

VINSON & ELKINS L.L.P.
THE WILLARD OFFICE BUILDING
1455 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20004-1008
TELEPHONE (202) 639-6500
FAX (202) 639-6604
www.velaw.com

Gregory C. Staple
Direct Dial 202-639-6744
Direct Fax 202-879-8944
gstaple@velaw.com

January 24, 2003

Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Attention: Section 1377 Comments
Office of the United States Trade Representative
600 17th Street, NW.
Washington, D.C. 20508

Re: Australia: Reply Comments Regarding
Compliance with the WTO Basic Telecommunications
Agreement Reference Paper

Dear Ms. Blue:

These Reply Comments are filed on behalf of Telstra Corporation Ltd. (Telstra) pursuant to the request of the Office of the United States Trade Representative (USTR) for Comments and Reply Comments, *inter alia*, on whether any World Trade Organization (WTO) member is acting in a manner that is inconsistent with its commitments under the WTO Basic Telecommunications Agreement, including the related Reference Paper on pro-competitive regulatory principles.

On January 9, 2003, the Competitive Telecommunications Association (CompTel) docketed Comments alleging that Australian rates for local access leased lines and, in particular, the rates charged by Telstra, "are excessive" and inconsistent with the cost-oriented interconnection rates for major suppliers provided for in Section 2.2(b) of the Reference Paper. CompTel's Comments also assert that Australian regulation of fixed-to-mobile (FTM) termination rates is "ineffectual" and has resulted in "excessive" rates that violate the bar on anticompetitive practices contained in Section 1 of the Reference Paper as well as the cost-oriented rate provisions of Section 2.2(b).

CompTel's assertions regarding leased line rates are unfounded and are based on an incomplete and, in some respects, misleading interpretation of the available data. A careful review of the evidence shows that Telstra's rates for local leased lines are indeed cost-oriented and, hence, consistent with Section 2.2(b) of the Reference Paper. Consequently, at least as far

as Telstra is concerned, there is no need for the type of augmented cost data and regulatory oversight proposed by CompTel at page 6 of its Comments.

So far as FTM calls are concerned, the Australian Competition and Consumer Commission (ACCC) regulates these charges and the current oversight regime (which benchmarks wholesale termination rates based on retail prices) will be reviewed again by the ACCC in 2003. Pending that review, it is premature, at best, to suggest that Australian regulators have failed to meet their WTO obligations. Beyond that, there is no evidence that the regime discriminates against new entrants.

On August 26 and December 13, 2002 Telstra provided substantial information to the USTR regarding Australia's compliance with the WTO Basic Telecommunications Agreement and the Reference Paper. Accordingly, these Reply Comments are limited to the specific allegations raised by CompTel's January 9 submission.

1. Telstra's Rates for Local Access Leased Lines Are Cost Based

CompTel's claims in regard to local access leased lines rest on two main assertions, namely that:

- Telstra's 2 Mbit/s local access leased lines are "excessively priced" as compared to prices for similar circuits supplied by carriers in other countries; and
- Competitors cannot effectively challenge Telstra's rates because the relevant Telstra cost data is held in confidence by the ACCC.

We respond to these claims in turn.

(a) CompTel's Price Comparisons Do Not Involve Like Services But, In Any Case, Telstra's Local Leased Line Rates Are Cost-Based.

CompTel alleges that Telstra's local leased line charges are excessive by international standards citing Telstra's purported charge of approximately US\$14,000 for a 5 km, 2 Mbit/s local access circuit. The charge CompTel has referenced appears to correspond to Telstra's Data Access Radial ("DAR") service which was implemented by Telstra in response to the ACCC's declaration of a Digital Data Access Service.¹ The DAR service delivers a dedicated leased line from the premises of the end-user to the point of interconnect of the competing carrier (access

¹ The Digital Data Access Service (DDAS) was deemed by the ACCC to be a declared service on June 30, 1997 under Section 39(1) of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*. The DDAS description was varied by the ACCC on November 4, 1998 following a public inquiry. The service description is available on the ACCC's Register of Declared Telecommunications Services at http://www.accc.gov.au/telco/listdecserv5_10.htm.

seeker), which may be the Telstra local exchange (*i.e.*, Central Office (CO)) at which the access seeker has co-located its equipment or the access seeker's premises located beyond the CO.

