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April 30, 2004

Richard York
Director – Regulatory
Telecommunications
Australian Competition and Consumer Commission
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Re: Mobile Services Review - Mobile Terminating Access Service

Dear Mr. York:

AT&T Corp. and AT&T Global Network Services Australia Pty. Ltd. (collectively, "AT&T") are pleased to provide comments on the ACCC's Draft Decision "*Mobile Terminating Access Service*," issued 26 March 2004 (the "*Draft Decision*").¹ AT&T provides a large volume of telecommunications services to Australia and has an interest in this proceeding because excessive mobile termination charges in Australia have a very negative impact on AT&T's customers who make calls to Australia. AT&T supports the ACCC's view in the *Draft Decision* that it is in the long-term interest of end users to treat wholesale mobile terminating access service ("MTA") as a Declared Service, and that it is necessary to adopt a new pricing principle that significantly reduces the price of the MTA service. However, AT&T disagrees with the ACCC's proposed remedy to gradually decrease the rate towards a conservative benchmarked target of AU\$0.12 over a staged adjustment period lasting between 1 July 2004 and concluding on 1 January 2007, and asserts that the ACCC has the full authority and justification to immediately reduce mobile termination rates to an even lower cost-oriented level.

¹ Australian Competition & Consumer Commission, *Mobile Services Review: Mobile Terminating Access Service, Draft Decision on Whether or not the Commission should Extend, Vary or revoke its Existing Declaration of the Mobile Terminating Access Service* (released Mar. 26, 2004).

Notwithstanding AT&T's strong preference for deregulatory market-based remedies, direct regulatory intervention is necessary to prevent mobile network operators ("MNOs") from abusing their market power by charging unreasonably high termination rates. As described below, AT&T supports ACCC's conclusions that the market for MTA services is not effectively competitive (*Id.* at 93.), and that continued Declared Service status is necessary in combination with a new pricing principle that aligns mobile termination charges with underlying costs (*Id.* at 104). AT&T also notes that Australia is required by its commitments under the WTO General Agreement on Trade in Services to ensure that its "major supplier" (*i.e.*, dominant) telecommunications carriers, including MNO provision of MTA services, must provide interconnection at cost-oriented rates.

I. High Mobile Termination Rates are a Major Concern that Harm the Long Term Interests of End Users

Excessive mobile termination charges foster inefficient investment and operations, and unfairly distribute benefits and costs by harming consumers making calls to mobile users, particularly from fixed networks, and by allowing MNOs either to cross-subsidize the costs of their more competitive services or to retain unjust profits. The ACCC was one of the first regulators in the world to recognize that above-cost mobile termination rates are a major concern, and many other countries have thereafter recognized this concern, as underscored by the Office of the United States Trade Representative ("USTR") in its 2003 Section 1377 review of telecommunications trade agreements.

The USTR again highlighted this concern in its recent 2004 Section 1377 review, in which it cited "some progress" in reducing mobile termination rates toward more competitive levels, and recognized Australia's "proposed measures to remedy rates considered unreasonable."² The USTR also noted in the 2004 Section 1377 review that "[t]he [United States] Administration, through the National Telecommunications and Information Administration, while not advocating regulation specifically for mobile services, has advocated that a principle of cost-orientation be applied to international mobile termination rates" in a manner consistent with specific trade agreements, and that the U.S. Federal Communications Commission recently announced that it will issue a Notice of Inquiry on high mobile termination rates. (*Id.*, at 5.)

The ACCC has properly analyzed the relevant MTA market and the need for a pricing principle that will significantly reduce mobile termination charges, based on both Section 152ALA of the Trade Practices Act 1974 and also on its WTO Trade Commitments.

² *Results of 2004 Section 1377 Review of Telecommunications Trade Agreements*, Apr. 7, 2004, at 2, available at: <http://www.ustr.gov/sectors/industry/Telecom1377/2004/1377report.pdf>

II. The ACCC Properly Analyzed the Relevant Market and Correctly Concludes that Continued Declaration of Mobile Termination Service with a New Pricing Principle is Likely to Promote Competition in Telecommunications Services

AT&T advocates the use of deregulatory market-based solutions whenever possible. In most circumstances, because competitive forces can overcome many market failures and can respond dynamically to consumer needs, a light-handed approach to regulation will achieve better results for the public than would regulatory intervention. However, in those circumstances where market failures make it impossible for competitive forces to discipline rates effectively, it is necessary to intervene with direct regulation. Unconstrained mobile call termination rates sit squarely within this latter category, and requires ACCC to take action to protect the long-term interest of end users through regulation.

