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January 10, 2003

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, D.C. 20508

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

Dear Ms. Blue:

On behalf of AT&T Corp. ("AT&T"), I am pleased to respond to the request of the United States Trade Representative ("USTR") for comments pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. Section 3107, concerning implementation of all trade agreements regarding telecommunications products and services, including the World Trade Organization ("WTO") Basic Telecommunications Agreement and the related General Agreement on Trade in Services ("GATS").

AT&T greatly appreciates USTR's important work to encourage WTO members to meet their commitments in basic telecommunications and value-added network services under the GATS. USTR's efforts to ensure compliance with those commitments have improved foreign market opportunities for the U.S. telecommunications industry. For this year's Section 1377 review, AT&T comments on harmful acts, policies or practices in breach of telecommunications trade agreements by: Argentina, China, Dominican Republic, Mexico, and Peru.

I. ARGENTINA

In 2002, USTR expressed strong concern with significantly above-cost mobile wireless termination rates in the European Union Member States and Japan. As USTR noted, the burden of these above-cost charges on U.S. operators and consumers may soon reach billions of dollars annually.[1] Similar concerns are raised by the wholesale mobile termination rates in Argentina, which also greatly exceed cost-oriented levels and thus breach the requirement of the Reference Paper for cost-oriented and non-discriminatory interconnection rates.

Earlier this year, Argentina's Secretary of Communications issued Resolution 124/2002, which requires modifications to the national numbering plan in order to permit carriers to separately identify domestic-originated calls that will terminate on mobile handsets, from international-originated calls that will terminate on mobile handsets.[2] In anticipation of this new requirement that will provide an ability to distinguish the origin of all mobile terminating traffic, both Telecom Argentina and Telefonica de Argentina have notified correspondents that from 1 January 2003 they will apply an increased rate of US$0.18 per minute for international calls terminating on mobile networks. This will be a more than 100% increase from the current mobile termination rates of US$0.09 per minute peak / US$0.07 off-peak. Moreover, these carriers propose to continue to charge the much lower rates of US$0.09 peak / US$0.07 off-peak for the domestic-originated calls terminating on mobile networks.

Argentina has committed in the WTO to ensure that major suppliers of basic telecom services provide interconnection at cost-oriented and reasonable rates. Specifically, Argentina has committed to unlimited market access for cross-border supply, including inbound international calls.[3] Likewise, Argentina committed to the Reference Paper, including the Section 2.2 requirement to ensure that major suppliers provide cost-oriented and non-discriminatory interconnection rates.[4] Both Telecom Argentina and Telefonica de Argentina are major suppliers in the market for wholesale termination of mobile calls on their individual networks, given that if one must call an end user on their mobile networks, there are not sufficient supply or demand side substitutes for their termination services.

These above-cost mobile termination surcharges contravene Argentina's WTO Reference Paper commitments under the GATS. First, the high mobile termination rates for inbound international calls are not cost-oriented as required by the Reference Paper. One clear demonstration that the charges do not reflect cost is that whereas the international termination charges will double, the domestic charges will remain the same at approximately US$0.08 per minute – which likewise is still above-cost.[5] No cost-justification has been provided to support the increased charges for international termination. Second, because this new higher charge imposed on international calls

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[1] Office of the United States Trade Representative, *Results of the 2002 "Section 1377" Review of Telecommunications Trade Agreements*, at p.1 (Apr. 3, 2002).
[2] Secretary of Communications, *International Originating Calls Terminating on Mobile Telephones*, Resolution 124/2002 (Aug. 16, 2002).
[3] World Trade Organization, Fourth Protocol to the General Agreement on Trade in Services, *Argentina – Schedule of Specific Commitments Supplement 1*, at 2 (May 7, 1997).
[4] *Id*. at 9.
[5] Cost studies in other jurisdictions suggest that a competitive charge for fixed-to-mobile termination should be around US$0.065 per minute, relying on LRIC plus equal proportionate mark-up for common costs. *See, e.g.*, *Review of the Charge Controls on Calls to Mobiles*, Issued by the Director General of Telecommunications on Competition in Mobile Voice Call Termination and Consultation on Proposals for a Charge Control, at Annex 4 ¶51 (Sept. 26, 2001) (UK).

will greatly exceed the charge that will continue to be imposed on domestic calls, the charge also fails to meet the Reference Paper requirement for non-discriminatory interconnection rates.

II. CHINA

Among China's WTO commitments to liberalize telecommunications services, it agreed to a six-year schedule for phasing in direct foreign participation in value-added network services and basic telecommunications, and also agreed to be bound by the obligation in the Reference Paper to establish an independent, impartial regulatory authority and a pro-competitive regulatory regime. Although China has taken positive steps to implement its WTO commitments to liberalize telecommunications service, its potential as a competitive market is not being realized due to an overly narrow interpretation of market access opportunities to foreign participants, and a lack of an independent regulator.

