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VIA ELECTRONIC MAIL

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
ATTN: Section 1377 Comments
Office of the United States Trade Representative
1724 F 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 U.S. trading partners' compliance with U.S. telecommunications trade agreements.

Two parties have docketed comments concerning Australia, namely Primus Telecommunications Group Incorporated (Primus) and COMPTEL. These parties allege in their filings (both dated December 16, 2005) that Australia has violated the U.S.-Australia Free Trade Agreement (FTA), as well as the World Trade Organization (WTO) Basic Telecommunications Agreement and the related regulatory Reference Paper. In these reply comments Telstra will primarily address the allegations made in the Primus filing because COMPTEL only makes negative comments with respect to Telstra's pricing of its wholesale local line rental service, and COMPTEL's allegations in this regard are identical to those made by Primus.

1. Introduction

As in the United States and many other countries, there is a robust public policy debate underway in Australia on key elements of telecommunications policy. The main aspects of that debate involve the precise terms of a new Operational Separation regime to be imposed on Telstra, the future structure and level of pricing for unbundled network elements (Unconditioned Local Loop Service, or "ULLS"), and the regulatory conditions that will apply to investment in a Next Generation Network (NGN).

The Primus filing grossly mischaracterizes the debate over all of these issues. It inaccurately describes both the existing regulatory environment and the positions of various parties (including Telstra) concerning the policy alternatives. Primus omits to reference the raft of existing legislation that has applied since 1997 and will continue to apply to telecommunications services in Australia.[1] Primus claims that legislation is still being "developed"[2] when in fact all the relevant new and amending legislation was passed by the Australian Parliament in September 2005.[3] Even more misleadingly, Primus fails to acknowledge the draft Determinations issued by the Federal Minister for Communications, Information Technology and the Arts on December 14, 2005, outlining the designated services covered by Operational Separation and the requirements with which an Operational Separation plan must comply. The Determinations address many of the allegations prematurely advanced by Primus, and are all easily accessible on the website of the Minister's Department.[4]

Far from being in actual or potential violation of the FTA, as Primus suggests, Australia has, and under any circumstances will continue to have, a regulatory regime that fully complies with the FTA. Indeed, in key respects, the Australian regime imposes more intensive regulation on Telstra than that faced by incumbent telecommunications carriers in the United States.

The Primus filing alleges that, as a result of its current or potential future policies regarding Operational Separation, ULL and NGN investment, Australia is or potentially may

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[1] Current federal legislation includes the *Telecommunications Act (C'th)* 1997; the *Telecommunications (Consumer Protection and Service Standards) Act (C'th)* 1999; the telecommunications-specific Parts XIB and XIC of the *Trade Practices Act (C'th)* 1974; and several other related Acts. Australian legislation is accessible online at: http://www.austlii.edu.au/

[2] Primus filing, p.1.

[3] New and amending legislation passed in September 2005 includes the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act (C'th)* 2005; the *Telecommunications Legislation Amendment (Future Proofing and Other Measures) Act (C'th*) 2005; the *Telstra (Transition to Full Private Ownership) Act (C'th)* 2005; and the *Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Act* (C'th) 2005.

[4] The final Determinations issued by the Minister are the *Telecommunications (Operational Separation - Designated Services) Determination (No. 1)* 2005 and the *Telecommunications (Requirements for Operational Separation Plan) Determination (No. 1)* 2005, both available at: http://www.dcita.gov.au/tel/connect_australia/operational_separation/determinations_relating_to_the_operational_separation . The drafts of these Determinations, which Primus has misleadingly omitted to mention in its filing, were made available on December 14, 2005 by the Minister, see her press release: http://www.minister.dcita.gov.au/media/media_releases/minister_announces_next_phase_for_operational_separation

become in violation of FTA Articles 11.7 (Expropriation and Compensation), 12.7 (Treatment by Major Suppliers), 12.8 (Competitive Safeguards), 12.10 (Unbundling of Network Elements) and 12.11 (Interconnection). It further alleges violations of Articles 12.7 (Resale) and 12.17 (Independent Regulatory Bodies and Divestment). In the paragraphs below, Telstra rebuts Primus' allegations on each count. At the outset Telstra will address Primus' misleading and incorrect characterization of the Australian competitive environment.