Upon analyzing the potential supply-side and demand-side competitive restraints on mobile termination charges, ACCC concludes that there is a separate market for termination on each mobile network. (*Draft Decision* at 56). In effect, ACCC finds that each mobile operator is a monopolist in the supply of termination to its own network, and AT&T agrees with these findings. As ACCC concludes, under the Calling Party Pays (“CPP”) system market forces do not constrain high mobile termination fees, because the person who initiates the call to the mobile phone pays the mobile operator for the mobile termination, while the called party, who is a customer of the mobile operator, is not charged for the termination. Because the consumer who subscribes to the CPP mobile operator is not the same consumer who pays the CPP mobile operator for call termination, there is no market constraint on CPP mobile operators to reduce high call termination fees.

There is no effective demand-side substitute for the calling party or the called party, because the potential substitutes (*e.g.*, placing calls to fixed rather than mobile lines, and sending short text messages rather than voice calls, or utilizing call-back) are clearly imperfect and also would undermine the quality and convenience factors that create demand in the broader mobile market. There also is no effective supply-side substitute, which would require a competing operator to have access to the details of the end user’s SIM card, and the mobile operator can simply refuse to share this information with other operators.

Market forces clearly are not operating here. Because calling parties cannot take their business elsewhere if they need to reach a customer on the particular mobile network, because mobile users are unlikely to make network provider decisions on the basis of termination charges that they never see nor pay, and because fixed network operators cannot protect themselves or their customers from high mobile termination rates by refusing to interconnect, the mobile operator can collect excessive charges with impunity.

Other national regulators have reached conclusions similar to the *Draft Decision*. The *Draft Decision* appropriately highlights the regulatory actions undertaken by Ofcom (formerly OFTEL), in finding that each mobile network operator exercises market power over call termination on their networks and should therefore be subject to termination rate regulation. *Id.* at 37. Ofcom made this determination following a European Commission recommendation designating the market for voice call termination on individual mobile networks as one where European Union Member State remedies are presumptively necessary. (See *Commission Recommendation 2003/31/EC on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation*, OJ L 114, 8.05.2003, at 45, market 16 of the Annex.)³ Likewise, regulators in other regions, such as the Office of Utilities Regulation in Jamaica, have set forth consistent views that MNOs possess market power for MTA service and must be regulated to ensure cost-based pricing.⁴

A recent Ovum study similarly finds that “[t]here are no effective market mechanisms to curb the price of the mobile termination service” and that “[t]here is considerable evidence that mobile termination rates (MTRs) are well above costs in most countries. We estimate that profit margins of over 100% are commonplace for most mobile network operators (MNOs).” (David Rogerson, *Mobile Termination Rates*, Ovum, Jan. 2004, at 1.) Ovum states that “[i]n markets where the calling party pays for making calls to a mobile phone, mobile termination rates take on the characteristics of a ‘bottleneck’ service.” (*Id.* at 4.) “By this we mean a service for which the normal disciplines of the competitive market are narrowed to such an extent that they no longer constrain the behaviour of the service provider.” (*Id.*) The result is unreasonably high mobile termination rates, which requires mobile rates to be “regulated and brought towards cost levels in order to correct these competitive distortions and network inefficiencies.” (*Id.* at 1.)

Australia’s WTO commitments in telecommunications services under the General Agreement in Trade in Services also require the provision of cost-oriented rates for call termination on the networks of mobile carriers in Australia. Australia made “additional commitments” under the WTO Reference Paper to ensure that “[i]nterconnection with a major supplier” is provided at “cost-oriented rates.” (World Trade Organization, Fourth Protocol to the General Agreement on Trade in Services, Apr. 11, 1997, Australia, Schedule of Specific Commitments, at 6.) For the same reasons that ACCC finds that MNOs in Australia are dominant in the provision of MTA services under Australian competition law, those mobile operators are “major suppliers” as defined by Australia’s Reference Paper commitments. They have “the ability to materially affect the terms of participation (having regard to price and

³ Regulators or competition authorities in Belgium, Finland, France, Greece, Hungary, the Netherlands and Sweden have also found that mobile operators have market power.

