late 2005 to fund broadband access for schools and libraries remains in effect, notwithstanding that it does not comply with Jamaica's WTO obligations. on incoming international traffic to fund universal service objectives. The surcharge is discriminatory and not competitively neutral because it applies only to in-bound international service and not to out-bound international service. On the surface it looks non-discriminatory and competitively neutral because it applies to all in-bound international traffic. So foreign carriers and Jamaican carriers are both subject to the surcharge for terminating foreign traffic on the Jamaican network. But the benefits of the surcharge go only to Jamaican carriers. In effect the Jamaican carriers recoup the surcharge through receipt of universal service funds in Jamaica. The surcharge thus treats foreign carriers in a discriminatory manner and is not competitively neutral.

Second, it is probably "more burdensome than necessary." Even though the surcharge has been in effect for about a year, there is still no information about how the amount was determined or how the money is being spent. So it is not possible to determine whether the surcharge is actually related to the funding needed.

#### **JAPAN WTO VIOLATIONS      Reference Paper and GATS Telecom Annex**

Since COMPTTEL began filing in the 1377 review process, the Government of Japan has made tremendous changes to facilitate a competitive telecommunications market. We understand that the Government of Japan has initiated a review of the regulatory framework in light of the switch to IP networks. Unfortunately, the Government will not be reviewing the structure of NTT until 2010. The two efforts should be conducted simultaneously so that NTT and competitive carriers receive the same treatment in any new regulatory scheme. Any new regulations should also ensure that the Reference Paper interconnection requirements apply to NTT's IP network.

We remain concerned about discriminatory pricing by NTT East and NTT West for local access lines, in violation of Japan's commitments under the Section 2 of the Reference Paper. The 2003 Telecommunications Law eliminated the distinction between Type 1 and Type 2 carriers, but the incumbent carriers continue to charge based on those distinctions. That means that companies purchasing substantially similar services are paying different prices. This is a direct violation of Section 5 of the GATS Telecom Annex, which requires non-discriminatory access to the public switched network.

### **MEXICO WTO VIOLATIONS      Reference Paper**

Mexico took a huge step backwards this year, adopting a calling-party-pays ("CPP") system for national and international mobile calls which has resulted in interconnection rates significantly above cost and rampant discrimination among carriers. Mobile termination rates vary depending on where termination occurs but, at a minimum, rates to terminate international calls have increased by at least \$0.14 per minute. This increase will result in payment of hundreds of millions of dollars by U.S. consumers to Mexican carriers.

At the same time, legal proceedings in Mexico have resulted in a non-uniform environment for inter-carrier compensation; some Mexican carriers are currently not within the CPP system and calls handled by these carriers that are terminated on mobile phones are rated differently. The pricing of calls with identical points of origination and termination can thus vary significantly based on the routing of traffic among Mexican carriers, resulting in discriminatory treatment of carriers.

By adopting the CPP system, Mexico is allowing Telmex to recoup the revenue that it lost by reducing wireline international termination rates as a result of the U.S.-Mexico WTO dispute. Mexico should not be allowed to avoid the consequences of the panel ruling in this way. Mexico's application of the CPP system violates its WTO obligation to abide by the panel ruling and its commitments under the Reference Paper to maintain cost-oriented and non-discriminatory terms and conditions for interconnection. USTR should take strong action in response.

### **SPAIN WTO VIOLATION      GATS Telecom Annex**

The members of COMPTTEL are pleased to report that most of the market issues raised in last year's filing have been resolved in a manner designed to promote competition. The Spanish regulator, La Commission del Mercado de las Telecomunicaciones ("CMT"), changed its initial plans and has maintained most of Telefónica's interconnection obligation and, in the case of bitstream access, even imposed additional obligations. The remaining issue in Spain is the excessive prices for local private lines. Prices remain among the highest in Europe, between 248% and 328% higher than the European Union benchmark. These prices restrict access to the public switched network and are not reasonable, as required by Section 5 of the GATS Telecom Annex.

## **SWEDEN WTO VIOLATION      Reference Paper and GATS Telecom Annex**

**Failure to require access to leased lines.** The matter has further deteriorated since last year's COMPTTEL filing. Though the Swedish regulator, Post-och telestyrelsen (PTS) completed its market analysis and mandated that the incumbent, TeliaSonera, offer local private lines at cost-oriented rates, TeliaSonera has made no improvement to its rate structure. Additionally, though more than 12 months have passed since the final market review decision was taken, PTS has not made any significant progress on enforcing the regulation. The failure of TeliaSonera to drop its rates and PTS to enforce its order creates significant market access problems for competitive carriers wishing to offer service in Sweden because TeliaSonera has a virtual monopoly (over 89%) in the wholesale leased lines market.

Under the GATS Telecom Annex, Sweden has an obligation to provide access to leased lines on "reasonable" terms and conditions. TeliaSonera's prices for low bandwidth leased lines services are among the highest in Europe. The absence of reasonable rates is a material barrier to entry in Sweden and a violation of Sweden's obligations under the GATS Telecom Annex.

**Failure to provide unbundled network elements.** As is the case with leased lines, the situation regarding access to unbundled network elements has deteriorated since last year's filing. As reported last year, PTS completed its market analysis of the wholesale bitstream market (DSL) in November 2004, which would require TeliaSonera to offer unbundled network elements at cost-oriented and non-discriminatory prices.

TeliaSonera challenged the PTS findings in court, resulting in a stay of implementation of the finding. As a result of various court actions, for a brief period during 2006, the stay was lifted and TeliaSonera was forced to present a reference interconnection offer for bitstream access. That terms in the offer were materially worse and more expensive than those provided TeliaSonera's own downstream operation. Unfortunately, before PTS had a chance to review the reference interconnection offer, further court action resulted in another stay of implementation.

Consequently, more than two years after the PTS found that TeliaSonera has to provide cost-oriented and non-discriminatory market access, TeliaSonera is still free to discriminate against competitive carriers and charge prices significantly above cost. A further aggravating factor is that the only wholesale product that TeliaSonera does make available to competitive carriers (at a price which COMPTTEL noted in last year's filing was many times higher than cost) will be withdrawn from the market beginning in June 2007 and completely unavailable after June 2008. As a result, competitive carriers will have no access to these essential facilities at any price. In the current situation, Sweden is in violation of its obligation to provide access to unbundled network elements at cost-oriented and non-discriminatory prices. If the situation does not improve over the next year, Sweden will likely be in violation of its obligation to provide access to the essential facilities of a major supplier, as required by Section 2 of the Reference Paper.



The members of COMPTEL ask USTR to monitor the enforcement efforts of PTS to ensure that local access leased lines and unbundled high speed network elements are made available in the manner required by Sweden's WTO obligations.

### **CONCLUSION**

For the reasons described above, COMPTEL urges the Office of the U.S. Trade Representative to work aggressively to address with the governments cited the fundamental issues presented by excessive mobile termination rates, above-cost and discriminatory provision of local access leased lines and failure to provide unbundled high speed network elements, as well the other issues set out herein. USTR should take appropriate actions to ensure that these countries ensure fair and non-discriminatory market conditions in accordance with their respective trade commitments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Earl W. Comstock', with a long horizontal flourish extending to the right.

Earl W. Comstock  
Chief Executive Officer