2. The Competitive Environment in Australia

2.1. Infrastructure-based competition

The Primus filing claims "in Australia, unlike all other countries, the incumbent carrier does not face competition from cable networks".[5] This is incorrect. The number two carrier in Australia, SingTel Optus, passes 2.2 million homes with its hybrid fiber coaxial cable network in the three major Australian cities. Similarly, regional carriers such as TransAct have built out extensive cable networks in other areas such as Canberra.

As shown in the table below, infrastructure-based competition in Australia's major metropolitan areas (inclusive of ULLS-based build) is extensive, with competitive local access networks passing 82 percent of the total premises in Australia's five major cities.

[5] Primus filing, p.2.

Competitor Infrastructure Coverage in Metro Areas

State	Metro services In operation (M)	Metro competitor coverage (M)	% Metro competitor coverage
Brisbane	0.59	0.40	**67%**
Sydney	1.55	1.30	**84%**
Melbourne	1.23	1.01	**82%**
Adelaide	0.44	0.37	**83%**
Perth	0.61	0.56	**92%**
Total Retail	4.43	3.64	**82%**

Source: Telstra

It should be noted that – just as is the case in the United States – intermodal competition is rapidly emerging in Australia from new technologies. Wireless broadband operators such as Unwired[6] and Personal Broadband Australia[7] have established networks covering major Australian capital cities and have been providing services to the mass consumer market for over 12 months. Additionally, Vodafone, SingTel Optus and Hutchison all offer broadband services on their 3G mobile networks. Intel Corporation has recently invested AUD 37 million in Unwired to assist its future network roll out.[8] This investment suggests that Primus' dire predictions regarding the competitive prospects for new entrants in the Australian telecommunications market do not appear to be shared by other U.S. companies.

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[6] Information regarding Unwired is available at: www.unwired.com.au

[7] Information regarding Personal Broadband Australia (PBA) is available at: http://www.pba.com.au/. PBA provides services via retail partners such as SingTel Optus.

[8] See Unwired Press Release, October 26, 2005, at: http://www.unwired.com.au/about/companyannouncements/20051026_unwired_announces_customer_numbers.pdf

Another rapidly emerging source of infrastructure-based competition is Broadband over Power Line (BPL). A subsidiary of the incumbent energy supplier in Queensland (Australia's third largest state), Ergon Energy, will commence the commercial supply of BPL services in February 2006 claiming to offer speeds up to 80 times that of existing broadband at prices below that of Telstra's entry level ADSL service.[9] BPL is also currently undergoing a mass consumer trial in the Australian state of Tasmania by a subsidiary of the Tasmanian power company Aurora Energy in conjunction with Mitsubishi Electric of Japan.

Further, there is nothing "unique", as Primus contends, in a former incumbent telecommunications operator having an interest in cable television. Similar circumstances exist in several OECD countries under sophisticated regulatory regimes. For example, Portugal Telecom owns that country's leading cable operator TVCabo;[10] Norway's Telenor owns a cable television network;[11] and Denmark's TDC operates TDC Cable TV covering 38 percent of Danish households[12] which is a larger footprint than that of Foxtel in Australia.

2.2. VoIP-based competition

As in the U.S., the emergence of infrastructure-based intermodal competition in Australia has been accompanied by the burgeoning availability of commercial Voice over IP (VoIP) services. Primus argues that "there is absolutely no merit in the claim that competitors are eroding Telstra's fixed line revenue",[13] but VoIP subscriber number growth demonstrates the inaccuracy of Primus' statement. For example, Australia's third largest Internet Service Provider, iiNet, has been adding approximately 4,000 subscribers per month to its consumer VoIP service.[14] Another VoIP provider, Engin, said in October 2005 that it was signing up 3,000 new

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[9] See http://www.thecouriermail.news.com.au/common/story_page/0,5936,17765477%255E952,00.html

[10] See under the "multimedia" section in the map of Portugal Telecom's group structure, available at: http://www.telecom.pt/InternetResource/PTSite/PT/Canais/investidores/Grupo/ESTGRU2003_P.htm

[11] See: http://www.telenor.com/about/operations/broadcast/

[12] See: http://tdc.com/article.php?dogtag=tdcc_abo_profile_tdc_cable

[13] Primus filing, p.3.

