December 16, 2005

VIA E-MAIL

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

AUSTRALIA: *U.S.-Australia Free Trade Agreement*

VIETNAM: *U.S.- Vietnam Bilateral Trade Agreement*

Dear Ms. Blue:

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 3106 ("Section 1377"), COMPTEL 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.

COMPTEL has a 25-year history as the largest and oldest association in the U.S. representing competitive facilities-based carriers, providers using unbundled network elements and interconnection, global integrated communications companies, and their supplier partners. As a result of its 2003 union with the Association of Communications Enterprises (ASCENT) and its merger in 2005 with the Association for Local Telecommunications Services (ALTS), COMPTEL has over 350 members of all sizes and profiles that provide voice, data and video services in the U.S. and around the world. COMPTEL is headquartered in Washington, D.C.

COMPTEL 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 COMPTEL members have made significant investments in telecommunications facilities and services outside the United States. COMPTEL 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 COMPTEL members are doing business and encountering market barriers. Many other countries present even more difficult entry problems for COMPTEL members but are not included because they have no or extremely limited obligations under existing trade agreements.

The fundamental issues raised by COMPTEL over the past years remain unresolved: (1) fixed-to-mobile termination rates that far exceed cost and are discriminatory; and (2) excessive pricing and discriminatory provisioning of local access leased lines and lack of access to unbundled high speed network elements. In fact, this second problem is spreading as incumbents begin widespread deployment of high speed networks and refuse to provide access to those networks to competitors. As described in COMPTEL's filing last year, the high level of fixed-to-mobile termination rates, discriminatory and over-priced leased line access and failure to unbundle broadband networks constitute violations of relevant trade agreements.

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. 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[1] 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.

Fixed-to-Mobile Termination Rates. Some downward movement has occurred in mobile termination rates, and in some places, such as Japan, mobile termination rates are no longer significantly out of line with costs. In Europe, Latin America and the Pacific Rim, excessive mobile termination rates remain a significant problem.

COMPTEL's 2005 filing describes in detail the relevant WTO obligations governing fixed-to-mobile termination rates and the need for such rates to be "cost-oriented" and non-discriminatory. At a minimum, the COMPTEL 2005 analysis demonstrates that mobile termination rates should be reasonable. According to the U.S.-Mexico Panel Report rates that exceed cost by a substantial margin may not be reasonable.

Long-standing regulatory proceedings have not produced cost-oriented rates. At best, countries such as France and Australia have ordered mobile termination rates to be

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[1] Mexico - Measures Affecting Trade in Telecommunications Services, WT/DS/204/8 (June 9, 2004) ("U.S.-Mexico Panel Report").

reduced to nine or ten cents a minute. Even in these cases, however, the reductions are phased in over a period of several years. A true cost analysis, at its most generous, means rates should be in the range of three to six cents a minute, slightly higher than rates for wireline termination. [2]

The problem is threatening to get worse, particularly with the proposed adoption by Mexico of a calling-party-pays system. COMPTEL calculates that nearly 150 countries have adopted a calling-party-pays system and the number increases every year.

In order to comply with their WTO obligations, COMPTEL submits that national regulatory authorities in their respective markets should implement effective regulatory controls including cost-oriented pricing and price squeeze tests over fixed-to-mobile termination. Non-discrimination obligations also should be established to ensure that vertically-integrated carriers cannot use their market power in anti-competitive ways.

The FCC has not yet issued a notice of proposed rulemaking in the current proceeding on mobile termination rates.[3] In its filing last year, COMPTEL asked USTR to file in the FCC proceeding, which USTR did not do. As the federal government agency charged with interpreting and implementing U.S. trade obligations, USTR should inform the FCC about the WTO significance of excessive and discriminatory mobile termination rates. Since no FCC order has been released yet, COMPTEL again urges USTR to express its views to the FCC that excessive mobile termination rates violate obligations under the WTO agreements and applicable free trade agreements.

Excessive Pricing And Discriminatory Provisioning Of Local Access Leased Lines; **Failure to Provide Unbundled Network Elements**. Provision of high speed broadband service is the only viable business model in today's world of convergence. Competitive carriers need access to local access lines of incumbents in a timely manner, at cost-oriented prices and on non-discriminatory terms and conditions (including provisioning and service levels) to provide such service. Access problems continue to

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[2] *See* New York Public Service Commission, *Petition of Sprint Spectrum, L.P. d/b/a Sprint PCS Pursuant to 225(b) of the Telecommunications Act of 1996 to Establish an Intercarrier Agreement with Verizon New York, Inc.,* Case 01-C-0767, Order on Petition for Rehearing, December 3, 2002, at 2 (arguing that, based on a detailed LRIC study it submitted to the PSC, the cost for terminating one minute of traffic on its mobile network in New York should be $US 0.039 per minute). *See* Florida Public Service Commission, *In re: Petition of Sprint Spectrum, L.P. d/b/a Sprint PCS for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Pursuant to 225 of the Telecommunications Act,* Docket No. 000761-TP, Prehearing Order, Order No. PSC-00-2535-PHO-TP, December 28, 2000, at 9 (arguing that, based on its cost study, the LRIC rate should be approximately $US 0.066 per minute). COMPTEL believes that the costs for mobile termination have continued to decline since these studies were undertaken because of a general decline in equipment costs and the increased efficiencies offered by technological innovation in the wireless sector.