Market Access: Presently, market entry is being delayed by the Ministry of Information Industry's ("MII") extremely narrow views of what constitutes a value-added service, for purposes of international value added network service licensing. The regulator has construed the meaning of value-added services in its WTO commitment schedule so narrowly that any meaningful offerings, such as IP-VPN services demanded by global enterprises, are excluded. Furthermore, the definition applied to foreign investors is much more narrow than the list of value-added services contained in China's own Telecom Regulation (State Council Order 291), that applies to domestic-owned operators. Without a change in MII interpretation, the net effect of current licensing criteria is to define foreign-invested value added service operators out of competition.

Independent and Impartial Regulator: China is far from achieving its Reference Paper Section 5 commitment to establish an independent regulator. The Chinese Government owns and controls all of the major operators in the telecommunications industry, and the MII still occupies dual roles as protector of state enterprise operators and as industry regulator. The pending Telecom Law could improve this situation by mandating a regulatory body that is organizationally separate from government agencies that are focused on developing the state-owned telecommunications industry. Because this new law has been pending for a long time, finalizing and adopting this should be a top priority for the government.

At present the regulatory environment in China is discouraging new entrants from participating. This will continue until foreign investors have a basis for confidence that China has a clear intention and a demonstrated plan to implement its WTO commitments.

III. DOMINICAN REPUBLIC

The Dominican Republic regulator, Indotel, has issued Resolution No. 043-02, which mandates a 50 percent increase in fixed rates for all inbound international traffic terminating with all carriers in the Dominican Republic.[6] However, there is no similar increase for outbound international or domestic long-distance traffic. This Resolution, which sets the floor price for termination of international rates at a minimum of US$0.08 per minute, results in an increase of almost 50% over existing commercially negotiated rates. The increase is currently required to become effective on 1 January 2003.[7]

Indotel has not shown that this increased charge is required by any increased costs for terminating inbound international calls, or by any greater costs for terminating such calls than are incurred by outbound international or domestic long distance traffic.

Resolution No. 043-02 contends that the interconnection rate increase is justified by a need to strengthen investment in the domestic telecommunications infrastructure.[8] However, the increased inbound charge contravenes the WTO obligations of the Dominican Republic to maintain transparent, non-discriminatory and competitively neutral universal service obligations, pursuant to Section 3 of the Reference Paper. Because the minimum charge is imposed only on one service – inbound international calls – rather than on all services that use the telecommunications network in the Dominican Republic, including outbound international calls and domestic long-distance calls, it is therefore neither non-discriminatory nor competitively neutral, as the Reference Paper requires.

The Resolution further specifies that the increase in international termination rates is essential to address the government's concern with a purported reduction in foreign currency affecting the national balance of payments.[9] While the GATS permits WTO members to take steps to restrict trade on balance of payments grounds, Article XII specifically states that "such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector." (GATS Article XII, 3).

Because the Resolution specifically targets telecom services – and only inbound international telecom services – without imposing the same surcharges on all other services, GATS Article XII prohibits this targeted rate increase.

IV. MEXICO

The US$14 billion telecommunications market in Mexico has great potential for growth, but is being harmed by the many barriers remaining to telecommunication competition. Mexico acknowledged the importance of open markets by making WTO commitments, which if fully implemented, would allow effective competition to flourish. Although these commitments

[6] Instituto Dominicano de Telecomunicaciones (INDOTEL), *Termination Rates for International Service*, Resolution No. 043-02 (June 20, 2002).
[7] Instituto Dominicano de Telecomunicaciones (INDOTEL), *Termination Rates for International Services*, Resolution No. 084-02 (Sept. 30, 2002).
[8] Resolution No. 043-02 at 6.
[9] *Id.* at 5. An unofficial translation states that "the lack of a legal norm containing the rates of reference has caused a drastic reduction in the foreign currency income" thus affecting "the equilibrium in the national balance of payments."

became effective in 1998, Mexico has failed to implement them. Competition in Mexico will provide benefits to customers and carriers in both countries with greater market growth, lower prices and through the introduction of new and innovative services.

USTR continues to undertake major efforts to bring Mexico into compliance with its WTO commitments for basic telecommunications services, including a formal WTO complaint concerning Mexico's failure to comply with its commitments concerning international services that is currently before a panel established by the WTO Dispute Resolution Body. However, major problems also remain to be resolved concerning Mexico's failure to allow fully open markets in domestic services.

Interconnection: Mexico has failed to ensure the availability of cost-oriented interconnection arrangements with Telmex, its major supplier, as required by Section 2.2 of the Reference Paper.