[14] iiNet Press Release, "iiNet surpasses 10,000 VoIP Subscribers", November 23, 2005. http://www.iinet.com.au/about/investor/voip_10000.pdf; and subsequent press releases on iiNet's website.

subscribers per month.[15] These are two of almost fifty new VoIP providers contesting the Australian consumer market.[16] The Australian government has actively encouraged the growth of VoIP-based competition to traditional POTS voice services by issuing a comprehensive policy framework that includes making available non-geographic telephone numbers for VoIP services.[17] It is curious that Primus should insinuate collusion between the Australian government and Telstra to frustrate competition, when in fact the Minister for Communications, Information Technology and the Arts is actively engaged in promoting such competition.

2.3. Global telecommunications operators in the Australian market

Primus claims to be "the only global telecommunications company in Australia", which may mislead the USTR as to the true intensity of competition in the Australian telecommunications services market. In fact, there are numerous global telecommunications companies active in Australia such as Vodafone,[18] the world's fifth largest telecommunications operator by revenue,[19] and Hutchison,[20] which operates 3G mobile networks in Hong Kong, Europe and the Middle East. Over 140 telecommunications carriers are licensed in Australia, many of them foreign-owned.[21]

For example, AT&T's Australian business is reported to be its largest source of revenue in the Asia Pacific region outside of Japan.[22] AT&T increased its staff

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[15] Engin Press Release, "Engin's paying subscriber base grows by 67% in September Quarter", October 27, 2005, available at: http://engin.com.au/public/pressreleases.htm

[16] Telstra estimate. According to a presentation by Shara Evans of Telsyte to the 2nd ACIF VoIP Industry Forum held in Sydney on December 6, 2005, 43 VoIP providers had entered the consumer market by June 2005, and Telsyte counted 19 IP-centric VoIP providers in April 2005. See: http://www.acif.org.au/projects/seminars and http://www.telsyte.com.au/market/voip-consumerreg-issues.htm .

[17] More information about the Australian government's VoIP policy framework is available at: http://www.dcita.gov.au/tel/internet_and_broadband_services/emerging_voice_services

[18] For a description of Vodafone's Australian activities, see : http://www.vodafone.com.au/

[19] Total Telecom, *Global 100*, (Terrapin) November 2005, at p.10.

[20] For a description of Hutchison's Australian activities, see : http://www.three.com.au/

[21] The list of currently licensed carriers in Australia is published by the Australian Communications and Media Authority: http://www.acma.gov.au/ACMAINTER.65668:STANDARD:1196574369:pc=PC_1625

[22] See Siobhan McBride, "AT&T adds 24 staff to meet growing demand", *ComputerWorld*, August 29, 2005, available at : http://www.computerworld.com.au/index.php/id;313453605;fp;512;fpid;6625415

numbers in Australia in 2005 and says it "has made significant investments in Australia to build a state-of-the-art MPLS network that includes six nodes and an Internet data centre in Sydney."[23] AT&T has lodged a detailed filing with the USTR in the current Section 1377 process documenting its competitive concerns in jurisdictions throughout the world, but has made no adverse comment regarding Australia.

Therefore, Primus is not "the only global telecommunications company in Australia" as it claims, but is rather the only global telecommunications company to complain about Australia. Primus' complaints are surprising given that 30 percent of Primus' revenues are sourced from Asia-Pacific – essentially its Australian business – and its most recently released financial results state that it is exceeding its broadband customer growth target in Australia.[24]

2.4. Access to essential facilities

Primus erroneously claims that Telstra Wholesale is unilaterally changing the terms of contracts in respect of access to essential facilities. Under the provisions of Part XIC of the *Trade Practices Act (C'th)* 1974, the terms and conditions of access are subject to oversight by the Australian Competition and Consumer Commission (ACCC). Access seekers such as Primus have the right to initiate arbitrations before the ACCC in the event of an access dispute, including specifically where "the supplier of a service wants to change some aspect of the provider's existing access to the service." (Section 152AG of the Trade Practices Act, definition of "Access seeker".) Primus is well aware of the arbitration powers contained in the Trade Practices Act, as it currently has three notified access disputes underway with the ACCC,[25] yet implies in its filing to the USTR that these rights do not exist.

