

March 12, 1999

Gloria Blue, Executive Secretary
Trade Policy Staff Committee
Office of the United States Trade Representative's Office
600 17th Street, N.W.
Washington, DC 20508
Attn: William Corbett, Esq.

Dear Mr. Corbett,

On behalf of CompTel/ACTA — the industry association formed recently by the combinations of the Competitive Telecommunications Association (“CompTel”) and America’s Carriers Telecommunication Association (“ACTA”) — I write in support of Carrier1's 1377 complaint regarding serious interconnection obstacles in the German market. CompTel/ACTA is the principal national industry association representing competitive telecommunications carriers and their suppliers. CompTel/ACTA’s 315 members include large nationwide carriers as well as scores of smaller regional carriers. CompTel/ACTA's members have a vital interest in the opening of markets throughout the world to meaningful competition.

Interconnection rights are a central feature of the WTO Basic Telecommunications Agreement ("WTO Agreement") Reference Paper, and a transparent, cost-oriented interconnection regime is an essential element of creating a competitive marketplace in any market with a dominant carrier. The outcome of the interconnection issue in Germany is especially important because of the size of the German market itself, and the important precedent that rules in Germany will set for other countries implementing the WTO Agreement.

Carrier1 is not a member of CompTel/ACTA. However, its complaint is amply confirmed by the experience of CompTel/ACTA's members in the German market. Our members have encountered unjustifiable barriers to interconnection in Germany. These problems have worsened in the wake of the election of the new government, which has openly championed Deutsche Telekom's (DTAG's) interests and intervened directly with the Regulator. It is particularly important that the U.S. government take action – working closely with D.G. IV and D.G. XIII of the European Commission – precisely because the interconnection situation in Germany has grown even worse in recent months.

Competitive carriers have encountered:

1. Delay. As Carrier1 explains in detail, DTAG has delayed negotiations with new entrants for months. DTAG has also failed to provision points of interconnection in desirable, high-traffic locations for as long as 9 to 10 months, and has denied competitive carriers access to DTAG's OSS databases in order to determine where capacity is available.¹ Indeed, DTAG's latest interconnection agreement provides the incumbent a 12 month time frame to provision a new special network access site. These delays fall far short of Germany's WTO commitment to provide interconnection "in a timely fashion."² They seriously interfere with the business plans of a number of our members who have invested in Germany in order to enter the German market, but remain unable to provide service. Delay also gives the incumbent extraordinary leverage in interconnection negotiations. An unsuccessful adjudication of an interconnection dispute means a delay in obtaining an interconnection agreement of at least 4 months. This leaves carriers that have been shut out of the German market for more than a year little choice but to sign DTAG's increasingly unfavorable interconnection offers.

2. Non-Transparent Interconnection Rules and Charges. Interconnection rates and technical conditions for new entrants in the German market remain so unsettled that these carriers cannot know their costs of providing service or develop a stable business plan. Furthermore, DTAG has been allowed to exploit a business record confidentiality provision under German law to shelter the data supporting its claims for higher rates and onerous technical conditions from rebuttal or public scrutiny. This system falls far short of Germany's commitment under the Reference Paper to supply interconnection under "terms, conditions (including technical standards and specifications) and *cost-oriented* rates that are *transparent*."³

For nearly a year, DTAG has denied new entrants regulated interconnection rates unless they satisfy a shifting array of infrastructure build-out and technical requirements. Last summer, the Regulator began a proceeding that was to clarify this matter. Today, competitive carriers know only that they must have three (3) points of interconnection (POIs), one of which must be a switch, and two (2) transmission lines to be "network operators" entitled in principle to regulated interconnection rates. However, higher rates may be imposed for network operators with undefined "atypical traffic flows" that impose higher costs on DTAG's network. During his visit to the United States last month, Vice President Arne Boernsen, who is taking the lead on this issue for the Regulator, suggested that he has already decided that rates for operators with fewer than 23 POIs will increase, even though he has not received DTAG cost data.

¹ Because rates in Germany are distance-sensitive, carriers must then pay DTAG more to route calls to high-traffic areas from the relatively remote locations at which interconnection is available on a less untimely basis.

² Reference Paper § 2.2(b).

³ Id. (emphases supplied).

Furthermore, in December, the Regulator indicated that the entire long distance and international interconnection regime may expire at the end of 1999. During a presentation at the German Embassy last month attended by FCC and Commerce staff, among others, Vice President Boernsen appeared to confirm this – creating further uncertainty.

DTAG's current interconnection agreement for new entrants contains numerous unspecified higher costs for "atypical traffic," as well as additional increases in rates for long distance and international traffic that the Regulator may impose when the regime expires. DTAG has given advance notice of the termination of its existing interconnection agreements in the end of 1999.

For the last year, the Regulator has not issued rules explaining what conditions apply to interconnection in Germany, leaving these conditions to be articulated through a confusing process of ad hoc adjudication by its independent adjudications branch. Regrettably, these adjudications have been confusing and at times seemingly contradictory. This uncertainty has allowed DTAG to choose among elements of these decisions that are most favorable to it, to disregard contrary statements of the regulator, and to impose DTAG's preferred conditions on new entrants.

Furthermore, these adjudications have accepted several technical conditions for interconnection based upon ex parte presentations of technical data that DTAG has protected from public scrutiny by asserting that they are confidential under German law. Ironically, in the very same adjudications competing carriers have been required to submit detailed deployment plans in order to obtain interconnection.⁴ Furthermore, DTAG's current interconnection agreement requires competitive carriers to provide planning data for a two-year period upon execution of the agreement and to project out traffic for a third year.

