

January 17, 2005

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Attention: Section 1377 Comments
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, DC 20508

Re: Australia: Reply Comments of Telstra Corporation Ltd.

Dear Ms. Blue:

These reply comments are filed on behalf of Australia's Telstra Corporation Ltd. (Telstra) in response to the request of the United States Trade Representative (USTR) for comments pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. §3106, concerning implementation of the World Trade Organization (WTO) Basic Telecommunications Agreement and the related regulatory Reference Paper.

Only one party, Comptel/ASCENT, has docketed comments concerning Australia. Accordingly, Telstra's reply is limited to the issues raised by that party. Comptel/ASCENT contends in comments dated December 17, 2004 that Telstra's charges for local leased lines are not cost-oriented and are excessive in contravention of §2.2(b) of the Reference Paper as well as §12 of the United States-Australia Free Trade Agreement (FTA). Comptel/ASCENT alleges that evidence of this is to be found in submissions to the Australian Competition and Consumer

Commission's (ACCC) current proceeding concerning the Digital Data Access and ISDN Services. Comptel/ASCENT further alleges that the ACCC's process is lacking in transparency in breach of §20 of the FTA. Finally, Comptel/ASCENT claims that Australian fixed-to-mobile (FTM) termination rates remain excessive notwithstanding a recent decision by the ACCC to reduce those rates.

Local Leased Line Rates

The United States Trade Representative (USTR) stated in its *2004 National Trade Estimate Report on Foreign Trade Barriers* that:

“Telstra has provided evidence that its leased line rates are now comparable with other competitive markets, and companies seeking to challenge these rates have the opportunity to do so under Australia's rules.”¹

The evidence to which the USTR refers has been provided in successive filings made on behalf of Telstra, namely in Telstra's January 24, 2003 Section 1377 reply comments;² its subsequent informational filing of November 10, 2003;³ and its January 23, 2004 Section 1377 reply comments.⁴ In these filings Telstra has comprehensively demonstrated that rates for local leased lines are indeed cost-oriented as required by the Reference Paper and are not “excessive.” The

¹ See USTR, *2004 National Trade Estimate Report on Foreign Trade Barriers*, April 1, 2004, p. 14, available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_National_Trade_Estimate/2004_NTE_Report/asset_upload_file231_4191.pdf

² Letter dated January 24, 2003 from Vinson & Elkins, “Australia: Reply Comments Regarding Compliance with the WTO Basic Telecommunications Agreement Reference Paper”, available at: http://www.ustr.gov/assets/Trade_Sectors/Services/Telecom/Section_1377/2003_Comments_on_Review_of_Compliance_with_Telecom_Trade_Agreements/asset_upload_file882_6934.pdf

³ Attachment to letter dated January 23, 2004 from Vinson & Elkins, “Australia: Reply Comments of Telstra Corporation Ltd.”, available at: http://www.ustr.gov/assets/Trade_Sectors/Services/Telecom/Section_1377/2004_Reply_Comments_on_Review_of_Compliance_with_Telecom_Trade_Agreements/asset_upload_file134_6910.pdf

⁴ Op.cit.

USTR further recognized in the *Results of 2004 Section 1377 Review of Telecommunications Trade Agreements* that the relevant rates have decreased in Australia.⁵ In that Report the USTR did not list Australia as a “key country of concern” in respect of access to leased lines. Telstra does not propose to reiterate the content of its previous filings save to record that due to the high level of competition in the Australian market, rates for local leased lines have further decreased since Telstra’s previous filings were made.

Comptel/ASCENT has failed to respond either to Telstra’s Section 1377 reply comments made in 2003 and 2004, or to the clear statements of the USTR in 2004 concerning leased line pricing in Australia. Instead, Comptel/ASCENT alleges that a current review proceeding being conducted by the ACCC in respect of the declaration of the Digital Data Access Service and ISDN Services (the DDAS/ISDN Declaration Review Proceeding) provides evidence of excessive pricing of leased lines by Telstra’s Wholesale business unit. Telstra submits that Comptel/ASCENT’s description of the DDAS/ISDN Declaration Review Proceeding is inaccurate and misleading for the following reasons.

Contrary to CompTel/ASCENT’s claim, pricing of the Digital Data Access Service is not the focus of the DDAS/ISDN Declaration Review Proceeding. In fact, the Discussion Paper⁶ issued by the ACCC to commence the DDAS/ISDN Declaration Review Proceeding makes clear that the Proceeding is concerned with whether the “declaration”⁷ of the DDAS and ISDN

⁵ See USTR, *Results of 2004 Section 1377 Review of Telecommunications Trade Agreements*, April 7, 2004, p. 7. Available at: http://www.ustr.gov/assets/Trade_Sectors/Manufacturing/Telecom/asset_upload_file802_5269.pdf.

