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APPENDIX A

THE COMMENTS REGARDING DT'S PRACTICES IN GERMANY ARE EXAGGERATED AND MISLEADING

Even if the comments of the German Competitors (Global TeleSystems ("GTS"), Novaxess, and QS Communications ("QSC")) were not beyond the scope of the Commission's public interest analysis, their allegations of anticompetitive practices in the German market are misleading and should be accorded no weight. A majority of neutral sources make clear that Germany has one of the world's most competitive telecommunications markets, especially for mobile telephony, and that many of the particular allegations in the comments distort reality.

Contrary to the German Competitors' allegations of anticompetitive practices and of German market control by DT, numerous third-party studies and relevant market data reveal that competition in the telecommunications market in Germany is robust. Germany opened its mobile telephony market in 1992, and all other sectors of its telecommunications market by January 1998. *See Sprint Corp.: Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d)*, Declaratory Ruling and Order, 13 FCC Rcd 17223, 17228 ¶ 14 (1998) ("*Sprint Corp.*") ("We agree with Sprint that the French and German telecommunications markets are now open to competition."). In doing so, Germany has been one of the European Union's pioneers in effective market liberalization.[1/] As a result of Germany's liberalization of its telecommunications market, competition has developed and thrived in each of the market

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1/ *See* Teligen, *Study on Market Entry Issues in EU Telecommunications Markets After 1st January 1998: A Report for the European Commission*, at 2 (July 26, 2000) ("*Study on Market Entry Issues*") ("Of the countries that liberalised in January 1998, Germany has seen the fastest development of competition over the period."); *FT Telecoms*, Financial Times, Nov. 15, 2000 ("In just over two-and-a-half years Germany has transformed itself from a country famous for its monopolistic telecoms regime to having one of the most competitive telecoms service markets in the world.").

sectors, prices have declined dramatically, and DT, as a former monopoly, has witnessed a precipitous decline in its market shares.

I. THE GERMAN REGULATORY SYSTEM HAS ALL THE ELEMENTS NECESSARY TO FOSTER ROBUST COMPETITION.

The German telecommunications market is the product of the procompetitive regulatory framework created by Germany's Telecommunications Act and implemented by the regulatory authority, RegTP. The Commission itself has acknowledged that Germany's regulatory system possesses each of the elements necessary to foster such vigorous competition.[2] In brief, Germany enjoys (1) a strong independent regulator; (2) a liberalized market that welcomes entry by foreign carriers, including those that are partially owned by foreign governments; and (3) domestic regulations and incentives that encourage and facilitate market entry.

Independent Regulatory Authority. The German telecommunications market is monitored by an independent regulator, RegTP. Although RegTP officially is overseen by the Federal Ministry of Economics and Technology, no decision taken by the Ruling Chambers of RegTP can be overturned by the Ministry. Rather, that authority rests solely with Germany's Administrative Courts and their appellate divisions, just as the FCC's decisions are subject to review in the U.S. courts of appeals. The Ministry is empowered to issue only general directives regarding the interpretation of the Telecommunications Act, and regulatory transparency requires that they be published in the Federal Gazette, the *Bundesanzeiger*. Notably, no such directive has ever been given. Finally, the German government's remaining shares in DT are supervised

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[2] *See Sprint Corp.*, Declaratory Ruling and Order, 13 FCC Rcd 17223, 17228 ¶ 14 (1998) ("We agree with Sprint that the French and German telecommunications markets are now open to competition.").

not by the Ministry of Economics and Technology, but by a third, separate entity, the Ministry of Finance.[3/] Consequently, RegTP is substantially insulated from potential political manipulation.

GTS and Novaxess have mischaracterized the relationship between RegTP and the Federal Ministry of Economics and Technology. GTS suggests that a recent Commentary Paper issued by the Ministry contains binding directives, and Novaxess declares that DT "will [thereby] be released from many of its dominant carrier restrictions."[4/] Neither of these statements is true. The Commentary Paper, a *non*binding discussion paper, merely affirms that significant competitive growth in certain markets, particularly the international market, points in the direction of possible price deregulation *in the future* (just as the FCC relied on growth in competition to deregulate the interexchange market, for example). Far from representing a statement of anticompetitive policy, this is an express goal of Germany's procompetitive Telecommunications Act, just as it is of section 10 of the U.S. Telecommunications Act of 1996.