[3] The Effect of Foreign Mobile Termination Rates on U.S. Customers, *Notice of Inquiry*, FCC 04-247 (rel. Oct. 26, 2004).

plague competitive carriers. In fact, the problem is spreading and additional countries have been added to this filing as a result.

Unbundled network elements, particularly interconnection and bitstream access, is another way for competitive carriers to provide cost-effective, high speed access to the Internet. In this case, the potential exclusion of parts of the network from regulation is of major concern.

COMPTEL's 2005 filing explained the nature of the WTO obligations with respect to leased lines and unbundled network elements, based on the U.S.-Mexico Panel Report. This analysis has not changed. Unfortunately, neither has the regulatory situation in many countries. While foreign regulators talk a lot about access and obligations, there is little enforcement. This failure to act is a direct violation of WTO obligations undertaken by the countries cited in this report.

The fact that U.S. regulatory action on unbundling and local access is under review does not justify inaction by USTR. The markets cited in this filing – as in the U.S. -- are still characterized, at a minimum, by a "major" supplier of access to the last mile. WTO Reference Paper obligations regarding a major supplier continue to be applicable. Similarly, the analysis of what is reasonable and non-discriminatory under the GATS Telecom Annex continue to apply.

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

Excessive Pricing of Local Access Leased Lines. COMPTEL applauds the decision of the Australian Competition and Consumer Commission ("ACCC") to order Telstra to reduce its pricing of wholesale DSL and to rebate a portion of excess profits to its wholesale customers. However, Telstra's pricing of leased lines remains excessive, particularly in comparison to other providers in the region. Telstra has traditionally charged its wholesale residential line access customers the same amount it charges each retail individual residential line customer, without giving wholesale customers any increased functionality or discounts for scale or costs borne. Recently, Telstra exacerbated the problem by introducing a price increase for residential line access services that applied to less than 5% of its retail customers but applied to 100% of its wholesale customers, thereby raising the wholesale rate above the retail rate. In addition, those retail customers subject to the price increase have been provided a range of discounts not made available to its wholesale competitors. As a result, Telstra has clearly engaged in a classic price squeeze. Since this type of wholesale service was not addressed by the ACCC in its recent action, Australia remains in violation of its obligations under the GATS Telecom Annex to provide access to leased lines on reasonable terms, including price. In addition, excessive pricing violates Australia's commitments under Sections 12.2 and 12.12 of the U.S.-Australia FTA.

Excessive Fixed-to-Mobile Termination Rates. In 2004, the ACCC determined that mobile termination should be regulated as a "declared service" and adopted a pricing principle that was to lead to progressive reductions ending at a rate of 12 Australian cents

(US$ 0.09) per minute in 2007. This past year, ACCC rejected a termination rate of US$ 0.128 proposed by Optus. At the same time, Telstra Mobile, the largest mobile operator in Australia, publicly supported the ACCC's decision. While these actions are all laudable, excessive rates will remain in place for the foreseeable future given the slow pace of scheduled reductions, strong opposition from some Australian operators and current average rates in excess of US$0.013 a minute. Therefore, while the problem of fixed-to-mobile termination rates in Australia continues to improve, the rates may still constitute a violation of the cost-oriented obligations imposed on major suppliers by Section 2.2(b) of the Reference Paper and Section 12.11 of the U.S.-Australia FTA.

CHINA WTO VIOLATIONS GATS, Reference Paper and GATS Telecom Annex

COMPTEL members have been frustrated by China's slow pace of liberalization. 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 a convergence in technology 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. As noted by USTR in its 2005 Report, 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). USTR said that this requirement "appears to be designed to limit market entry rather than to protect consumers' interests." COMPTEL agrees with this conclusion and urges the USTR to work with its Chinese counterparts to eliminate this domestic capitalization requirement. COMPTEL notes that, in addition to being a serious bar to entry, the requirement makes little sense with the new technology available.

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 one – let alone 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, noted by USTR in its 2005 report, 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 COMPTEL 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 COMPTEL 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 COMPTEL has raised in these comments are exacerbated by the lack of independence of the Chinese regulator, 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 COMPTEL 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, COMPTEL does not believe the specific concerns raised in these

comments, as well as COMPTEL's broader concerns - to ensure fair and equal treatment of foreign-based telecom operators – can ever be adequately addressed. Accordingly, COMPTEL 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. COMPTEL 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. COMPTEL 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 last year's filing, the size of this fee is inconsistent with Colombia's GATS obligations.

COMPTEL 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.

EGYPT WTO Violations GATS and GATS Telecom Annex

Discriminatory and Burdensome Interconnection Requirements. The Government of Egypt undertook WTO obligations in the telecom sector in 2002, including the obligation to eliminate Telecom Egypt's monopoly on fixed line service as of January 1, 2006. Prior to the end of Telecom Egypt's monopoly, the Government of Egypt has an obligation under Article VIII of the GATS to require Telecom Egypt to treat all carriers, regardless of their nationality in a non-discriminatory manner. Further, under Section 5 of the GATS Telecom Annex, the Government of Egypt must ensure access to

Telecom Egypt's network on reasonable and nondiscriminatory terms and conditions for services that are scheduled.[4] Egypt is violating these obligations.

Telecom Egypt discriminates among carriers seeking to access its network. Some carriers do not get necessary technical information that other carriers seem to get. Some carriers have to pay for end-to-end bandwidth while others pay only for a half-circuit. Some carriers are forced to wait a long time before reaching an agreement to terminate traffic with Telecom Egypt while others do not face delay. The National Telecommunications Regulatory Authority is aware of this discriminatory treatment but has failed to act.