3. Operational Separation

Primus alleges that legislation recently passed by Parliament to impose a new Operational Separation regime on Telstra calls into question Australia's compliance with

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[23] *Ibid.*

[24] *Business Wire*, "Primus Telecommunications Reports Third Quarter 2005 Financial Results", November 2, 2005.

[25] A list of currently notified access disputes can be found at : http://www.accc.gov.au/content/index.phtml/itemId/635059/fromItemId/356715

Articles 12.7 and 12.8 of the FTA. Specifically, with respect to Article 12.7, the Primus filing claims that "having effective operational separation of Telstra is important to ensure that it treats other carriers fairly with regard to services and interconnection",[26] that the Government has removed "the ACCC from any role in reviewing the plan, or overseeing its implementation",[27] and that the operational separation plan for Telstra is "woefully inadequate, and sets the stage for unmitigated abuse by Telstra of its market position to provide anti-competitive favorable terms to its affiliates in the various markets in which they compete."[28] Further, with respect to Article 12.8, it claims that "the Australian Government's actions to delegate to Telstra development of an operational separation plan may very well result in violation of Australia's commitment to prevent major suppliers from engaging in anti-competitive practices such as cross subsidization."[29]

All of these claims are at variance with the facts. First, nothing in Article 12.7 or any other provision of the FTA requires that Australia impose an operational separation regime in the first instance. Indeed, in the United States and in most OECD countries, regulators have steadfastly refused to impose operational or structural separation on telecommunications carriers. Instead most jurisdictions, appropriately in Telstra's view, rely upon access and competition regulation to manage service equivalence and interconnection issues. In Australia the relevant access and competition provisions in the Trade Practices Act include Division 2 in Part XIB (anti-competitive conduct) and Division 3 in Part XIC (the standard access obligations). Australia was already fully compliant with Articles 12.7 and 12.8 of the FTA by virtue of the application of these and other provisions in the Trade Practices Act, prior to passage of the Operational Separation legislation in September 2005. In short, no operational separation plan of any sort is required for Australia to comply with Articles 12.7 or 12.8 (or any other provision) of the FTA.

Second, Primus' claims with respect to removing the ACCC from oversight of the Operational Separation plan are simply incorrect. To the contrary, the requirements for the plan issued by the Minister in her Determination in December 2005 detail the extensive powers of the ACCC in reviewing, overseeing and enforcing the arrangements.[30] As noted

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[26] Primus filing, p.4

[27] Primus filing, p.4

[28] Primus filing, p.4

[29] Primus filing, p.5

[30] See *Telecommunications (Requirements for Operational Separation Plan) Determination (No. 1)* 2005, especially Sec. 19. See footnote 4 for URL.

in the Introduction, the draft form of this Determination was available to Primus prior to the date of filing its comment with the USTR, however Primus has failed to acknowledge either the Determination's existence or its content.

Third, Primus' claim that the plan is "woefully inadequate" is both incorrect and premature. It is incorrect, in that the required components of the plan constitute one of the most intensive regimes of its kind anywhere in the world, mandating (among other things) that Telstra maintain wholly separate facilities, staffs, accounting procedures and lines of reporting authority for its retail, wholesale and network business units. At the very least, Primus' claim is premature, in that the Determinations set out the requirements to be met by the plan and the details of the plan have yet to be finalized and presented for industry consultation.

Further, Telstra does not agree that all of the services designated under the Operational Separation legislation will necessarily constitute "public telecommunications services" as defined in Article 12.7. Most of the designated services under Operational Separation, for example the Domestic PSTN Originating and Terminating Services and the Line Sharing Service, are not services offered to the public generally but are rather components of such public telecommunications services provided using network elements. The competition safeguards in relation to network elements are found in Articles 12.10 and 12.11 of the FTA, and hence Article 12.7 has limited relevance for the application of Operational Separation.