QSC also is mistaken in characterizing DT's relationship with RegTP as "tangled and overbearing."[5/] As RegTP's mandate requires, and as its rulings illustrate, the German regulatory authority serves the interests of competition, not of DT. For example, since the end of 1999 RegTP has twice ordered substantial reductions in interconnection rates charged to DT's competitors.[6/] RegTP also has ordered DT to provide number portability at no charge.[7/] And in

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3/ *See* European Commission, *Fifth Report on the Implementation of the Telecommunications Regulatory Package*, Annex 3, at 6 (Nov. 11, 1999) ("*European Comm. Fifth Implementation Report*").

4/ Comments of Global TeleSystems ("GTS") at 10; Comments of Novaxess at 5.

5/ Comments of QS Communications ("QSC") at 4.

6/ *See* Federal Republic of Germany, Regulatory Authority for Telecommunications and Posts, *Annual Report 1999* at 14 (*"RegTP Annual Report 1999"*); William Boston, *Deutsche Telekom To Lower Charges, Aiding a U.S. Deal*, Wall St. J., Sept. 12, 2000, at A23. On appeal

November 2000, over the objection of DT, RegTP ruled that DT must offer interconnection to ISPs on a flat-rate basis as of February 1, 2001.[8/] Belying GTS's charge of "lax regulatory oversight,"[9/] these procompetitive decisions are illustrative of just how committed RegTP is to market liberalization, rather than protection of the incumbent, and just how independent a body it is. Far from having the power to set policy unilaterally, as the German Competitors allege, DT failed to dissuade RegTP from adopting these orders and many other procompetitive decrees.

Consumer groups have applauded RegTP's "clear commitment to provid[ing] residential customers with choice and competitive prices."[10/] In the words of a market analyst, "DT has . . . experienced greater competitive pressure than any other EU incumbent as the German regulator has embraced not just the letter, but the spirit of EU guidelines."[11/] GTS suggests that the newly appointed interim president of RegTP, Matthias Kurth, will somehow compromise RegTP's commitment to market liberalization.[12/] But Kurth's history with DT's long-time rival Colt Telecom, as well as his tenure at RegTP, expose that prediction as entirely unfounded; indeed,

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of the more recent rate reduction, a reviewing court entered a preliminary injunction but has not finally resolved this matter.

7/ *See European Comm. Sixth Implementation Report*, Annex 2, at 132.

8/ *German Regulator Orders Deutsche Telekom to Charge Flat Monthly Rate to ISPs*, AFX (UK), Nov. 16, 2000.

9/ Comments of GTS at 9.

10/ European Commission, *Sixth Report on the Implementation of the Telecommunications Regulatory Package*, Annex 2, at 124 (Dec. 7, 2000) ("*European Comm. Sixth Implementation Report*").

11/ Goldman Sachs, Global Equity Research, *Deutsche Telekom (DTEG.F) Telecom Services*, at 52 (July 26, 2000).

12/ *See* Comments of GTS at 21-22.

Kurth's appointment has been hailed as a victory for new entrants, as he is seen as a strong supporter of competition.[13/]

Liberal Market Entry Policies and Procedures. Another procompetitive hallmark of the German regulatory system is its liberal rules and procedures for entry into the telecommunications market. Germany, in fact, places no restrictions on foreign ownership.[14/] Consequently, numerous non-German companies — BellSouth, AT&T, WorldCom, Sprint, and British Telecom, to name only a few — have entered all telecommunications sectors in Germany. America Online is now the second largest ISP in Germany, a market that will soon match the Internet density of the United States and is predicted to have 20 million subscribers by the end of the year 2000.[15/] Indeed, DT is the *only* major player in the German telecommunications marketplace that is not substantially owned or controlled by non-German companies.

Germany also welcomes into its market carriers that are foreign *government*-owned or -controlled. For instance, KPN, the partially government-owned Dutch carrier, holds shares of E-Plus, Germany's third-largest mobile carrier. Foreign government-owned companies including France Telecom, Sonera, and KPN are also part-owners of entities that have recently

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13/ *See* Ralph Atkins, *German Watchdog to Name New Chief*, FT.com (Dec. 5, 2000), *available at* globalarchive.ft.com/globalarchive/articles.html?id=001205000316 &query=Germany+to+name+watchdo.

14/ *See* Klaus-Dieter Scheurle, Pres., Regulatory Authority for Telecomms. and Posts, *Importance of Telecommunications for Germany*, Address at Dusseldorf, at 3 (Feb. 2, 1999), *available at* www.regtp/de/en/aktuelles/reden/01146/index.html.