The attitude of Telecom Egypt and the regulator bode ill for full market competition starting in 2006. It is urgent that USTR remind Egypt of its WTO commitments and urge compliance.

FRANCE WTO VIOLATIONS Reference Paper and GATS Telecom Annex

In France, new entrants continue to face multiple barriers that are in clear violation of the WTO Reference Paper and GATS Telecom Annex.

Lack of Independence of the Regulator. This situation has not improved since COMPTEL's 2005 filing. Section 5 of the Reference Paper requires that the regulatory body be separate from, and not accountable to, any supplier of basic telecommunications services. However, the independent regulator established by the French Government to oversee telecommunications policy, L'Autorité de Régulation des Communications Electroniques et des Postes ("ARCEP"), effectively shares oversight with the Finance Ministry, which also has a major ownership interest in the major supplier, France Telecom ("FT"). Though the French government has decreased its interest in FT over the past year to 19.85% it still remains the largest shareholder. This arrangement results in confusion and a lack of transparency, in violation of Section 5 of the Reference Paper. Indeed, the shortcomings of the regulator have been highlighted by the OECD as a key weakness in the French regulatory regime.[5]

The lack of independence is demonstrated by the way the regulator acts. In order to approve a FT retail offer, most of the time, 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

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4 Egypt has market access and national treatment obligations for most services, other than fixed-line domestic voice and international fixed-line voice and data services. The excluded services are subject to commitments as of January 1, 2006.

5 OECD, Regulatory Reform in the Telecommunications Sector, p. 51, available at www.oecd.org/dataoecd/36/35/32482712.pdf.. *See also*, European Electronic Communications Regulation and Markets 2004 (10th Report) ("10th Implementation Report"), Staff Working Paper, Vol. 1 at 121 COM (2004) 759 Final, available at http://europa.eu.int/information_society/policy/ecomm/implementation_enforcement/annualreports/10threport/index_en.htm.

proceedings necessary to regulate FT. It has taken ARCEP a number of years to commence a proceeding to implement an obligation of accounting separation for FT, announcing the proceeding a couple of months ago. Yet the necessary public consultation on this matter has not been published yet. This means that it will probably not be implemented before 2007, giving FT the benefit of no regulation in that area for an extended period of time.

Discriminatory and Burdensome Interconnection Requirements. FT requires 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.[6]

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-based rates and on non-discriminatory terms and conditions. As noted in COMPTEL's comments from last year, 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.

Recently, FT acquired Wanaddoo, an ISP, and Tranpsac, a leased line provider. There might be structural separation between these entities, but FT appears to favor these subsidiaries 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.

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[6] Annex 3 of the 10th Implementation Report" corroborates the claims of competitive carriers regarding the high prices for most types and lengths of leased line, with the exception of short distance high capacity lines (140/155 Mbits/s).

Excessive Fixed-to-Mobile Termination Rates: Regulation of the mobile sector in France continues to be insufficient, in clear violation of Sections 1.1 and 2.2(b) of the Reference Paper and Section 5(a) of the GATS Telecom Annex.

There have been some positive developments but with little effect so far on pricing. In November 2005, the French antitrust authority found the three mobile operators in France guilty of market collusion from 1997 to 2003 by sharing confidential information on their subscribers and agreeing on market share among them. They were ordered to pay a combined €534 million (US$628 million) — the biggest penalty ever imposed by France's Competition Council and the third largest in European antitrust history.

The French regulator, ARCEP, designated both Orange (France Telecom) and SFR (Cegetel) as having Significant Market Power in the national interconnection market, with a legal obligation to provide cost-oriented carrier grade interconnection (fixed-to-mobile termination) to fixed operators. ARCEP ordered Orange France, SFR and Bouygues Telecom to lower their rates on January 1st 2005 by 16.3% for Orange France and SFR, and by 17.3% for Bouygues Télécom. A new drop of the rates by 24% will take place on January 1st 2006. A third drop is programmed for the 1st January 2007. Even with these praiseworthy actions, mobile termination rates remain excessively high, averaging in excess of US$0.13 cents a minute in the third quarter of 2005.

Despite these ARCEP-mandated reductions on fixed-to-mobile termination rates, France remains an unhealthy marketplace for U.S. carriers due to price squeeze strategies executed by the vertically integrated SMP operators Orange (France Telecom) and SFR (Cegetel), and the discriminatory termination charges levied by all mobile operators in favor of calls from other mobile networks.

GERMANY WTO VIOLATIONS Reference Paper and GATS Telecom Annex

Unfortunately for competitors and consumers, the negative situation in Germany described in COMPTEL's 2005 filing and in USTR's 2005 Section 1377 Report has not improved. As emphasized in comments of earlier years, the intermingling of interests between the German Federal Government, its telecommunications regulator (now known as the Federal Network Agency ("BNetzA")) and Deutsche Telekom ("DTAG") remains a serious problem. In fact, this situation has deteriorated even further as the newly elected German government has announced in its coalition agreement to exempt DTAG from regulation with regard to its proposed investments in the broadband market to expand its optical fiber network (referred to as "VDSL").