The rates for Telstra's DAR service are not directly comparable kilometer-by-kilometer with most other local access leased lines, however, because charges for DAR are determined on the basis of the radial distance between the CO of the end-user and the CO of the carrier, not on the actual routing distance of the service from end-user to carrier – which may be significantly larger. Thus, one cannot directly compare Telstra's charge for a 5km 2Mbit/s DAR circuit unless one knows the configuration and service details associated with the comparison 2 Mbit/s leased access circuit.

Leased lines offered for local access typically vary in different countries in terms of both their service characteristics and configuration. Simple price comparisons that do not have regard to the service description or the non-price terms applicable to the services tend to be misleading. In this case, however, CompTel does not disclose either the full service description or the non-price terms applicable to the local access leased line services in the other countries mentioned (Sweden, Taiwan, the U.S.).

In any case, Telstra's DAR service is cost-based, with charges determined using a Total Service Long Run Incremental Cost (TSLRIC) model. Where a competing carrier (access seeker) requests a 2 Mbit/s service with a radial distance of 5 km, Telstra typically incurs the following costs:

- network terminating equipment at the end-user premises;
- 2 Mbit/s local access transmission from the end-user premises to the end-user's CO, which is predominantly delivered on optical fiber;
- multiplexing equipment at the end-user's CO;
- 2 Mbit/s transmission from the end-user's CO to the Timed Digital Cross Connect ("TDCC"), which is mainly located in the CBD of the capital city. If the end-user is located in a metropolitan area, this distance (measured end-to-end) can be as far as 50 km;
- TDCC port and controller cost;
- 2 Mbit/s transmission from the TDCC, which is mainly located in the CBD of the capital city, to the access seeker's CO². If the access seeker's point of interconnect is located in a metropolitan area, this distance (measured end-to-end) can be as far as 50 km;
- multiplexing equipment at the access seeker's CO;

² The "access seeker's CO" means the Telstra CO at which the access seeker has co-located its equipment, or the Telstra CO serving the access seeker's premises located beyond the CO.

- 2 Mbit/s access transmission from the access seeker's CO to the access seeker's premises (note that this component is optional for the access seeker, as it may have in-exchange equipment and hence be in a position to terminate its traffic to its premises itself);
- network terminating equipment at the access seeker's CO or at the access seeker's premises.

It bears emphasis, therefore, that where the end-user and the access seeker's point of interconnect are located in the same CO, the radial distance is zero and hence DAR charges decrease significantly – up to 30% – since no inter-exchange transmission or TDCC is required.

In addition to the network costs described above, there is a network management system cost that is shared with other services. Customers have access to important network information and enjoy guaranteed service levels as part of the DAR offering. DAR is a channelized carriage service with additional features to ensure higher quality carriage, not a simple transmission service. There are costs attached to providing this higher quality service. Again, CompTel has not indicated what service levels apply to the other services it cites. Both these costs and the core costs listed above may legitimately differ in countries with differing exchange and urban densities.

CompTel's cost comparisons for local leased lines are also flawed because CompTel uses OECD data for national leased lines (not local lines) cited by the Australian National Office of the Information Economy.³ CompTel fails to explain how data relating to charges for national leased lines (i.e. reflecting a basket that is heavily weighted towards long-distance leased lines) is relevant to local access leased line charges – particularly its cited example of a 5 km local access circuit. CompTel's OECD data is also out of date; the cited report is over two years old, dating back to August 2000. More recent OECD data suggests that Australia's national leased line charges remain above the OECD average, but closely approximate charges in Canada which, not coincidentally, is another country with a huge landmass and unusually large inter-capital distances.⁴