Vice President Boernsen stated at a workshop held at the German Embassy last month that the Regulator has no authority to require that DTAG cost data be made public. DTAG must agree to the data's release, even in an "atypical traffic" proceeding that DTAG itself has requested that the Regulator conduct in order to raise rates on new entrants. Such a regime is plainly not "transparent" within the meaning of the Basic Telecommunications Agreement.

3. Anti-Competitive Technical and Infrastructure Build-out Requirements.

Since last Spring, DTAG has frustrated many carriers' entry into the German market by demanding that carriers immediately build out large numbers of POIs and meet onerous technical requirements. These requirements fail to meet Germany's commitment to ensure interconnection with DTAG "at any technically feasible point in the network," and to prevent DTAG from "engaging in . . . anti-competitive practices."⁵

⁴ See, e.g., PrimeTEC Deutschland v. Deutsche Telekom AG, Decision of RegTP Ruling Chamber 4, File No. 4-98-018/Z 16.08.98 (Oct. 22, 1998).

⁵ Reference Paper, §§ 2.2, 1.1.

Requirements to deploy as many as 23 points of interconnection, and an additional switch for termination of international traffic operate as a barrier to entry that deters new entrants. When coupled with DTAG's extraordinary delay in provisioning these points of interconnection in desirable locations, the requirement forces competitive carriers to make significant up-front investments in Germany with little or no prospect of obtaining cost-oriented rates in the near term.

DTAG has also been allowed to impose onerous technical requirements on new entrants — some of which have been approved in adjudications:

- Competitive carriers must guarantee DTAG a minimum of 180,000 minutes per month per interconnection network interface or pay very high penalties. There is no ramp-up time for meeting this requirement.
- If traffic flowing through a competitive carrier's POI to or from an area in which the competitor lacks a POI exceeds 48.8 erlang, the carrier must obtain a new POI. This means that unless a competitive carrier's traffic remains in a narrow band, the carrier must either pay a large penalty, or else invest in an additional POI and immediately meet the 180,000 minute minimum.
- Traffic that is not switched through at least one POI is subject to higher, resale rates.

These extraordinary technical requirements appear to force competing carriers to mirror DTAG's network structure — which is clearly contrary to the spirit of the Reference Paper's requirement to afford interconnection "at any technically feasible point in the network."

The stated justification for these infrastructure build-out and technical requirements is that they are necessary to prevent "atypical traffic"⁶ from imposing congestion and uncompensated costs on DTAG's network. As noted above, this contention has never been justified by publicly available data. It is somewhat surprising because DTAG has

complained about losing long distance market share — which should mean that there is unused capacity on its network.

Moreover, the argument is belied by DTAG's active resistance to carrier's carrier arrangements that would take more traffic off of its network, particularly in high-traffic areas. Some of DTAG's efforts are discussed in Carrier1's complaint. We add here that DTAG also

⁶ "Atypical traffic" is itself a circular term that is based upon the structure of the incumbent's network and skewed to the advantage of the incumbent. It appears to relate to the incumbent's expectations regarding traffic over its network from the days before meaningful long distance competition in Germany.

has policies prohibiting competitive carriers from sharing POIs or switches, from using their call pre-selection codes on another carrier's network, and from interconnecting with one another in DTAG collocation facilities. The argument is also contradicted by restrictions, approved by the Regulator's adjudications branch and discussed below, against long distance operators handing off traffic to DTAG at regulated interconnection rates if the traffic originates from a region for which the operator does not have a license.

If DTAG and the government were simply concerned with avoiding network congestion and costs from "atypical traffic," they would encourage these efficient arrangements between competitive carriers that would relieve congestion and reduce costs for DTAG. Instead, they have chosen a course that interferes with these competitive arrangements, discourages carriers from taking traffic off of DTAG's network, and demands economically inefficient investment that deters entry into the German market.

4. Discrimination. DTAG abruptly altered its position on interconnection conditions last Spring. This about-face has produced obvious discrimination in the "terms, conditions . . . and . . . rates" for interconnection with DTAG:⁷ There is one set of quite favorable rules for carriers who were fortunate enough to obtain an interconnection agreement from DTAG before the Spring of 1998; and another set of highly unfavorable terms for carriers whom DTAG negotiated with after it imposed extensive infrastructure build out and technical requirements.

5. Exorbitant National License Fees. A national license to provide telecommunications service in Germany costs an exorbitant 3 million DM (\$1.6 million). This price has never been adequately justified, and is currently under appeal.

Carriers who do not pay this fee operate at a significant disadvantage. For example, a carrier's carrier may not hand off traffic at regulated rates to DTAG that originated from city carriers outside the regions in which the carrier's carrier is licensed to provide service, even if each carrier in the chain of communication has a valid license for the areas in which it is operating (e.g. the city carriers who originate the traffic have valid licenses). Given the great regulatory uncertainty in Germany, investing in the license is itself a significant and highly uncertain investment.

⁷ Id. § 2.2(a).

For the foregoing reasons, CompTel/ACTA urges USTR and others in the interagency 1377 working group to take strong action in response to the pattern of serious departures from Germany's WTO commitments and anti-competitive conduct revealed in Carrier1's complaint. We would be happy to answer any questions you may have.

Sincerely,

Carol Ann Bischoff
Executive Vice President &
General Counsel
CompTel/ACTA