In its 2005 comments, COMPTEL highlighted the most critical telecommunications policy issues in Germany. Not only has the German Government not adequately addressed these problems, but the above mentioned announcement to exempt DTAG from regulation regarding VDSL even threatens to worsen the already critical broadband situation in Germany.[7] COMPTEL believes it is time for USTR to take more

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[7] See, for instance the V-DSL Position Papers of the German Competitive Carriers Association ("VATM") at www.vatm.de and ECTA

decisive action to address the widespread failure of the German Government to live up to its WTO commitments.

Potential Failure to Provide Interconnection and Unbundled Network Elements. DTAG announced at the beginning of September 2005 that it would be investing Euro three billion to expand its fiber optic network – mostly by using empty ducts that were installed when DTAG was the monopoly provider. DTAG's aim is to extend the fiber optic network in the 50 largest German cities beyond the main distribution frame to the node/loop concentrator and hence much closer to the final customer. Due to the shorter copper line, data transfer rates in the order of 50 Mbit/s could then be reached with the additional VDSL technology. DTAG has requested the regulator to refrain from any interconnection or unbundling requirements covering this new part of the network. The newly elected German government announced its support for DTAG's position in its coalition agreement and BNetzA is unlikely to disagree.

If BNetzA does follow the German government request and refrains from regulating access to the new fiber, Germany will be in violation of Section 2.2 of the Reference Paper. That section requires a major supplier to provide interconnection on certain terms and conditions. To make an appropriate determination, BNetzA must undertake the necessary competition or "market" analysis, a point noted by the European Commission in initiating a second phase examination of the proposed action.[8]

BNetzA's decision not to regulate DTAG's new fiber network cannot be analyzed in terms of developments in U.S. regulation. In the United States, the FCC undertook a market analysis before determining that it would not regulate access to the new fiber network being installed by the incumbent providers.[9] That analysis cited the competition between cable modem service and SDSL broadband internet access services, as well as "the threat of competition from other forms of broadband Internet access, whether satellite, fixed or mobile wireless, or a yet-to-be -realized alternative."[10] Germany does not have a similar market structure and its cable TV networks do not provide significant competition in the provision of broadband services.[11]

(http://www.ectaportal.com/uploads/4322broadbandrelease_final3.doc). According to ECTA's most recent Broadband Scorecard, Germany, together with Ireland and Greece, has dropped to the bottom of 15 old EU Member States with the incumbent retaining 76% market share in the broadband market in Germany.

8 Proceeding No. De/2005/0262: Wholesale broadband access in Germany, "Serious Doubt Letter," dated 11 Nov. 2005 from European Commission to BNetzA.

9 Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, FCC 05-150 (rel. Sept. 23, 2005).

10 Id. at ¶¶ 50, 56-57.

11 According to a recent OCED statistic, in Germany only 0.3 subscribers per 100 inhabitants have broadband cable connections, while in the United States this figure is 26 times higher. *See* http://www/oecd.org/document/16/0,2340,en_2649_37409_35526608_1_1_1_37409,00.htm.

DTAG seems to be pursuing the same strategy with its expansion plans for VDSL as it did during the launch of ADSL, exploiting monopolistic structures that protect it against competition while shielding the key elements needed to provide service from regulation (access networks, cable ducts, node infrastructure, node sites/terminals). The extension of fiber optic cables and exclusive use of the node sites/terminals and areas in the local loop would inevitably lead to re-monopolization if competitors are left without access in this area.

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 inclusion in the coalition government agreement of a provision relating to regulation of DTAG 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) 38.03% 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 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.

The lack of regulatory impartiality is demonstrated not just by the legal, political and economic relationship between the government, the regulator and DTAG, but also by the way the regulator operates. This year, BNetzA expanded its regulatory portfolio to cover electricity, gas, railways and postal services. Experienced staff previously working on telecommunications have been shifted to work on other sectors and have not been replaced, giving the impression that telecommunications regulation is not a high priority.

BNetzA operates in a non-transparent manner, which contributes to a lack of impartiality, as well as being inexplicable in an electronic age. The German regulator does not fully publish its decisions or rules of procedures on the internet. While it is understandable that confidential business information must be protected, BNetzA often condenses its decisions to half a page. It is impossible for market participants to understand or judge the reasoning when decisions are not published. It is also incomprehensible how other regulators can publish decisions that explain their reasoning without revealing confidential business information when BNetzA is not able to do so. BNetzA's practice is not in line with that of most German administrative courts which publish their decisions on the Internet.

The duration of BNetzA proceedings also contributes to the conclusion that the regulator favors DTAG and wishes to give it more time to profit from its market power.

The pace of decision making is agonizingly slow[12] and there are concerns that BNetzA's "Ruling Chambers" that are in charge of imposing regulations on DTAG are not appropriately staffed.[13] For example, pursuant to the German Telecommunication Act, decisions regarding the abuse of dominance generally have to be issued within four months from the commencement of proceedings. However, the timeframe is exceeded by BNetzA on a regular basis.

Even more disturbing, the German regulator has failed to carry out most of the market analyses and remedy imposition process required by Directive 2002/21/EC, a process which began in 2003. The market analyses are the first step in determining whether a provider is dominant in the specific market and are followed by a remedy decision which decides what remedies should be undertaken to prevent abuse of that dominant position. To-date, BNetzA has only finalized the full process for one of the 18 identified markets. In contrast, the United Kingdom, Sweden, Portugal, Finland and Hungary have each finalized the process for at least 15 markets.