In conclusion, no set of regulatory requirements on Telstra is likely to be sufficient in the eyes of Primus or Telstra's other competitors, but there can be no doubt whatsoever that, when finalized, the Operational Separation Plan will go well beyond the patterns and practices of most other countries, including the United States, and will far exceed any requirements associated with the FTA.

4. Unconditioned Local Loop Service (ULLS)

Primus alleges that a determination by the Australian government to implement ULLS prices on a nationally averaged basis would violate Articles 12.8, 12.11 and 12.17 of the FTA. Specifically, it claims that such a determination would "allow [Telstra] to continue heavily cross-subsidizing ULL prices"[31] allegedly in violation of Article 12.8, remove from the ACCC the "power to make network elements available on an unbundled, cost-oriented

[31] Primus filing, p.5.

basis"[32] allegedly in violation of Article 12.11, and "use a discretionary ministerial power to set an averaged deleterious price for its copper ULLs."[33]

Primus is correct in noting that Telstra has urged the Government to consider implementing a policy of nationally averaged ULLS prices. In every other respect, its claims are incorrect and misguided. Such a policy would not violate any provision of the FTA. Indeed, such a policy for ULLS prices would be consistent with, and may even be required by, Article 12.18 (Universal Service) of the FTA.

First, Primus' concerns about "deleterious" ULLS prices under a nationally averaged regime are not motivated by an interest in sound public policy, but rather its self-interested concern that margins on services it provides in metropolitan areas would be diminished.[34] Telstra agrees that ULLS prices (whether calculated on an averaged or de-averaged basis) should be cost-oriented, and has presented extensive empirical evidence to the ACCC that the current level of prices is far below costs. Despite this evidence, the ACCC in December 2005 rejected Telstra's undertaking with respect to ULLS prices,[35] and has issued a draft determination that would require a further 40 percent reduction in ULLS prices. Since 2002 the ACCC has sought to reduce ULLS prices by some 63 percent.

Primus' claim that "a nationwide average price on ULL's [sic] … would seriously impact the business cases of all competitors"[36], is inconsistent with a number of investor relations presentations made by Australian-based carriers and with analysis undertaken by numerous financial market analysts.[37] The clear conclusion from these documents is that a move to a ULLS-based network remains a financially positive decision for Telstra's competitors regardless of whether the ULLS price is geographically de-averaged or averaged.

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[32] Primus filing, p.8.

[33] Primus filing, p.10.

[34] Specifically, Primus alleges that averaged ULLS pricing will result in "wholesale prices in the metro areas far above cost." (Primus filing, p.6.)

[35] ACCC, *Assessment of Telstra's ULLS and LSS monthly charge undertakings: Final Decision – Public Version*, December 2005, available at : http://www.accc.gov.au/content/index.phtml/itemId/660425/fromItemId/269280

[36] Primus filing, p.3

[37] See, for example, the presentation by Allen Lew, MD (Consumer) SingTel Optus, dated June 28, 2005, available at: http://home.singtel.com/investor_relations/investor_presentations/default.asp; Deutsche Bank, "ULL storm clouds brewing", December 8, 2004; Macquarie Research Equities, "How low will ULL prices go?", March 10, 2005; Citigroup, "On the ropes!", September 5, 2005.

Primus appears to contend that Article 12.8 prohibits cross-subsidization *per se*, when in fact only cross-subsidization that is *anti-competitive* is implicated by that Article.

The real cause of Primus' complaint is the long-held policy position of the Australian Government that Australians should have access to a standard telephone service at equivalent prices and service levels, regardless of where they live. The Minister for Communications, Information Technology and the Arts and the Minister for Finance and Administration stated in a joint press release in December 2005 that,

> "…the Government will also make more explicit Telstra's price parity obligation by including in the price controls a requirement that Telstra offer a basic line rental product at the same price across the country. This requirement will ensure that parity is maintained without compromising Telstra's capacity to introduce new pricing packages or to respond to competition.
>
> The Government has committed to pricing parity for phone services, including line rental services, for Australians living in rural, regional and remote Australia and has also committed to equitable access to broadband services across the country."[38]

