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January 23, 2004

Ms. 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: Review Under Section 1377 Regarding  
WTO Agreement on Trade in Services*

Dear Ms. Blue,

On behalf of Deutsche Telekom AG (“DTAG”), I would like to respond briefly to the comments submitted by the CompTel/ASCENT Alliance regarding this year’s review being undertaken by the Office of the United States Trade Representative (“USTR”) pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988. Mostly repeating allegations which have already been raised in 2003, the CompTel/ASCENT Alliance alleges that Germany is not fully compliant with its obligations under the World Trade Organization Basic Telecommunications Agreement and Reference Paper (“WTO Agreement”). Again it lodges complaints regarding leased line provisioning, fixed-to-mobile termination rates, and the broadband market. In addition, the CompTel/ASCENT Alliance raises concerns regarding the preconditions to be fulfilled before ex-ante regulation is applicable.

DTAG would like to take this opportunity to reiterate its belief that Germany is in full compliance with its WTO obligations. While DTAG accepts that new entrants will oppose some regulatory decisions in Germany, and that they will support others, the issue here is whether Germany has liberalized its telecom market in a way that violates its WTO commitments. DTAG respectfully submits that it has not. No party could reasonably disagree that Germany has fostered one of the most liberalized and vibrant telecommunications sectors in the world.

In the following paragraphs, DTAG will respond briefly to the major allegations contained.

***1. Local Access Leased Lines – Provisioning Delays.***

Largely repeating the arguments of 2003 the CompTel/ASCENT Alliance alleges that Germany is violating the WTO Agreement because DTAG incurs excessive delays when provisioning leased lines.

DTAG again submits that this complaint relates to a condition of the marketplace in early 2001, a period also characterized by a particularly high demand for leased lines (as explained in our previous comments to USTR dated March 15, 2002 and January 31, 2003). Deutsche Telekom responded to these allegations in a detailed manner already in 2003 and pointed out that this condition no longer exists today.

Deutsche Telekom respectfully submits as Attachment 1 charts from the Report of the European Commission on its performance in the supply of leased lines in 2002, which was published on December 19, 2003. The report clearly confirms that provisioning times for leased lines in Germany are nowhere near the highest in Europe. In fact, as Deutsche Telekom has previously pointed out, significant improvements in leased line provisioning should alleviate any concerns that Germany is in violation of the WTO Agreement, particularly when it is recognized, as DTAG pointed out last year, that Germany has imposed on DTAG a much broader leased line obligation than the United States or other countries have imposed on their own incumbent carriers. DTAG is required to provision leased lines even when it has “no facilities available” and therefore must construct the underlying facilities necessary to comply with a carrier’s order. In the context of this broader leased line obligation, DTAG’s current performance in provisioning leased lines does not raise any issues of Germany’s compliance with its WTO obligations.

CompTel/ASCENT also alleges that DTAG engages in anticompetitive and discriminatory practices while providing local access lines to competitors. Deutsche Telekom would like to respond that two court decisions in Germany (Administrative Court of Cologne, October 16, 2002 and Higher Administrative Court Münster, February 2, 2003) explicitly confirm that Deutsche Telekom’s leased line provisioning practices are not discriminatory. The Higher Administrative Court comes to the conclusion that DT offers leased line products to competitors under the same contractual terms offered to retail customers. The court also states that it cannot find that DT is favouring its retail customers with shorter provisioning times.

## ***2. Excessive and Discriminatory Fixed-to-Mobile Termination Rates***

CompTel/ASCENT continues to contend that mobile termination rates in Germany do not comply with the requirement in Section 2.2 of the Reference Paper that such rates must be “non-discriminatory, cost-oriented, transparent and reasonable.” We do not feel that CompTel/ASCENT has added new material arguments to its prior allegations. In response, Deutsche Telekom respectfully repeats the argument, which has been made in 2003.

As DTAG noted in the last two years, the Reference Paper applies only to “major suppliers,” and no mobile carrier in Germany has been designated as a “major supplier.” Hence, the Reference Paper requirements are still inapplicable.

The criticism of Germany’s decision not to designate any mobile operator as a “major supplier” is misplaced. The mobile market sector in Germany is intensely competitive.

The CompTel/ASCENT Alliance's claim that mobile operators must be "major suppliers" because they control the termination of traffic on their own networks is overbroad. Such an approach would result in virtually all telecommunications carriers, including all CLECs in the United States, being classified as "major suppliers" because they control the termination of calls over their own networks. DTAG believes that National Regulatory Authorities ("NRAs") have both the authority and competence to determine which, if any, telecommunications carriers in their countries qualify as "major suppliers."

The criticism of mobile termination rates in Germany and other countries primarily reflects a divergence in mobile charging regimes. The United States has adopted a "receiving party pays" ("RPP") regime where the mobile operator's costs are recovered primarily through retail rates paid by mobile subscribers. DTAG would repeat that the "calling party pays" (CPP) regime adopted in Germany and throughout Europe has been enormously successful in stimulating growth through investment in mobile networks, innovative new services, and high penetration levels, even among low-income citizens. The penetration level throughout Europe is nearing 80% under the CPP regime, whereas mobile penetration in the United States is still significantly below this.