⁶ The Discussion Paper on DDAS and ISDN Services (September 2004) is available on the ACCC’s website at: <http://www.accc.gov.au/content/index.phtml/itemId/538668>

⁷ “Declaration” means that an access provider such as Telstra that supplies DDAS and ISDN services to itself must also supply the service, upon request, to competitor carriage service providers. The procedure for declaration of services is set out in Part XIC of the Trade Practices Act 1974 (A Declaration). Declaration enables service

services should be extended beyond its current June 2005 expiration date. The ACCC requested input on pricing movements since the original declaration of the DDAS and ISDN services in 1997 and 1998 respectively, but this is only one of the six main matters that submissions were asked to address.⁸ The Proceeding has not been initiated due to concern with Telstra's current pricing of DDAS and ISDN services as Comptel/ASCENT alleges, but rather because the ACCC is required by Australian law to conduct a public inquiry during the 12 months prior to the scheduled expiration date of a declared service on whether to extend, vary or revoke the declaration, or allow it expire with or without making a new declaration.⁹

Further, Telstra rejects Comptel/ASCENT's claim that the comments received by the ACCC in the DDAS/ISDN Declaration Review Proceeding "clearly demonstrate" excessive pricing of Digital Data Access Services. Notably, Comptel/ASCENT do not cite to any specific pricing data; nor do they submit any data of their own. The ACCC states in the Discussion Paper that it intends to publish a draft report setting out its preliminary findings in early 2005. Pending issue of the draft report the submissions made by industry have not yet been published by the ACCC on its website. It is surprising that Comptel/ASCENT considers itself to be in a position to make claims as to what the comments received by the ACCC may "clearly demonstrate", given that none of the comments filed with the ACCC have yet been made publicly available. Comptel/ASCENT appears to have ignored the ACCC's explanation in the Discussion Paper of

providers to have access to the inputs they require to supply competitive communications services to end-users and in accordance with the standard access obligations contained in s. 512AR of the Trade Practices Act.

⁸ The six main matters that the Discussion Paper requests submissions to address are: (i) market definition; (ii) technologies used to provide DDAS and ISDN services; (iii) market structure; (iv) price movements; (v) profit margins; (vi) impact on efficient investment in infrastructure. See section 5 of the Discussion Paper, *op. cit.* note 3.

⁹ Section 152ALA(7) of the Trade Practices Act as read with Part 25 of the Telecommunications Act 1997 (C'th).

the current pricing principles it applies to declared services, particularly the fact that in a number of arbitrations the ACCC has used total service long-run incremental cost (TSLRIC) principles as the basis for determining price terms for the Digital Data Access Service.¹⁰ This is manifestly a cost-oriented approach to leased line pricing as required by the Reference Paper.

Telstra submits that Comptel/ASCENT's complaints regarding the transparency of the ACCC's conduct of the DDAS/ISDN Declaration Review Proceeding are premature given that the Proceeding is plainly only in its initial phase. Telstra expects that its submission along with other parties' comments will be made available shortly by the ACCC in accordance with the deadline it has specified for release of its draft findings. Thereafter the ACCC will conduct further public consultation as required by Australian law and will proceed to a final decision on whether to renew the declaration of the DDAS and ISDN services. Once this occurs, Telstra believes it is appropriate that the ACCC's determination and any comments it may make regarding leased line pricing be taken into account in the USTR's findings.

In summary, Comptel/ASCENT has failed to rebut the comprehensive evidence submitted by Telstra in its previous Section 1377 reply comments regarding leased line pricing in Australia, and which was acknowledged by the USTR in its 2004 findings. Comptel/ASCENT has further failed to advance any new evidence of its allegations regarding leased line pricing. The DDAS/ISDN Declaration Review Proceeding has not produced any finding to support Comptel/ASCENT's claim that Telstra's local leased line rates are excessive and are not cost-oriented. Accordingly Comptel/ASCENT's allegations simply do not bear scrutiny and should not be credited by the USTR in this year's Section 1377 review.

¹⁰ See section 6 of the Discussion Paper, *op. cit.* note 3.