This policy is consistent with Article 12.18, which clearly acknowledges the right of each party to pursue universal service policies. Telstra accepts this policy and has simply asked that the wholesale pricing regime for the ULLS be made consistent with this social policy objective. In this, Telstra shares the conclusion reached by the OECD, that, "if the regulator wishes to preserve the geographically averaged structure of end user prices, it is essential to geographically average ULL prices."[39]

In the absence of averaged ULLS prices, the impact of Australia's retail pricing parity (i.e., universal service) regime would be to discriminate against Telstra and place it at a severe competitive disadvantage, forcing it to subsidize below-cost retail rates in rural areas while allowing competitors to "cherry pick" low-cost urban customers. Such a policy arguably would violate Article 12.18 of the FTA, which requires that "each Party shall

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[38] Press Release, "Wholesale access prices for ULL and wholesale pricing parity", December 19, 2005, available at: http://www.minister.dcita.gov.au/media/media_releases/wholesale_access_prices_for_ull_and_retail_pricing_parityand at http://www.financeminister.gov.au/media/2005/mr_5905_joint.html

[39] OECD, *Access Pricing in Telecommunications*, 2004, p. 134. Available at: http://www.oecd.org/dataoecd/26/6/27767944.pdf

administer any universal service obligation that it maintains in a transparent, non-discriminatory, and competitively neutral manner".

Contrary to Primus' allegation that Telstra has exhibited "contemptuous disregard for the role of the regulator",[40] Telstra has in fact lodged an undertaking with the ACCC which would establish a uniform national ULLS price of AUD 30 per month.[41] Should the ACCC once again reject these undertakings, Telstra reserves its right to make use of the provisions in the Trade Practices Act enabling review by the Australian Competition Tribunal of the ACCC's decisions in respect of access undertakings,[42] consistent with Articles 20.4 and 20.5, and particularly Article 12.22(c) of the FTA.

Critically, Primus misconstrues the meaning of "cost-oriented" in Article 12.11(d) of the FTA, as applicable to ULLS pricing. Primus contends that the "cost-oriented" test *requires* de-averaging of prices on a geographical basis to reflect lower costs in metropolitan and urban areas versus higher costs in peri-urban and rural areas. According to Primus, a price averaging regime for ULLS will *per se* violate Article 12.11(d) of the FTA – presumably because averaging inherently involves below or above cost pricing for specific ULLS (or, as suggested by the ACCC, four bounded classes of ULLS) in particular geographical bands. This argument does not bear scrutiny. The language of Article 12.11(d) is identical to Article 2.2(b) of the WTO Reference Paper, which was closely examined by the WTO Panel decision in the 2004 U.S.–Mexico matter. The Panel took the view that "cost-oriented" rates need not equate exactly to cost, but should be founded on cost, with an element of causality between the cost elements and the services provided.[43] The Panel noted that,

> "The degree of flexibility inherent in the term 'cost-oriented' suggests, moreover, that more than one costing methodology could be used to calculate 'cost-oriented' rates."[44]

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[40] Primus filing, p.6.

[41] Telstra Press Release, "Telstra lodges averaged ULLS undertakings", December 28, 2005. Available at: http://www.telstra.com.au/abouttelstra/media/mediareleases_article.cfm?ObjectID=36336

[42] Section 152CE *et seq* of the Trade Practices Act.

[43] WTO, *Mexico – Measures Affecting Telecommunications Services: Report of the Panel*, 2 April 2004 (WT/DS204/R), at ¶¶ 7.168 and 7.174.

[44] Op.cit. para 7.168.

Contrary to Primus' assertions, mechanical reflection of cost in ULLS pricing does not constitute the only or even a preferred form of compliance with Article 12.11(d). Taken to its logical conclusion, Primus' approach would require that every individual ULLS should be differently priced to reflect its unique cost elements. Such an extreme de-averaging approach would be inherently impractical to apply and could not be considered to be "reasonable, having regard to economic feasibility", which is the key qualification set by Article 12.11(d) for determining whether a rate is "cost-oriented". The Panel in the U.S.-Mexico matter said,

> "The term 'reasonable' thus suggests that the interconnection rates should be 'suitable to the circumstances or purpose' – in other words, that they reflect the overall objectives of the provision that the rates represent the costs incurred in providing the service. The word 'reasonable' thus emphasizes that the application of the cost model chosen by the Member reflects the costs incurred for the interconnection service. Flexibility and balance are also part of the notion of 'reasonable'."[45]