The setting of wholesale and retail rates under the CPP regime is a complex undertaking because it entails cost allocation decisions in a dynamic competitive and technological environment. It is artificial to extract a single rate element from one regime, such as the terminating rate, and make comparisons with a similar rate element in a different charging regime, while ignoring the numerous other factors that affect pricing in each regime. (It would be equally artificial and inappropriate to condemn retail mobile rates in the United States by comparing them with the significantly lower retail rates charged in many CPP regimes). Hence, it is inappropriate to judge mobile termination rates in Germany or any country by comparison to the lowest possible LRIC-based wholesale rates.

The WTO Agreement does not require NRAs to supplant effective marketplace forces through regulatory intervention to minimize terminating mobile rates at the cost of significant increases in the retail rates paid by end-user subscribers. Nor does the Reference Paper require countries to use a specific LRIC methodology, or even to use any LRIC methodology at all, when establishing retail or wholesale rates. In DTAG's view, such regulatory intervention is unnecessary in Germany given the intensity and success of mobile competition.

Terminating mobile rates in Germany and other European countries have already been falling at a significant percentage annually in recent years due to various factors, including new entry and market competition. Mobile termination rates in Europe continue to see a significant downward trend. This has been the result of both market forces as well as regulatory intervention. The current mobile terminating rates in Germany are still below the European average as indicated in the most recent benchmark of the EU implementation report. Other trends on the German mobile market such as the introduction of retail price plans similar to bucket rate plans in the US will put pressure on wholesale prices, ultimately leading to further reductions in termination rates.

### ***3. The Broadband Market – Bitstream Access***

The CompTel/ASCENT Alliance complains that DTAG currently does not offer bitstream access to its competitors. CompTel/ASCENT concludes that SMP in the retail DSL market supposedly requires bitstream access regulation – because - when a wholesale product such as bitstream access is not offered, then competition is impeded in the retail broadband market.

In response DTAG would respectfully note that Germany has not violated its WTO commitments. The Reference Paper does not require regulatory intervention concerning specific wholesale broadband products.

Concerning CompTel/ASCENT's assumption that bitstream access regulation is necessary because of DTAG's market share in the DSL retail market we would like to point out that a market share in the retail market alone does not require regulatory intervention. This is especially true as the DSL market is a new and rapidly developing market.

In this context it should be noticed that Deutsche Telekom already offers a number of wholesale backhaul products to ISPs. For example, T-DSL Zisp, ISP-Gate, OnlineConnect are all wholesale products offered by DTAG for DSL mass market traffic; DTAG also offers various high-quality wholesale products for the traffic of business customers.

In addition, DTAG offers a portfolio of wholesale broadband products that enable competitors to offer competitive retail services to the end-user. Regulated Broadband access obligations - in particular ULL and Line Sharing - already exist. In Germany, unlike in other EU Member States, ULL has been successfully implemented. In December 2003 the number of ULL in Germany had risen to 1.35 Million (compared to only about 500,000 in all other EU Member States combined). In the UK for example, OFTEL announced in March 2003 that only 3,000 unbundled local loops are currently used for DSL services.

50 infrastructure-based operators are currently offering DSL access services mostly on the basis of unbundled local loops (ULL). In particular, city carriers, which focus on customer acquisition and service in one particular region, are operating successfully on the basis of this business model. Hansenet, for example, has gained over 30% market share in the DSL market in Hamburg, and serves 40,000 broadband customers. The case of Hansenet highlights that a stable regulatory environment and planning reliability is indispensable for infrastructure investment. Changing market entry conditions can lead to stranded investment, which reduces incentives for future investment and innovation.

In this context it should also be noted that the FCC has not imposed any wholesale broadband access obligations. On the contrary, in its Triennial Review decision of February 2003, the FCC has rather provided for unbundling relief to the ILECs for broadband, which is intended to spur increased facilities-based investment

#### ***4. Preconditions for ex-ante-regulation***

CompTel/ASCENT also expresses concern that Germany may decide to eliminate RegTP's *ex ante* authority over DTAG's rates. Should Germany do so, it would not be a violation of its obligations under the WTO Agreement. DTAG repeats that the U.S. tariff system under the Communications Act of 1934 severely limits the *ex ante* rate-making authority of the Federal Communications Commission. Section 204(a)(3) provides that any local exchange carrier may file new rates that become effective on 15 days' notice, and that such rates are conclusively deemed lawful. In some cases, carriers are permitted to file tariffs to become effective on one day's notice. In DTAG's view, these U.S. laws and policies confirm that the existence of effective *ex ante* rate-making authority is not an essential ingredient of a liberalized telecommunications regime under the WTO Agreement and the Reference Paper.

I hope this letter has fully addressed any concerns that you may have. Should you desire to discuss further the situation in Germany regarding any of the issues raised in this proceeding, please do not hesitate to call me.

Best regards,

Wolfgang Jakubek  
Managing Director  
Deutsche Telekom Inc., Washington Office

cc: Jonathan McHale  
Kenneth Schagrin