Further, the OECD data probably exaggerates the cost of leased lines in Australia because it is likely based upon "rack rates," not actual market rates. Leased line charges in Australia are not tariffed but are subject to commercial negotiation. Many access seekers negotiate rates below Telstra's "rack rates" based upon volume and term commitments, for example. An access seeker that takes issue with Telstra's charges for a declared service can ask the ACCC to intervene, but at present there are neither any disputes pending with the ACCC nor any

³ The NOIE link provided by CompTel at footnote 5 (page 7) of its comments is incomplete and resolves to a dead link. The correct link is:
http://www.noie.gov.au/projects/framework/progress/ie_stats/csop_april2002/csop_pages/basket_national_lines.htm

⁴ See "Price of leased lines in the OECD Area, May 2002"; <http://www.oecd.org/xls/M00035000/M00035875.xls>

arbitrations taking place in respect of Telstra's DAR service. This provides further evidence that access seekers do not consider Telstra's DAR charges to be "excessive" as claimed.

Lastly, any competitor that is dissatisfied with Australia's local or long distance leased line rates is free to construct its own transmission facilities as many companies have already done. For example, Australia's Productivity Commission has noted that once planned network build-out is completed, there will be eight competing backbone providers on the heaviest inter-capital traffic routes.⁵ In May 2001, the competitive pressure on leased line rates in Australia also has led the ACCC to exempt inter-capital transmission from the relevant declared service description.⁶

(b) The ACCC's Confidentiality Practices Regarding Leased Line Costs Do Not Have An Anti-Competitive Impact

As in other countries, including the U.S., Australian regulators have found that they are most likely to achieve their regulatory objectives if commercially sensitive data submitted by a regulated entity may be kept in confidence. In the current case, so far as local leased lines are concerned, the ACCC has decided not to publish certain network cost data supplied by Telstra for local access services. However, if a dispute arises about Telstra's prices, the ACCC has extensive powers under the Trade Practices Act 1974 to direct Telstra to disclose relevant information to the ACCC; such information can be used to investigate allegations of a price squeeze or predatory behavior.⁷

It is not clear which provision of the WTO Reference Paper CompTel thinks has been breached by ACCC's confidentiality practices. Notably, Article III *bis* of the General Agreement on Trade in Services (GATS) provides that nothing in the Agreement shall require any Member to provide confidential information which would prejudice legitimate commercial interests of particular enterprises, public or private. And there is nothing in the Reference Paper to the contrary. As such, it appears that the ACCC is well within its rights under the GATS to determine, on a reasonable basis, whether carrier information can be kept confidential.

⁵ *Telecommunications Competition Regulation, Inquiry Report No. 16*, Productivity Commission, 21 September 2001, available from: <http://www.pc.gov.au/inquiry/telecommunications/finalreport/index.html#publish>.

⁶ The ACCC indicated that it would exempt transmission from the declaration if it is between any of Adelaide, Brisbane, Canberra, Melbourne, Perth or Sydney. The Melbourne-Canberra-Sydney route was excluded from the variation of the intercapital transmission capacity declaration in 1998. See http://www.accc.gov.au/telco/inquiry/Domestic_transmission_capacity_service_final_report.zip.

⁷ Part XIB of the *Trade Practices Act* specifically prohibits telecommunications carriers from engaging in conduct with anti-competitive effects, which includes price squeezing and predatory behavior.

(c) Unbundled access to the local loop and extensive facilities-based competition provide new entrants many alternative access options.

Although CompTel has focused its comments on the allegedly anti-competitive impact of 2 Mbit/s local leased line rates, several alternative mechanisms exist in Australia for local access. These include DSL, optical fiber transmission, ISDN, point-to-point microwave, LMDS and HFC. Insofar as last-mile access is concerned, the ACCC has also declared an Unbundled Local Loop (ULL) service in 1999 and a Line Sharing Service (LSS) in 2002. These services all provide competitors with alternative “last mile” access for high speed data services.