15/ *See* Gary C. Hufbauer & Edward M. Graham, *"No" to Foreign Telecoms Equals "No" to the New Economy!*, International Economics Policy Briefs, No. 00-7, IIE (Sept. 2000).

obtained valuable third-generation mobile licenses.[16] Swisscom, owned in part by the government of Switzerland, owns Debitel, the telecommunications company that was formerly a subsidiary of DaimlerChrysler.

Largely because Germany has no special licensing requirements for foreign carriers, the number of participants in the German telecommunications market has soared. As of June 2000, 321 Class 4 licenses for provision of voice telephony services and 559 Class 3 licenses for provision of transmission lines had been granted.[17] Moreover, as of December 31, 1999, more than 1,200 providers of telecommunications services not subject to any licensing requirements at all, such as resellers, had been registered with RegTP.[18] In its *Mid-Year Report 2000,* RegTP interpreted this "consistently high number of providers" as a reflection of "the intensity of competition in the German telecoms market."[19]

Procompetitive Regulatory Measures. Germany has complemented its liberal policies on ownership and licensing with proactive measures to open the existing telecommunications infrastructure for use by new market players. First, Germany's cost-based interconnection rates are among the lowest in the world. At the end of 1999, RegTP cut interconnection rates by more than 24 percent on average; and on September 8, 2000, RegTP ordered a further 23-percent

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16/ *See* Edmund L. Andrews, *The German Auction of Wireless Networks Uncovered Deep Fissures in the European Telecommunications Landscape*, N.Y. Times, Aug. 28, 2000, at C4; *A Tender for Selling Licenses for Researching and Developing 3G Networks (UMTS) Finished in Germany*, Telecommunications Services Market, Aug. 28, 2000; Sandra Wendelken, *Six Groups to Offer 3G in Germany*, Radio Communications Report, Aug. 21, 2000; Jonathan Collins, *The Bid Is Up in Europe*, 2000 CMP Media, Inc., Sep. 4, 2000.

17/ *See* Federal Republic of Germany, Regulatory Authority for Telecommunications and Posts, *Mid-Year Report 2000, available at* www.regtp.de/en/market/start/fs_15.html at 29 ("*RegTP Mid-Year Report 2000*").

18/ *See* Deutsche Telekom AG, SEC Form 20-F at 44 (filed April 19, 2000).

19/ *RegTP Mid-Year Report 2000* at 10.

reduction, effective June 1, 2001.[20] Thus far, DT has negotiated and finalized at least 117 interconnection agreements with its competitors.[21] Second, Germany also led the way within the EU in requiring full unbundled access to local loops from the outset of market liberalization in January of 1998.[22] Even by the end of 2000, no other large European country had imposed such a requirement; the United Kingdom will not do so until July of 2001.[23] The price of local loop access in Germany — which was established by order of RegTP, rather than by DT — now is comparable to or below the price of such access in the United States,[24] and the European Commission reports that, as of December 2000, there were 87 local loop access agreements in place between DT and its competitors.[25] Finally, in order to encourage market entry and competition to the fullest extent possible, the German government added other key requirements: number portability, carrier selection, and third-party billing and collection, all of which are essential building blocks for the development of competition. This approach to market liberalization, called the "'big bang' approach" by one analyst,"[26] "allowed entrants to enter the

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20/ *See RegTP Annual Report 1999* at 14; William Boston, *Deutsche Telekom To Lower Charges, Aiding a U.S. Deal*, Wall St. J., Sept. 12, 2000, at A23. *See supra* n.6.

21/ *See RegTP Mid-Year Report 2000* at 12; *European Comm. Sixth Implementation Report*, Annex 2, at 123.

22/ *See European Comm. Sixth Implementation Report*, Annex 2, at 127.

23/ *See* Teligen, *Study on Market Entry Issues*, at 27 (July 26, 2000).

24/ *See* Declaration of J. Gregory Sidak at 25 ("*Sidak Decl.*") (attached as Appendix B).

25/ *See European Comm. Sixth Implementation Report*, Annex 2, at 123. Alleging unreasonable delays in the provisioning of local loop access, GTS and QSC complain that DT should have to accept binding provisioning intervals and contractual penalties for breach thereof. *See* Comments of GTS at 22-23; Comments of QSC at 20-21. They fail to mention that, even though DT already includes such terms in contracts with other carriers, neither GTS nor QSC has expressed an interest in negotiating those terms with DT.

26/ *See* Teligen, *Study on Market Entry Issues*, at 27.