This failure to act demonstrates bias in favor of DTAG. It has the practical effect of favoring DTAG because it creates a "legal limbo" where the old regulatory remedies are no longer valid and the new remedies have not been put in place. This occurs particularly in Germany because of contradictory interpretations by BNetzA and the relevant appeals court on what rules apply during the transition from the old regime to the new.

Discriminatory Access to Local Leased Lines. DTAG has implemented a new tariff scheme for leased lines that has led to significant rate reductions. Unfortunately, DTAG continues to treat its competitors in a discriminatory manner. In addition, the regulator has not formally acted to guarantee access to leased lines from DTAG. Both are violations of German's obligations under the GATS Telecom Annex, which requires the provision of access to the public switched network on nondiscriminatory and reasonable terms and conditions.

The discrimination arises in a number of ways. Information on the geo-coordinates for tariff measuring points of DTAG is necessary for competitors' exact calculations, optimization of competitors' networks, selection of interconnection locations and review of DTAG's invoices. DTAG has so far refused to make this information available to competitors. Competitors must rely on a pricing tool that DTAG

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[12] The slowness of the BNetzA process is exacerbated by the fact that all major decisions taken by BNetzA become mired in the judicial appeal process (in many cases for years), granting DTAG even more time to enjoy its market power. The courts regularly issue a "stay" of a BNetzA decision in favor of DTAG even before the judges rule on the injunctive relief petition. Injunctive relief procedures at the courts can take up easily four to six months with decisions on the merits taking much longer.

[13] Among the BNetzA staff working in market regulation, 20 % are economists and 80 % are administrative lawyers, with very few competition lawyers. The amount of staff with private sector experience is very limited, as many former Ministry of Post staff were granted lifetime tenure when they moved to BNetzA.

has announced will be provided electronically. Use of this web-based tool could potentially reveal competitors' business secrets. Finally, access to leased lines at this time is done "voluntarily" by DTAG because the regulator has not finished the market analysis needed to formally order leased line access. As a result, competitors lack regulatory certainty that DTAG will not change its mind at a time when competitors have no remedy to enforce access.

Failure to Provide Unbundled Network Elements. The German regulator has refused to require DTAG to provide access to an essential element of DTAG's network, known as "bitstream access." This is a high-speed access link to the customer premises (*e.g.*, by installing ADSL equipment and configuration in its local access network). The ability to purchase this network element would enable competitors to provide high speed services to customers. A different configuration would enable a competitor to purchase transmission services from DTAG at a 'higher' level in the network hierarchy where the competitor may already have a point of presence (*e.g.*, transit switch location).

Despite numerous requests by competitive carriers, DTAG has refused to offer a viable wholesale broadband product/bitstream access. The German regulator has refused to intervene to force DTAG to provide access to this network element on the grounds that it has not yet finished the market analysis proceedings. As a consequence, it is not possible for competitive carriers to replicate DTAG's retail broadband products (such as DSL) and they are also not able to gain market shares by offering their own innovative products based on broadband technology. BNetzA's failure to act violates Germany's obligations under the Reference Paper to require the major supplier to provide interconnection to unbundled network elements at cost-oriented rates.

Excessive Fixed-to-Mobile Termination Rates and Anti-Competitive Pricing. Germany's mobile termination rates remain far in excess of cost in violation of Section 2.2 of the Reference Paper and Section 5 of the GATS Telecom Annex. BNetzA has designated DTAG's T-Mobile and Vodafone D2 as having significant market power with a legal obligation to provide cost-oriented, carrier grade interconnection (fixed-to-mobile termination) to fixed operators. But BNetzA has not yet determined what remedies it will impose. So far, BNetzA relies on a "glide path" and industry agreements to lower the rates, but it remains unclear when the rates will reach a cost-oriented level and when Reference Interconnection Offers will be published. Current mobile termination rates average over US$0.16 cents a minute.

INDIA WTO VIOLATIONS GATS and GATS Telecom Annex

COMPTEL applauds the Government of India's actions over the past year to remove market entry barriers. Decisions issued by the Department of Telecommunications ("DOT"), have addressed many of the concerns expressed by COMPTEL in last year's filing. By significantly lowering the initial licensing fee and eliminating the network build-out requirement for long distance licenses, DOT has taken a step to expand the competitive landscape in India. But it has not gone far enough. The

licensing fee for long distance services of US$500,000 remains excessively high and a significant barrier to entry.[14]

In addition, India removed the multimillion dollar licensing fee for IP Virtual Private Network services by classifying IPVPN has a long distance service. Unfortunately, by categorizing IPVPN services as a long distance service, India reduced allowable foreign ownership from 100% to 74%. While this is not a violation of India's WTO commitments, it is step backwards that should be remedied.

Lack of Access to Submarine Cable Capacity. India has a general obligation to allow access to and use of the public telecommunications network under Article 5(a) of the GATS Telecom Annex on reasonable and non-discriminatory terms and condition. In a consultation paper issued earlier this year, the TRAI recognized that operators of international private leased circuits do not have access to submarine cable capacity on reasonable terms and conditions. The barrier to access is not capacity on the submarine cables themselves. The issue is access to the cable landing stations, which in each case is controlled by a single party and constitute an "essential facility." There are currently seven operational submarine cable systems that land in India today. Regulation is needed to control exorbitant rates for access at these cable landing stations and to prohibit discriminatory treatment, such as delays in provisioning and poor service quality.