Substantial infrastructure build has taken place in Australia, and continues, using optical fiber, microwave, DSL and HFC in Australian capital cities. Competitors can use their own infrastructure or buy it from another carrier. In fact, as noted in the CompTel comments, Optus is significantly undercutting Telstra’s rates for a 5 km, 2 Mbit/s local access leased line. While the Optus service may not deliver the same quality as Telstra’s service, this example demonstrates that the market is competitive and that wholesale customers have attractive choices.⁸

2. Fixed-to-mobile termination charges

CompTel has submitted that regulation of fixed-to-mobile (FTM) termination rates under the ACCC’s current approach is ineffective and that termination rates are “excessive”.

As Australia’s largest wireline carrier, Telstra obviously has a significant interest in the termination rates paid to mobile carriers. FTM rates are currently regulated by the ACCC and the Commission is scheduled to review its current approach during 2003. In the interim, the ACCC will continue to regulate terminating access using a retail benchmarking approach, under which wholesale access rates are pegged to retail price variations.

The market for mobile communications in Australia is highly competitive with four infrastructure-based carriers and numerous resellers. And notwithstanding CompTel’s concerns, there are no access disputes before the ACCC in relation to fixed to mobile (or mobile to mobile) terminating access rates.

Since 2002, the ACCC has collected retail data from all mobile network operators for the purposes of implementing its retail-benchmarking methodology. The data will also be used in connection with the scheduled full review by the ACCC of its current mobile pricing principles.⁹

⁸ A useful indicator that Telstra’s ownership of the local loop is not a barrier to competition in data markets is that Telstra’s own market share of Frame Relay Services, the primary retail product using data access, is only in the vicinity of 50%. *Telsyte’s 2002 Industry Profile: Australian Frame Relay Services*, available from www.telsyte.com.au.

⁹ See, most recently, *Pricing Methodology for the GSM and CMA Terminating Services*, Final Report, ACCC, September 2002, available at: http://www.accc.gov.au/telco/gsm/price_meth_gsmcdma_fin.pdf.

A key question in this review is likely to be whether the retail-benchmarking methodology has worked to achieve cost-oriented termination rates.

It is worth noting that the Reference Paper merely sets out best-practice principles; it does not compel any particular result. WTO members that endorsed these principles agreed to ensure that their domestic regulatory authorities would respect them, which the ACCC has done. Whatever complaints CompTel may have about the results, it is indisputable that the ACCC's benchmarking approach was designed to use the pressures of a competitive retail market to achieve cost-oriented FTM termination rates at the wholesale level.

Finally, Telstra notes that, to its knowledge, CompTel has never made any submission itself in the numerous inquiries held by the ACCC to establish the most appropriate mobile termination regulatory regime for the Australian market. In Telstra's view, special interest organizations such as CompTel that believe that existing Australian regulatory practices are causing harm to U.S. investors with commercial interests in Australia, ought first to lodge their comments with the domestic regulator. If CompTel is genuinely concerned about the status quo, then it should advise the ACCC accordingly. To fail to do so, and then to complain to the USTR about the regulatory outcome appears somewhat disingenuous.

Taking into account the above, at this juncture Telstra believes that it would be appropriate for USTR to conclude that the issue of FTM termination rates is being considered by the ACCC, and that the ACCC's stated intention is to ensure that cost-oriented termination rates should apply. Any comment by the USTR on alleged breaches of Australia's WTO commitments should be held in abeyance at least until the ACCC's reconsideration of the FTM issue is completed.

Conclusion

CompTel's assertions are unfounded and/or misleading. Australia's regulators are committed to establishing cost-oriented rates for local access leased lines and the termination of mobile traffic consistent with Section 2.2 of the Reference Paper. Moreover, competitive checks already exist on the rates for both services, as competitors are free to construct competing networks for both fixed and mobile services. In these circumstances and especially given the ACCC's pending review of FTM termination rates, there is no ground for concluding that Australia has failed to meet its WTO obligations or that any U.S. market entrant or investor has been unfairly treated.

Questions regarding these Reply Comments should be directed to the undersigned at (202) 639-6744.

Sincerely,

/s/ Gregory C. Staple

Gregory C. Staple

Page 8
January 24, 2003

cc: Rhonda Schnare - Office of the General Counsel, USTR
Kenneth Schagrin - Office of Industry and Telecommunications, USTR