[German] market rapidly offering a variety of services, whereas their counterparts elsewhere were more restricted by regulation."[27]

In light of all these procompetitive developments, a recent study comparing the telecommunications markets of the United States and eight European countries reported that from 1998 to 1999 Germany had surpassed the United States in the degree to which its market had been liberalized.[28]

II. COMPETITION CONTINUES TO GROW IN EACH SECTOR OF THE GERMAN MARKET.

As shown above, Germany has dedicated itself to liberalizing its telecommunications market and to welcoming competition from both domestic and foreign competitors. The result of this process of reform is a German market that is fiercely competitive in nearly every sector. The wireless, long distance, and Internet markets, in particular — and increasingly the local market — all have multiple participants, relatively low rates, and other indicia of thriving, competitive markets.

Wireless. Germany's vibrant mobile telephony market has become a battleground for international mobile market players. In fact, of all the wireless competitors in Germany — including the new third-generation licensees — T-Mobil, DT's wireless operating subsidiary, is the only major wireless competitor in Germany that is owned exclusively by a German parent. It ranks second in subscribership behind Vodafone AirTouch, which acquired control of

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27/ *Id.*

28/ *See* Dieter Elixmann, Gabriele Kulenkampff, & Ulrike Schimmel, *The Development of Telecommunication Markets in Selected European Countries and in the U.S.*, WIK, Report presented at the 11th European Regional ITS-Conference, Sept. 9-11, 2000, Lausanne, Switzerland. This Report is based on findings made at the request of Mannesmann AG, DT's most important competitor in Germany.

Mannesmann Mobilfunk last year.[29/] E-Plus, which is now owned by BellSouth and KPN, ranks third.[30/] The fourth-largest carrier is Viag Interkom, which British Telecommunications Plc recently agreed to acquire.[31/] As of mid-2000, their respective market shares were approximately 41 percent (Vodafone), 39 percent (DT), 15 percent (E-Plus), and 5 percent (Viag Interkom).[32/] On the service competition and sales level, there is also vigorous competition among these network operators and numerous service providers (resellers) including MobilCom, Talkline, and Debitel. Overall, 14 different service providers have a retail market share of about one-third of the German mobile services market. This competitive environment has resulted in price reductions for wireless services of up to 60 percent in the past two years,[33/] and of more than 20 percent in 1999 alone.[34/] The European Commission notes that "following a 50% reduction by the two leading mobile operators on 1 January 2000, German [fixed-to-] mobile interconnection

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29/ *See RegTP Mid-Year Report 2000* at 20.

30/ *See id.; see also* BellSouth Corp., SEC Form 10-K, at 22 (filed Mar. 2, 2000).

31/ *See RegTP Mid-Year Report 2000* at 20; Jesse Eisinger, *Wireless Licenses in Germany Come at a Steep Price*, Eur. Wall St. J., Aug. 21, 2000 (noting BT's acquisition of Viag). Other competitors include U.S. firms such as Ameritech and Motorola. In addition, U.S. carriers WinStar, Teligent, Star One, Callino, and others have secured the majority of licenses for wireless local loop frequencies. *See* Steven Lipin, *Obscure Start-Up Ends Up Drawing an AllStar Board*, Asian Wall St. J., Dec. 15, 1999, at 3; *Formus Communications Co-Founder Named to Broadband Solutions' Hall of Fame*, PR Newswire, Apr. 6, 2000; Brian White, *Star One Wins German Licenses but Faces Financial Problems*, Network Briefing, Aug. 26, 1999; "Telephony," Communications Daily, Aug. 27, 1999.

32/ *See RegTP Mid-Year Report 2000* at 20.

33/ *See* Deutsche Bank AG, *Deutsche Telekom AG: T-ing Up the World*, Mar. 17, 2000, at 32.