The Panel then goes on to disqualify some of the costs that Mexico had sought to include, which were not costs actually incurred in the supply of the relevant service.[46] However, all the costs relied upon for calculation of averaged pricing of ULLS in Australia are costs actually incurred in supply of that service. The issue of which costing methodology should be used – averaging or deaveraging into geographic bands – does not give rise to any breach of the "cost-oriented" requirement in Article 12.11(d). While WTO Panel decisions do not bind interpretation of identical provisions in the FTA, Telstra submits that the Panel's views should be regarded as persuasive on this point.

5. Regulation of Next Generation Networks

The Primus filing claims that a decision by the Australian government to impose less restrictive regulatory requirements on NGN than on existing networks would violate Articles 12.11 and 11.7 of the FTA. Specifically, it asserts that such a policy decision would threaten Australia's "policy promoting infrastructure-based investment … [and] its commitments to ensure reasonable interconnection at any technically feasible point on its major supplier's network."[47] Such a policy, according to Primus, would also be "in violation of [Australia's]

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[45] Op.cit. para 7.182

[46] For example, the general state of the telecommunications industry, the coverage and quality of the network, and whether rates are established under an accounting rate regime, would all not be relevant to determining a proper cost-oriented rate. (Op.cit. para 7.183.)

[47] Primus filing, p.9.

commitments not to allow expropriation of covered assets."[48] In fact, Article 12.23 of the FTA specifically permits each of the parties to forebear from regulating such services, and the United States has lately done so by effectively exempting from access requirements the fiber, DSL and cable modem networks of incumbent carriers.[49]

Primus' characterization of Telstra's plans for an NGN buildout is also highly misleading. Indeed, the notion of an alternative regulatory treatment for NGNs of any sort is at this time highly prospective, as the Government has made no commitments and offered no proposals for exempting NGNs from regulation in any way. However, it should be noted that in the Digital Compact and National Broadband Plan to which Primus refers, Telstra offered to commit "to provide competitors continued guaranteed access to current service levels (1.5 MB) on current terms."[50] Further, it should be noted that, to the extent Telstra has proposed a less intrusive regulatory regime for NGN investments, its proposals have been limited to exempting such investment from the telecommunications-specific provisions (Parts XIB and XIC) of the Trade Practices Act. Under this proposal, Telstra's NGN network would remain subject to potential access regulation under Part IIIA of the Trade Practices Act, the same regime that applies to other network providers in Australia such as electricity and natural gas networks. Telstra's view is that application of Part IIIA to telecommunications would be consistent with the FTA, however this remains a hypothetical issue until such time as the Trade Practices Act is amended to give effect to the changes proposed by Telstra. No such Bill is before the Australian parliament at present, nor has the Australian government indicated that it will make any such amendments.

6. Resale

Finally, Primus alleges that Australia's policies with respect to wholesale pricing violate Article 12.9 (and perhaps also Articles 12.2 and 12.12) of the FTA. Specifically, Primus raises concerns regarding two services, the wholesale business grade DSL or "BDSL" service and the wholesale line rental service.

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[48] Primus filing, p.9.

[49] See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Dok. No. 02-33, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005); and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005) (*NCTA v. Brand X*), *aff'g Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 & CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling and NPRM*).

[50] See p. 19. Available at: http://www.telstra.com.au/abouttelstra/investor/docs/tls339_briefingpaper.pdf

6.1. BDSL

Telstra strongly disputes Primus' assertions regarding contract negotiations for the wholesale supply of BDSL. Telstra Wholesale makes available a standard wholesale agreement called the Customer Relationship Agreement (CRA), the term of which is typically five years. The CRA is an umbrella agreement enabling wholesale customers to obtain a range of wholesale services without in each case having to renegotiate the general terms and conditions of supply with Telstra. Specific types of service supplied under the CRA, such as BDSL, are subject to terms appropriate to those services. In the case of the BDSL service, the applicable term is twelve months, reflecting the fact that pricing and technology for the service and its competitive substitutes are changing rapidly with market take-up being uncertain. Primus has misleadingly confused the term of the CRA more generally, with the term of a specific service offered under the CRA.