Mobile Termination Rates

Comptel/ASCENT argues that notwithstanding the ACCC's determination in respect of the mobile terminating access service in June 2004,¹¹ which Comptel/ASCENT concedes to be "progressive and praiseworthy", Australian fixed-to-mobile (FTM) termination rates will continue to be excessive "for the foreseeable future". Whilst these comments are not directed specifically at Telstra, as one of many mobile carriers in Australia Telstra considers it is appropriate to make the following two points.

First, Comptel/ASCENT has noted that one of the mobile operators in Australia, Vodafone, has filed suit to overturn the determination.¹² However, Comptel/ASCENT has not explained that several access disputes have recently been notified to the ACCC against the mobile operators Vodafone and Optus regarding their proposed terms for mobile terminating access,¹³ including access disputes filed by Telstra against Optus¹⁴ and Vodafone.¹⁵ In these

¹¹ ACCC, Mobile Services Review - Mobile Terminating Access Service: Final Decision on whether or not the Commission should extend, vary or revoke its existing declaration of the mobile terminating access service, June 2004, available at: <http://www.accc.gov.au/content/index.phtml/itemId/520596>.

¹² Vodafone Press Release, "Vodafone appeals ACCC Final Decision over 'legislative powers'", July 27, 2004, available at: http://www.vodafone.com.au/docs/Vodafone_appeals_ACCC_Decision_Final.pdf

¹³ Vodafone's proposed terms are contained in an access undertaking filed with the ACCC on November 26, 2004. See: <http://www.accc.gov.au/content/index.phtml/itemId/551931>.

¹⁴ ACCC, "Telecommunications access dispute", December 30, 2004, available at <http://www.accc.gov.au/content/index.phtml/itemId/559107/fromItemId/2332>.

¹⁵ ACCC, "Telecommunications access dispute", December 23, 2004, available at <http://www.accc.gov.au/content/index.phtml/itemId/557747/fromItemId/2332>. Other access disputes notified to the ACCC in respect of the domestic mobile terminating access service include: (i) PowerTel Limited against Vodafone Pty Limited (see ACCC, "Telecommunications access dispute", December 23, 2004, available at: <http://www.accc.gov.au/content/index.phtml/itemId/557680/fromItemId/2332>); (ii) PowerTel Limited against Optus (see ACCC, "Telecommunications access dispute", January 12, 2005, available at: <http://www.accc.gov.au/content/index.phtml/itemId/565947/fromItemId/2332>); and (iii) Hutchison 3G Australia Pty Limited against Vodafone Network Pty Limited, January 12, 2005, available at: <http://www.accc.gov.au/content/index.phtml/itemId/565943/fromItemId/2332>.

actions Telstra is seeking implementation of domestic mobile terminating access terms for 2005 in accordance with the ACCC's June 2004 determination.

Second, CompTel/ASCENT erroneously states that it was only in 2004 that the ACCC determined that mobile termination should be regulated as a "declared service". In fact, the domestic mobile terminating access service was deemed to be declared as far back as June 1997.¹⁶ The relevant ACCC documentation, publicly available and easily accessible on its website www.accc.gov.au, makes it clear that the issue under consideration in the 2004 Mobile Services Review was whether the ACCC should extend, vary or revoke its existing declaration of the mobile terminating access service.¹⁷

In conclusion, Telstra thanks the USTR for the opportunity to address the inaccuracies contained in the comments docketed by CompTel/ASCENT. Telstra notes that in accordance with the side letters to the FTA exchanged between the USTR and the Australian Minister for Trade on May 18, 2004,¹⁸ annual meetings are to be held between the United States and Australia to discuss communications and information technology matters, including issues pertaining to market access. The side letters envisage that representatives of industry may be invited to attend, and Telstra would be glad to participate in any such consultation. Should CompTel/ASCENT persist with its allegations (notwithstanding their lack of basis) the

¹⁶ ACCC, *Deeming of Telecommunications Services*, June 30, 1997, p. 19.

¹⁷ The ACCC's Mobile Services Review index page is at <http://www.accc.gov.au/content/index.phtml/itemId/333898>.

¹⁸ Letter from the Hon. Mark Vaile MP, Minister for Trade, Australia to the Hon. Robert B. Zoellick, USTR, dated May 18, 2004; and reply from the USTR to Minister Vaile of the same date; both available at: http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file130_3905.pdf.

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forthcoming US-Australia consultation may be an appropriate forum to comprehensively demonstrate that Australia is in full compliance with its treaty obligations.

Any questions regarding this submission should be directed to the undersigned at (202) 639-6744.

Sincerely,

/s/ Gregory C. Staple

Gregory C. Staple