On-Net Interconnection: For interconnection of domestic long distance calls to Telmex's network in a city where a new competitive carrier has a network, Cofetel allows Telmex to charge competitive carriers 0.975 cents per minute for 2002 interconnection, without any cost-justification. In addition, long distance carriers must pay a "call attempts" surcharge (2.85% of the interconnection charge) and 0.53 cents per interconnection minute for special projects, resulting in a net payment of 1.53 cents per minute. By comparison, long-distance interconnection in countries with effective competition is routinely available for about one cent per minute.

Off-Net Interconnection: For interconnection of long distance calls to areas of Mexico where equal access interconnection arrangements are not available, or where a new competitive carrier does not have a network, Telmex charges competitive carriers a "resale" tariff rate. The resale rate is currently about 8 cents per minute, about four times the level of a cost-justified rate. The resale rate is based, without cost-justification, on a 25% discount from Telmex's commercial rates to customers.

Similar regional interconnection is routinely available in countries with effective competition for approximately 2 cents per minute.

Local Interconnection: Mexico has also failed to ensure timely, non-discriminatory, cost-based interconnection for local competitors. Although Telmex has recently provided interconnection to several carriers, Telmex has imposed several restraints to prevent full and fair competition. For example, local number portability is not provided, and Telmex has imposed a discriminatory "bill and keep" system that excludes data traffic, and that benefits only Telmex. Additionally, the lack of interconnection quality standards results in routing and programming failures for competitors' local service traffic. Furthermore, Telmex imposes several restrictions on the provision of transit services between local service providers and long distance networks that increases competitors' costs and results in degraded service levels.

Anti-Competitive Practices: Mexico has failed to maintain appropriate measures to prevent anticompetitive practices by Telmex, as required by Mexico's commitments under Section 1.1 of the Reference Paper. Although Mexico's Competition Commission, the CFC, has again found that Telmex possesses market power, Mexico's telecommunications regulator, Cofetel, has failed to promulgate new dominant carrier rules to prevent Telmex from engaging in anticompetitive conduct.

Enforcement of dominant carrier safeguards is long overdue in Mexico. Telmex has denied competitors phone lines needed to provide service, priced its own services at predatory rates, refused to allow other carriers to interconnect to its network, and has withheld fees it owes competitors. Furthermore, Mexico allows Telmex to offer DSL services while excluding its competitors by refusing to unbundle the local loop, even for bit stream access.

Similarly, Mexico has not enforced its regulations requiring Telmex to offer a billing and collection service to its competitors under non-discriminatory terms and conditions. Telmex has refused either to provide such requested services or to disclose the terms and conditions under which it provides such services to its affiliates. Cofetel has not responded to numerous complaints filed as early as 1997.

<u>Prohibition on Foreign Ownership and Control</u>: Mexico should eliminate its prohibition on foreign control of Mexican "concessionaires" (carriers authorized to own and operate basic telecommunications facilities), which is also contrary to Mexico's WTO obligations.

V. PERU

Mobile termination rates in Peru are significantly above-cost. As in other countries where the wholesale mobile termination rates are not cost-oriented, AT&T is concerned that the burden will disproportionately harm US operators and consumers.

The high rates are inconsistent with the Peruvian Government's WTO commitment to ensure that major suppliers of basic telecom services provide cost-oriented and non-discriminatory interconnection rates. Specifically, Peru committed to unlimited market access for cross-border supply, including inbound international calls.[10] Likewise, Peru committed to the Reference Paper, including the Section 2.2 requirements to ensure that major suppliers provide cost-oriented and non-discriminatory interconnection rates.[11] The regulator, Ospitel, is not sufficiently enforcing these requirements with respect to what Telefonica del Peru, a major supplier in Peru, is charging to terminate mobile traffic.[12]

Telefonica del Peru continues to charge very high settlement rates for mobile terminating traffic, at US$0.185 per minute for mobile termination on the network of its mobile operator affiliate

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[10] World Trade Organization, Fourth Protocol to the General Agreement on Trade in Services, *Peru – Conditional Proposal for Basic Telecommunications Revised*, at 3 (Feb. 5, 1997).
[11] *Id.* at 7.
[12] Federal Communications Commission, *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, (rel. June 18, 1999) (listing Telefonica del Peru as the dominant operator in Peru).

Telefonica Moviles, and an even higher US$0.2053 per minute for termination on any other mobile operators' network. These charges are neither cost-oriented nor reasonable. Studies conducted in other jurisdictions suggest that a competitive charge for fixed-to-mobile termination should be approximately US$0.06 per minute,[13] thus suggesting that the Telefonica charge is as great as 200% above cost. There is no apparent cost-justification for Telefonica's higher charge, nor is there any indication that either Telefonica or Ospitel are planning any actions that would result in lower charges.

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AT&T would be pleased to provide any further information that would be helpful to the Committee. Please do not hesitate to contact me in that regard.

Respectfully submitted,

Douglas W. Schoenberger
Director
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Federal Government Affairs

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[13] *See supra* note 5.