Improper Market Access Restrictions. In connection with permitting additional foreign ownership in most telecommunications services providers,[15] the Government of India imposed a number of conditions on investors which raise significant competitive concerns and will inhibit rapid development of the telecom sector. One of the conditions 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.

ITALY WTO VIOLATIONS Reference Paper and GATS Telecom Annex

Failure to Provide Unbundled Network Elements at Cost-Oriented Prices. The Italian regulator has failed to carry out the obligations in the Reference Paper with

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[14] It is instructive that none of the European Union members or Canada charge any fee for obtaining a license to provide long distance services, including international. The United States fee is under $1,000 – 500 times lower than India's fee.

[15] *See*, Press Note No. 5 (2005 Series), 3 November 2005, "Enhancement of the Foreign Direct Investment Ceiling from 49 Percent to 74 Percent in the Telecom Sector."

respect to ensuring that a major supplier provides interconnection on cost-oriented, non-discriminatory terms and conditions, as well as access to unbundled network elements. Prices for local private lines and interexchange services in Italy remain among the highest in Europe and appear still far from being cost oriented.

This is due in part because the regulator has failed 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). No action has been taken to update the models even though equipment and other costs have declined.

Lack of Access to and Discriminatory Pricing and Provisioning of Leased Lines; Failure to protect customer information. Provisioning and quality assurance is a significant issue for competitive providers in Italy. Provisioning is not on a first-come, first serve basis. Rather Telecom Italia provisions lines requested by its affiliates first, leaving others to wait. The quality of service supplied by Telecom Italia is insufficient, but more important there is plenty of evidence that Telecom Italia provides its competitors with a quality of service below that which is offered to its own retail division. In fact, in 2004, the Italian Competition Authority fined Telecom Italia €152 million (US$182.3 million) for having abused its dominant position in the market for fixed network telecommunications services for business customers. One of the two types of conduct cited by the Authority was "imposing technical and financial conditions on its competitors that were less favourable than those offered to its own commercial divisions for the same services to the end-customer."[16] Finally, competitors often experience prolonged delays in obtaining pricing from Telecom Italia. Telecom Italia, as the major supplier, has failed to provide service on a non- discriminatory basis in contravention of its obligations under Paragraph 5 of the GATS Telecom Annex.

Telecom Italia also violates the confidentiality of customer transactions. Competitive carriers must provide Telecom Italia with the name and address of the customer for whom the leased line is requested. In some case, it appears that Telecom Italia has approached the customer to provide service directly. Italy must have measures in place to prohibit such conduct according to the paragraph 1 of the Reference Paper. The Italian regulator has taken no action to enforce the confidentiality rules

Excessive Fixed-to-Mobile Termination Rates. The mobile termination rates in Italy continue to remain high compared to the other EU countries. In 2005, rates ranged from US$0.14 to over US$0.20 cents a minute depending on the carrier and related terms and conditions.

JAMAICA WTO VIOLATIONS Reference Paper

[16] Italian Competition Authority, Press Release No. 30 (Nov. 19. 2004), available at http://www.agcm.it/agcm_eng/COSTAMPA/E_PRESS.NSF/0/d026f17090259e9dc1256f56002f34cb?OpenDocument.

In April 2005, the Government of Jamaica imposed a surcharge on incoming international traffic to fund universal service objectives. The surcharge is US$0.03 a minute for termination on fixed-line telephones and US$0.02 a minute for termination on mobile telephones. The money collected is supposed to fund broadband access for schools and libraries.

Although Jamaica has the right to define universal service according to its own needs, the method of funding the defined objectives is subject to paragraph 3 of the Reference Paper. Paragraph 3 of the Reference Paper says that any universal service obligation must be "administered in a transparent, non-discriminatory and competitively neutral manner" and must be "not more burdensome than necessary for the kind of universal service defined by the Member."

The surcharge does not meet the standard set in paragraph 3. First, it 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." Unfortunately, since the Government of Jamaica has not published any information about how it arrived at the surcharge amount or how it intends to spend the money raised, it is not possible to substantiate this claim.

JAPAN WTO VIOLATIONS Reference Paper and GATS Telecom Annex

Since COMPTEL began filing in the 1377 review process, the Government of Japan has made tremendous changes to facilitate a competitive telecommunications market.

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 and GATS Telecom Annex

As a result of the U.S.-Mexico Panel Report , which found that Mexico violated its WTO obligations in a number of respects, Mexico agreed to take certain actions to

bring its laws and regulations into compliance with the panel recommendations. Implementation has been slow, and numerous steps remain to bring Mexico into full compliance with its WTO obligations.

Mexico has taken one step that is not required by its WTO commitments, according to the U.S.-Mexico Panel Report. In August 2005, the Secretary of Communications and Transport published new regulations authorizing majority owned foreign companies to apply for resale licenses for national and long distance services. The regulations do not make clear whether local, data and mobile services are available for resale or not. Article 31 of the Mexican Telecom Law does not pose any limitations on the type of services that can be resold. The Secretary of Communications and Transport should clarify that all services are available for resale in furtherance of Article 31 of the Mexican Telecom Law. Moreover, the resale regulations restrict Mexican resellers from directly interconnecting with foreign carriers. This restriction is a significant entry barrier as U.S. companies would be unable to directly interconnect with their Mexican affiliates, requiring them to go through Telmex or one of the other existing concessionaires.