34/ *See RegTP Annual Report 1999* at 16; *see also RegTP Mid-Year Report 2000* at 21 (mobile telephony prices have decreased 13 percent from June 1999 to June 2000).

tariffs are now among the lowest in Europe."[35] The recently completed third-generation wireless auction, which was open to carriers from any country and employing any technical standard, will introduce additional competition (including more foreign participation) in Germany, as new entrants MobilCom and Group 3G have acquired valuable new licenses.[36] MobilCom is backed by France Telecom (which is majority government owned), and Group 3G brings together Telefonica S.A. and Sonera Ltd. (the latter of which is majority government owned). All of this new activity has led market analyst Goldman Sachs to opine that "Germany now has the most competitive mobile market in Europe."[37]

Long Distance. The European Commission reported in November of 1999 that there were then some 47 carriers offering long distance service in Germany — more than any other national market in the European Union[38] — and that these carriers already had captured 40 percent of the long distance market, and approximately 48 percent of the market for international long distance.[39] Among these providers are numerous foreign telecommunications carriers, including U.S. long distance providers AT&T, WorldCom, Sprint, Qwest, GTS, and Primus Telecommunications. As the number of market participants has grown, so, too, have the competitive pressures on DT and its rivals. A recent study of the German market observes that

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35/ *European Comm. Sixth Implementation Report*, Annex 2, at 127.

36/ *See German '3G' Winners Take Hit from Credit Rating Agency S&P,* TR Daily, Aug. 21, 2000 (noting that having six distinct licensees will produce "fierce" competition); *German '3G' Spectrum Auction Tops U.K. Bidding Total by $10 Billion,* TR Daily, Aug. 17, 2000.

37/ Goldman Sachs, Global Equity Research, *Telecom Services: Mobile Europe*, 1 (August 30, 2000).

38/ *See European Comm. Fifth Implementation Report*, Annex 4, at 150-51.

39/ *See* Application by VoiceStream Wireless Corp. and Deutsche Telekom AG for Transfer of Control and Petition for Declaratory Ruling, filed Sept. 18, 2000, at 14.

these "competitive pressures in long-distance, both domestic and international, gained momentum quickly in 1999, forcing Deutsche Telekom to stem market share erosion with substantial price cuts."[40/] In the short time since the German market was liberalized, rates for domestic long-distance calls have fallen by as much as 85 percent (to as little as 2 cents per minute), and rates for international long-distance calls have dropped by as much as 93 percent.[41/] RegTP reports that, in the first six months of the year 2000 alone, call-by-call long-distance charges dropped as much as 40 percent.[42/] What is more, the competitive pressures that brought about these price reductions show no sign of diminishing. Goldman Sachs estimated that in June of 2000 DT was still "losing around 1% per month in DLD [domestic long distance] market share and 1.5% per month in ILD [international long distance] market share."[43/]

Local Services. The local telephony market in Germany also is becoming increasingly competitive. As of November 1999, there were 147 carriers authorized to provide local service,[44/] and, in its number of operators offering local calling, Germany now ranks second in the European Union.[45/] While QSC states that competitors' market share of local service is a

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40/ Goldman Sachs, *Fixed Income Research: Deutsche Telekom, Connecting to Growth*, 4 (June 6, 2000).

41/ *See RegTP Mid- Year Report* at 17-18; Klaus-Dieter Scheurle, Pres., Regulatory Authority for Telecomms. and Posts, *Competition, Regulation and the Future of Regulation in Germany*, Address at J.F. Kennedy School of Gov't, Harvard Univ., Boston, at 1 (April 10, 2000), *available at* www.regtp.de/en/aktuelles/reden/01774/index.html.

42/ *See Reg TP Mid- Year Report* at 17.

43/ Goldman Sachs, Global Equity Research, *Deutsche Telekom (DTEG.F): Telecom Services*, at 56 (July 26, 2000).

44/ *European Comm. Fifth Implementation Report*, Annex 4, at 229.

45/ *European Comm. Sixth Implementation Report*, Annex 1, at 11-12.

mere 1.1 percent,[46/] statistics from the European Commission reveal that this percentage has risen to as much as 5 percent,[47/] which is comparable to the experience of the United States. Moreover, new entrants are beginning significant deployment of wireless local loop technology; in 1998 and 1999, RegTP allocated wireless local loop frequencies to 18 operators, many of which were U.S. companies.[48/] Many business customers have a choice of provider, and consumers in more than half of the 83 largest German cities now do as well.[49/] These choices are certain to widen further, since DT's declining interconnection charges are expected to save competitors an estimated 13 percent in interconnection costs in 2001, and 23 percent in 2002.[50/]

Germany's leadership in mandating unbundled network access has resulted not only in increasing local competition, but also in a burgeoning DSL services market, in which "nearly 70 companies are lining up to offer high-speed DSL services using Deutsche Telekom's basic copper network."[51/] In June 2000, RegTP specifically ordered that DT "provision colocation space in its local exchanges within 10 weeks if space is available."[52/] According to RegTP's *Mid-Year Report 2000*, there were already half a dozen competitors of DT offering DSL access

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46/ *See* Comments of QSC at 19.