In any event, the ACCC has commenced an inquiry regarding wholesale DSL that includes within its terms of reference the possible declaration of BDSL services under Part XIC of the Trade Practices Act.[51] Article 12.9(2) of the FTA provides that,

> "Each party may determine in accordance with its law and regulations which public telecommunications services must be offered for resale by major suppliers …, based on the need to promote competition or such other factors as the Party considers relevant."

Consideration of declaration under Part XIC of the Trade Practices Act is a process consistent with Article 12.9(2) of the FTA. Primus has every opportunity to participate in the ACCC's strategic review, and the USTR will have access to extensive detail on the parties' differing views from the publication of submissions on the ACCC's website, as is its ordinary practice. What is relevant for the USTR at this stage is that an established regulatory regime operates in Australia, under the Trade Practices Act and consistent with the FTA, to test the validity of concerns such as those raised by Primus regarding supply of BDSL, and if necessary to enable enforcement or other action to be taken by the regulator. Hence, if the ACCC takes the view that BDSL should not be declared following consideration of the criteria set

[51] Specifically, on p.14 of its December 2005 Discussion Paper titled "A strategic review of the regulation of fixed network services", the ACCC notes certain complaints regarding wholesale supply of the BDSL service and invites comment on "whether any additional wholesale broadband services need to be declared given prevailing competition concerns."

out in Part XIC of the Trade Practices Act, that decision will also be consistent with the FTA.

6.2. Wholesale local line rental service

The Primus filing claims that recent price changes for Telstra's retail and wholesale residential line access service have "the characteristics of a price squeeze."[52] Telstra does not agree that its current wholesale local line rental pricing constitutes a "price squeeze" or is in any other respect anticompetitive. However, as with BDSL, the ACCC is investigating Primus' complaint. The ACCC has issued Telstra with a Consultation Notice under section 151AKA(10) of the Trade Practices Act.[53] Telstra has responded to the ACCC that the area of competition in which carriage service providers compete with Telstra is the service bundle (i.e. including long distance and fixed-to-mobile calls) rather than line rental and local calls alone. Primus' complaint does not make a like-for-like comparison, because it compares standalone wholesale line rental pricing with retail line rental pricing which is only one component of a bundle of retail voice services offered together. Competitors such as Primus are able to match Telstra competitively on price across the bundle of retail voice services. The investigation being conducted by the ACCC is wholly in accordance with Article 12.22 of the FTA, and the same would be true of a finding by the ACCC after due process that no "price squeeze" exists.

7. Conclusion

Telstra thanks the USTR for the opportunity to address the inaccuracies contained in the comments docketed by Primus and COMPTEL. Telstra regrets that Primus, in particular, has chosen to use the forum provided by the Section 1377 proceedings to make numerous unsubstantiated allegations against Telstra, as well as to generally bring into question the conduct of the Australian government in setting policy for regulation of the Australian telecommunications market. The factual misstatements contained in the Primus filing are so extensive that Telstra has not sought to correct each and every inaccuracy and misleading omission, but instead has confined itself to addressing Primus' most egregious allegations.

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[52] Primus filing, p.7.

[53] ACCC Press Release, "ACCC issues Consultation Notice to Telstra over wholesale line rental increase", December 22, 2005, available at: http://www.accc.gov.au/content/index.phtml/itemId/720007/fromItemId/2332. The return date on the Consultation Notice is January 27, 2006, and the USTR and other interested parties may monitor these proceedings as they progress at the ACCC web site.

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,[54] annual consultations are to be held between the United States and Australia to discuss communications and information technology matters, including issues pertaining to market access. Telstra understands that the first such annual consultation is tentatively scheduled to take place in February 2006, which would enable the USTR to have regard to relevant information shared in those discussions well prior to the scheduled date of March 31, 2006 for conclusion of its Section 1377 review. The side letters envisage that representatives of industry may be invited to attend the annual consultation, and Telstra would welcome the opportunity to do so as it is Telstra's view, as documented herein, that Australia is in full compliance with all of 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
Counsel for Telstra Corporation Ltd.

[54] 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 .