COMPTEL members have a major concern that Mexico will move backwards. COMPTEL noted in its February 2005 filing with USTR the disturbing announcement by the Mexican regulator, COFETEL, to adopt a calling-party-pays system for mobile calls which would let mobile carriers apply termination charges to both domestic and international long-distance calls. Currently a mobile termination charge of approximately $0.20 is applied only to domestic local calls. If this existing rate is applied to domestic and international long distance calls, it could cost U.S. consumers more than $248 million annually.

Implementation of COFETEL's proposal would effectively allow Telmex to recoup the revenue that it lost by reducing wireline international termination rates through new mobile termination charges. COMPTEL noted in February that such an action by COFETEL would make a mockery of the WTO dispute settlement system and once again place Mexico squarely in violation of its WTO commitments under the Reference Paper and the GATS Telecom Annex. USTR should take strong action to preclude such a backwards step.

Unfortunately, every other issue cited in COMPTEL's 2005 filing remains outstanding. Telmex continues to charge "resale" rates for interconnection of long distance calls to its network in areas where there is no competition. Telmex fails to provide interconnection on non-discriminatory terms. For example, it fails to provide quality standards for local service and local number portability. The discriminatory "bill and keep" system excludes data traffic and benefits only Telmex. Finally, all the anti-competitive practices noted in COMPTEL's prior filing remain of concern. USTR should reconsider whether Mexico is in compliance with the findings of the U.S.-Mexico Panel Report in light of the continuing regulatory problems.

NEW ZEALAND WTO VIOLATIONS Reference Paper and GATS Telecom Annex

Excessive Mobile Termination Charges. Mobile termination rates in New Zealand are among the highest in the Asia Pacific region**,** in some cases more than fourteen times higher than the rates paid to terminate calls on fixed networks in New Zealand. Throughout 2005, rates were in excess of US$0.24 a minute. These rates are significantly above cost. The government's failure to force the carriers to immediately bring down the charges violates New Zealand's obligations to provide cost-oriented interconnection and access to and use of the public telecommunications transport on terms and conditions that are "reasonable."

The New Zealand Commerce Commission released a report in June 2005, finding that mobile operators are not subject to competitive pressure and "recommended to the Minister of Communications that the termination of fixed line voice calls on a cellular telephone network should be regulated."[17] In August, the Minister of Communications asked the Commission to reconsider its decision, including whether offers made by Telecom New Zealand and Vodafone satisfactorily address the identified issues. Thus, there may be a significant delay in implementation of actual cost-oriented rates, leaving this continuing violation of New Zealand's WTO obligations.

SPAIN WTO VIOLATION GATS, Reference Paper and GATS Telecom Annex

The members of COMPTEL are becoming increasingly concerned with the deteriorating regulatory environment in Spain. We are hopeful that many of the current issues with interconnection will be resolved with the new RIO that is about to be released but strongly encourage the USTR to keep a close watch on the situation.

Failure to require effective interconnection, excessive prices for local private lines and discriminatory access to leased lines. The Spanish regulator, La Comisión del Mercado de las Telecomunicaciones ("CMT"), has started to reduce the interconnection obligations on Telefónica even while the company maintains a dominant position in the market. CMT plans to eliminate the current obligation on Telefónica to offer wholesale bitstream service while UNE deployment is still at a minimum in Spain. The action is unjustified and would violate the Reference Paper obligation to regulate interconnection pricing and terms and conditions by a major supplier of its essential facilities.

The absence of regulation by CMT is also evident in the wholesale ADSL market. CMT refuses to apply consistent pricing controls on Telefónica's wholesale ADSL product based on the minimal competition existing between Telefónica and competitive providers that are using unbundled network elements.

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[17] New Zealand Commerce Commission, *Final Report of the Schedule 3 Investigation Into Regulation of Mobile Termination*, June 9, 2005 at 36.

Telefónica's retail ethernet service, MacroLAN, is considerably cheaper than the equivalent local private line service and CMT is reluctant to regulate a wholesale ethernet service. Consequently, it is impossible for competitors to participate in bids which require nationwide high bandwidth access services because they cannot offer competitive rates.

Prices of local private lines in Spain are among the highest in Europe (between 33% and 390%) according to European Commission statistics.[18] Though the regulator recently reviewed them in the new RIO from Telefónica, the reduction has been minimal (33% reduction for 2 Mbps, 34 Mbps and 155 Mpbs, and only a 10% reduction for 64 Kbps y n x 64 Kbps circuits).

Failure to allow Resale of Mobile Services. CMT has failed to require mobile operators to provide access to their networks for virtual operators. There is no limitation in Spain's WTO commitments on resale or mobile service operation yet no foreign company has been able to enter this market because of refusal of incumbent operators to provide the necessary access. This is a violation of Spain's market access commitment to allow resale. CMT is considering a proposal to require access by mobile operators and Comptel encourage USTR to keep a close a watch on the market analysis results.

SWEDEN WTO VIOLATION Reference Paper and GATS Telecom Annex

Failure to require access to leased lines. The Swedish regulator, Post- och telestyrelsen (PTS) has completed its market analysis and mandated that the incumbent, TeliaSonera, offer local private lines at cost-oriented rates. So far, though, TeliaSonera has refused to do so. This is particularly problematic because the price of TeliaSonera's low bandwidth leased lines services are among the highest in Europe. PTS has so far taken no action to enforce its decision with significant anti-competitive results.