47/ *See European Comm. Sixth Implementation Report*, Annex 1, at 11-12.

48/ *See RegTP Mid-Year Report 2000* at 9-10.

49/ *Id.* at 12.

50/ William Boston, *Deutsche Telekom To Lower Charges, Aiding a U.S. Deal*, Wall St. J., Sept. 12, 2000, at A23. *See supra* n.6.

51/ *See* William Boston, *How to Shift the Internet into High Gear: Speed up Competition in Local Phone Services*, Wall St. J. Eur., June 13, 2000, at 11.

52/ Michelle Donegan & Peggy Salz-Trautman, *German, UK Operators in Bid to Force DSL Unbundling Progress*, Communications Week International, Nov. 13, 2000, www.totaltele.com/view.asp?articleID=33732&Pub=CWI&categoryid=705&kw=RegTP.

services and another dozen expected to launch service before the end of 2000.[53/] Furthermore, these new entrants serve 30 of the 60 German towns and regions in which DSL service is now available.[54/]

Other Sectors. The remaining sectors of Germany's telecommunications market also are experiencing a sharp rise in the number of competitors, with many of them from the United States. AOL is the second largest Internet service provider in Germany, and Compuserve enjoys a significant market share as well.[55/] With these new market entrants and intensifying competition, DT has again seen its market share decline. Contrary to the claims of QSC,[56/] this competitive atmosphere is certain to grow even more vibrant, because on December 15, 2000 DT launched its new wholesale flat rate for competing ISPs that purchase narrowband access from DT and resell it to end customers.[57/] This offer came a full one and a half months earlier than RegTP had ordered.[58/]

As these German markets grow ever more competitive, there are also more and more American companies participating in them. Cisco, Global Crossing, IBM, Qwest, UUNet, and other U.S. firms provide Internet backbone, data transmission, and computer hardware in Germany, and American companies such as Lockheed Martin (formerly COMSAT), GE

53/ *See RegTP Mid-Year Report 2000* at 16.

54/ *See European Comm. Sixth Implementation Report*, Annex 2, at 134.

55/ See Reg TP Mid- Year Report at 23.

56/ *See* Comments of QSC at 23.

57/ *See* Press Release, Deutsche Telekom, *Deutsche Telekom Is Now Offering a Wholesale Flat Rate for Online Services* (Dec. 14, 2000), *available at* http.www.telekom.de/ dtag/presse/artikel/0,1018,x1033,00.html.

58/ *See German Regulator Orders Deutsche Telekom to Charge Flat Monthly Rate to ISPs*, AFX (UK), Nov. 11, 2000.

American Communications, and SPACELINK have entered the country's satellite communications market. Additionally, as DT divests substantial portions of its cable television network, U.S. concerns — Callahan Associates, for example — have been the first to take controlling interests in some regions of Germany.[59/] DT is currently negotiating with other U.S. companies with respect to its cable networks in other regions.[60/]

III. THE COMMENTERS' PARTICULAR ALLEGATIONS DISTORT REALITY.

Notwithstanding this evidence of a regulatory environment conducive to the development of local competition, and strong signs that such competition is increasingly robust, the German Competitors level a series of charges about DT's conduct in the German market and the effectiveness of RegTP.[61/] While their claims are beyond the scope of the Commission's public interest test, they are sufficiently misleading to warrant a brief response.

Flat-Rate Services. GTS complains that DT's flat-rate tariffs — for example, the XXL tariff, "which allows customers to make free phone calls and online connections on Sundays and public holidays for a small additional fee"[62/] — enable DT to engage in predatory pricing, price squeezes, and similar anticompetitive activities.[63/] But GTS ignores the fact that RegTP, the independent regulatory authority, must approve DT's flat-rate tariffs. When considering flat-rate tariffs for bundled services, the regulator examines the cost-orientation of each of the regulated

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59/ *See* Deutsche Telekom AG, SEC Form 20-F, at 6 (filed Apr. 19, 2000).

60/ *Id.*

61/ *See generally* Comments of GTS; Comments of QSC; Comments of Novaxess.

62/ *Deutsche Telekom's Free Phone Calls Blocked by German Court*, AFX News (UK), June 6, 2000.

63/ *See* Comments of GTS at 20.

services separately, looking specifically for the possibility of anticompetitive conduct.[64/] The formula for calculating an acceptable price floor is the approved, cost-oriented interconnection fee plus a 25 percent surcharge to cover attendant billing, collection, and other services.[65/] The surcharge enables competitors to make offers comparable to those of DT. Under these requirements, DT cannot cross-subsidize its services or engage in the other anticompetitive activities alleged by the German Competitors.