Failure to provide unbundled network elements PTS also completed its market analysis of the wholesale bitstream market (DSL) in November 2004. Before the market analysis could take effect TeliaSonera appealed the decision to the local court which enjoined the proceedings. Consequently the PTS market analysis decision was never given legal force and TeliaSonera is still not providing unbundled network elements as required by the Reference Paper. The wholesale product that TeliaSonera does make available to alternative carriers is priced approximately 800-900% higher than the TeliaSonera's end customer service. Therefore, from a commercial perspective, the existing wholesale bitstream service forecloses the downstream market.

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.

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[18] Commission Staff Working Document, *Methodology, reference configuration and data of leased lines in Member States*, notified under Document # C(2005) 103, 29 March 2005. pp. 6-10.

SWITZERLAND WTO VIOLATIONS Reference Paper and GATS Telecom Annex

Excessive Fixed-to-Mobile Termination Rates. Fixed-to-mobile termination rates in Switzerland are far from cost-oriented and are discriminatory, in violation of Section 2.2(b) of the Reference Paper and Section 5(a) the GATS Telecom Annex. Swisscom's mobile affiliate, the largest mobile network operator in Switzerland, charges fixed operators rates to terminate calls on its mobile network that are far higher than those charged for termination on the fixed network.

In addition there is still no final decision on the regulation of mobile termination rates. A case is pending in front of the Swiss Competition Commission but the timing of a decision is unclear. In a preliminary decision, the Competition Commission heavily criticized the exorbitantly high mobile termination rates in Switzerland. As a result, Swisscom Mobile voluntarily decreased its termination rates from June 2005 onwards. However, until the final decision is made by the Swiss Competition Commission there is no binding obligation on Swisscom Mobile and therefore a large amount of legal uncertainty for the operators in Switzerland.

Mobile operators in Switzerland discriminate against fixed network operators. Mobile operators charge fixed network operators a far higher rate than the rate the mobile operators charge their own customers for connecting to other mobile customers or customers on the mobile operator's own fixed network (or that of its affiliated carrier). This type of discriminatory pricing violates the Reference Paper requirement that interconnection be provided on non-discriminatory terms and conditions, including prices.

VIETNAM Bilateral Free Trade Agreement

Although Vietnam is not a member of the WTO, on December 10, 2001, the U.S.-Vietnam Bilateral Trade Agreement ("BTA") entered into force. The BTA incorporates the GATS, the GATS Telecom Annex and the Reference Paper. In addition, Vietnam committed to l (i) refrain from imposing new or more onerous discriminatory prices and fees; and (ii) eliminate, discriminatory prices and fees for the installation of telephones, telecommunications services (other than the subscription charge for local telephone service).

Vietnam has failed to live up to the BTA obligations in numerous respects. Vietnam's failure calls into question its ability to comply with WTO obligations upon its accession.

Lack of Access to and Use of the Public Network; Unreasonable Domestic Regulation. Under the GATS Telecom Annex (incorporated into the BTA), the Government of Vietnam has an obligation to provide access to and use of the public switched telecom network on reasonable and non-discriminatory terms and conditions. As noted in COMPTEL's prior filing, the U.S.-Mexico Panel Report has determined that

"reasonable" does not mean "cost-oriented" but must have some relationship to cost. In addition, GATS Article VI (also incorporated into the BTA) requires that government regulation be based on objective and transparent criteria and not be more burdensome than necessary to ensure the quality of the service being supplied.

The Government of Vietnam is violating both the GATS Telecom Annex and the GATS, Article VI by imposing excessively high termination rates for international traffic and a quota system for terminating such traffic. The Ministry of Post and Telematics decreed that termination rates must be in excess of US$0.17 cents a minute. In addition, the Ministry imposed a quota system on the amount of traffic Vietnamese carriers may terminate in the country, based on the carrier's network infrastructure and the type of traffic. While the cap is imposed on the Vietnamese carrier, the Vietnamese carrier passes on the costs of any penalty to the foreign carrier. So if the cap is exceeded by more than 30%, the Vietnamese carrier will pass on to foreign carriers surcharges of up to 28 cents a minute. If the Vietnamese carriers fail to file their traffic reports fully and timely with the Ministry, they automatically face a 3% quota deduction in the following month. As a result, it is more likely that in the following month the Vietnamese carrier will exceed its quota and pass the cost of the surcharge on to the foreign carrier.

The minimum rate is significantly higher than termination rates in competitive markets, which average two to four US cents a minute. Even though there is no obligation for the rates to be cost-oriented, they are not "reasonable" for purposes of the GATS Telecom Annex. The price floor and quota system is purely protectionist. It is not based on objective and transparent criteria and does not facilitate the provision of service. Rather, it makes service more difficult by limiting the ability of U.S. carriers to freely negotiate termination agreements with their Vietnamese correspondents. It is thus a violation of GATS Article VI.

In addition to problems caused by the price cap and quotas, access to the public switched network is not always available in a timely fashion and is often discriminatory, in violation of the GATS Telecom Annex. Some foreign carriers have had difficulty in reaching agreements with the Vietnamese state-owned carriers (the only licensed carriers in the market) to terminate international traffic. Some carriers have been denied return traffic while others do not have that problem.

As part of Vietnam's negotiations for WTO accession, COMPTEL hopes that the USTR can achieve the elimination of these barriers during the WTO negotiations.

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 on 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,

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