The recent decision by RegTP to mandate flat-rate interconnection for ISPs also underscores the hollowness of the German Competitors' claims. The fact that RegTP did not dictate an exact rate to be charged — a point seized on and misinterpreted by GTS[66/] — is no more than adherence to standard legal procedure, since such flat-rate tariffs are never subject to *a priori* regulation; DT proposes a price and RegTP reviews it. Moreover, in a good-faith response to new entrants' concerns, DT already has begun to offer flat-rate access — several weeks *earlier* than required by RegTP.[67/]

License Fees. The data do not support the claims of GTS and QSC that the license fees set by RegTP and required for entry into the German market are "exorbitant" or that the fees constitute barriers to market entry.[68/] As noted above, Germany had issued 321 Class 4 licenses for provision of voice telephony services and 559 Class 3 licenses for provision of transmission

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64/ *See* RegTP Resolution BK2-1-00/035 (Feb. 16, 2000), at 21-22, Annex 1.

65/ *See id.* at 19-21, Annex 1.

66/ *See* Comments of GTS at 20.

67/ *See* Press Release, Deutsche Telekom, *Deutsche Telekom Is Now Offering a Wholesale Flat Rate for Online Services* (Dec. 14, 2000), *available at* http.www.telekom.de/ dtag/presse/artikel/0,1018,x1033,00.html.

68/ *See* Comments of GTS at 12; Comments of QSC at 27.

lines by June of the year 2000.[69] These figures place Germany near the top of the European Union in this category and refute any notion that the license fees have barred market entry. A recent Teligen study further refutes the charge that Germany's license fees are inflated by pointing out that, "whereas most other countries have an annual fee, some linked to turnover,"[70] Germany's fee is a one-time event. The study therefore concludes that, "compared to the business potential [Germany's fees] [are] a relatively low barrier to entry."[71] Furthermore, as required under the EC Licensing Directive of 1997, national license fees are supposed to reflect actual "administrative costs."[72] The Upper Administrative Court of Northrhine-Westfalia ruled in October 1999 that the license fees established by RegTP — which, given their one-time nature, must cover administrative expenses for as much as 30 years — are consistent with EU law.[73] Moreover, the German government is currently considering amending statutory law to lower license fees, and the EU also is considering eliminating the imbalance in fees charged by member states.

Billing and Collection Services. As an initial matter, it is noteworthy that DT — *unlike* incumbent carriers in the United States — is required to provide billing and collection services to its competitors. The congressional testimony submitted by each of the German Competitors nevertheless alleges that problems implementing this requirement impede competition.

69/ *See RegTP Mid-Year Report 2000* at 29.

70/ Teligen, *Study on Market Entry Issues*, at 28.

71/ *Id.*

72/ *European Comm. Fifth Implementation Report*, Annex 1, at 2.

73/ Metromedia Fiber Network, Inc., December 1999 Annual Report (SEC Form 10-K405), at 18, *available at* news.moneycentral.msn.com/sec/business.asp?Symbol=MFNX. A subsequent, contrary decision of the administrative court of Cologne is currently on appeal to the federal administrative court in Berlin.

Specifically, the testimony charges that DT's most recent offer to competitors increases charges for billing and collection services by as much as 600 percent, and that DT requires competitors to submit an individual direct debit authorization for each customer.[74/] Both assertions are wrong. As of February 1, 2001, DT's fees for billing and collection services are scheduled to increase from 40 to 80 percent, subject to the outcome of an arbitration proceeding and depending on the specific structure of the services provided by a contracting carrier. The increases reflect, and simply recoup, the costs incurred by DT in providing these services. Indeed, since the end of 1998, DT has been required to offer these services without being able to cover its costs. As for required debit authorizations, DT and its competitors have agreed in recent negotiations to include clauses in each carrier's general terms and conditions that enable DT to debit amounts owed from an end customer's account without risk. This double authorization will more than satisfy the need for explicit permission for DT directly to debit the accounts of competitors' customers, and by no means constitutes a barrier to competition.

QSC also is wrong in its claim that DT stifles competition by refusing to provide new market participants with billing services.[75/] RegTP's rulings and current DT practice show that charge to be baseless. On February 21, 2000, RegTP ruled that DT must continue to provide billing and collection services for voice telephony (call-by-call and preselection), directory inquiry, value-added, and Internet-by-call services. Currently, DT provides these services for a host of carriers and service providers, and DT will do so for any requesting company. Additionally, under the online billing procedure — *i.e.*, where DT resells other providers'

74/ *See, e.g.*, Comments of Novaxess, Annex A (Lipman Testimony), at 21-22.

75/ *See* Comments of QSC at 27.

services to end-users — billing and collection services are directly offered for all value-added services, which appear on the customer's DT bill as DT services.

Interconnection. The German Competitors are further mistaken in suggesting that DT, rather than RegTP, dictates the rules and conditions for interconnection.[76] First, RegTP "is empowered to order, at the request of an interconnecting party, public telecommunications network operators to interconnect and to *define the conditions of interconnection*, and sets the deadlines for implementation of the decision."[77] In nearly every case, RegTP becomes involved because one of the parties to a negotiation will invoke the dispute settlement procedure, which prescribes that a decision must be made within six weeks (with limited extensions up to another four weeks) and enforcement shall occur within three months. Second, the rules for provision of interconnection are published in the Official Gazette as a general administrative order — just as all interconnection rates are published as basic offers.

As mandated under EU law, RegTP has authority to publish elements of interconnection agreements that "are expected to be part of the reference interconnection offer (RIO)."[78] The EU Commission's *Fifth Implementation Report* observed that Germany's RIO has been created "progressively" and "on the basis of decisions of the Ruling Chambers on tariff authorisation and dispute settlement, which have then been published by RegTP as part of the RIO (*Grundangebot*)."[79] As parties to these interconnection agreements and to the specific disputes brought before RegTP's Ruling Chambers, DT and its competitors have had a voice in the

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76/ *See, e.g.*, Comments of Novaxess, Annex A (Lipman Testimony) at 17 (emphasis added).

77/ *European Comm. Fifth Implementation Report*, Annex 3, at 6.

78/ *Id.*, Annex 3, at 7.

79/ *Id.*

development of the RIO, and the terms of interconnection are well known to them. As for the interconnection delays complained of by GTS and QSC,[80] they ignore that it takes time to fulfill an increasing rush of requests: DT has provided or received orders for some 71,000 points of interconnection, "which corresponds to the capacity needed to transport all German telecommunications."[81]

RegTP also has asserted its authority in regulating the costs of interconnection. After slashing rates by more than 24 percent at the end of 1999,[82] in 2000 RegTP again "lowered the charges that competitors must pay Deutsche Telekom AG to tie into the dominant phone company's network."[83] In addition, the new interconnection fees will no longer be based on distance, but rather on the network elements used (switches, loops) and the number of central offices to which a carrier connects. They are understood to reflect "the government's goal of rewarding companies that build infrastructure and thus create jobs and improve overall service."[84] Although it is "difficult to compare the [current, distance-based] German interconnection tariffs with the EU best practice benchmark,"[85] which is element-based, the

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80/ *See* Comments of GTS at 13; Comments of QSC at 27.

81/ *European Comm. Sixth Implementation Report*, Annex 2, at 126 (describing provisioned and unprovisioned points of interconnection).

82/ *See RegTP Annual Report 1999* at 14.

83/ William Boston, *Government Cuts Charges to Tie Into Giant's Lines*, Wall St. J., Sept. 12, 2000. *See supra* n.6.

84/ *Id.*

85/ *European Comm. Sixth Implementation Report*, Annex 2, at 126.

European Commission has observed that the prospective tariffs and conditions recently approved by RegTP have "removed a major concern of new entrants."[86/]

Conclusion

The comments of the German Competitors provide a distorted view of competition in the German telecommunications market. The Commission recognized in 1998 that Germany had in place all the necessary hallmarks for the development of competition;[87/] as a result of these conditions, most market sectors are now fiercely competitive. Competition in the market for local telephony is not yet as robust as in the markets for wireless and long distance services, just as new entrants in the United States have been relatively slow to aggregate substantial market share. But the German Competitors' claims of anticompetitive practices are unfounded. RegTP has adopted and enforced strongly procompetitive policies, often rejecting the positions advanced by DT. Given time, local competition will flourish, as competition has in every other market sector. RegTP is poised to ensure this outcome, and there is plainly no warrant for any intervention by the FCC.

86/ *Id.* at 127.

87/ *See Sprint Corp.*, Declaratory Ruling and Order, 13 FCC Rcd 17223, 17228 ¶ 14 (1998).