⁴ See Office of Utilities Regulation, *Assessment of Dominance in Mobile Call Termination, Supplementary Consultative Document*, TEL 2004/03 (released March 30, 2004).

supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of [their] position in the market,” as those commitments require. (*Id.* at 5). Thus, Australia must ensure that interconnection with these major suppliers is provided at cost-oriented rates.

AT&T accordingly supports the ACCC’s analysis of the market performance and the ongoing need for a more robust remedy, but urges the ACCC to impose a remedy that ensures immediate MTA service rate reductions to cost-oriented levels.

III. The ACCC Should Implement Mobile Termination Access Service Rate Reductions Immediately Rather Than Over a Three-Year Glide-path, and Should Establish LRIC-based Rates

After correctly concluding that MTA service should remain a Declared Service, and determining that a new pricing principle is necessary to more closely align MTA charges and costs, the ACCC proposes to adopt a target termination price of AU\$0.12 based on international benchmarking, and to implement this reduction from current rates over the course of a three year glide-path.

AT&T welcomes the ACCC’s decision to implement a pricing principle that will significantly reduce prices, and agrees with the ACCC that the target termination price of AU\$0.12 is indeed a “conservative” price target. *Draft Decision* at 167. The ACCC acknowledges, for example, that international benchmarking of publicly available LRIC studies on MTA services shows rates between AU\$0.05-AU\$0.12, and that the ACCC have set the target rate at the high end of the publicly available cost estimates.

Similarly, AT&T’s own extremely conservative study of termination costs for U.S.-outbound international calls in 65 countries shows that average per minute termination costs for international calls to called parties served by mobile networks, *including the costs of international transmission and gateway switching in addition to mobile termination*, should be no greater than AU\$0.116 (US\$0.084). The 65 country average purely for mobile termination, based on 50% of a mobile operator’s mobile to mobile on-net rate as a surrogate for the cost of termination on a mobile network is only AU\$0.081 (US\$0.059).⁵ AT&T’s recent study, which is attached to these

⁵ The use of half of a mobile to mobile on-net rate is supported by a recent Ovum study, which states that “[r]egulators can obtain a proxy for cost-based rates from prices of other services set in markets where competitive forces mean that prices are reasonably cost reflective” and that “50% of the price of a mobile on-net call” may be used to estimate the cost of mobile call termination. David Rogerson, *Mobile Termination Rates*, Ovum, Jan. 2004, at 32. Within the AT&T study, the tariff component pricing for a national mobile retail rate for Australia, based on 50% of a mobile on-net call, is noticeably the highest of the 65 countries in the study. This high retail tariff certainly does not reflect that termination costs are higher in Australia than in any of the 65 countries (which include several less developed countries), but suggests that the prior pricing principle of benchmarking wholesale mobile termination rate reductions against retail subscriber price reductions created an unintended incentives for mobile carriers to maintain extraordinarily high retail prices as well as high wholesale prices.

comments as Appendix 1, is largely based on public carrier tariffs for the network components used to terminate international calls. Since many of these tariffed rates are not set in competitive markets, AT&T's study provides very conservative estimates for the costs of terminating international calls on mobile networks.

ACCC's proposed target rate of AU\$0.12 clearly is set at a very conservative level, and indeed, the ACCC can and should satisfy its obligation to ensure cost-oriented rates by using a LRIC-based approach that would reduce the rate further than that proposed in the *Draft Decision*. Even though the Commission has tentatively decided to not determine a LRIC price for mobile termination service, on the basis that it would be costly (in a resource sense) and time consuming to implement (*Id.* at 164), AT&T encourages the ACCC to reconsider this approach given that LRIC best replicates prices that would be charged by carriers subject to competitive market pressures, and in turn, best ensures an efficient utilization of the service in question. Nonetheless, to bring immediate benefits to end users, AT&T would support the ACCC implementing the currently proposed rate reductions, during the interval it would take to conduct a full LRIC study.

After establishing the conservative target rate, ACCC proposes a gradual adjustment to the target price that will last three years, through January 2007. (*Id.*, at 167-168). ACCC supports this long glide-path on the basis that "any move substantially to reduce the price of mobile termination services could generate significant disruption to the pricing and business strategies of mobile network operators." (*Id.*). AT&T disagrees. The proposed three-year implementation period is far too generous to the MNOs, particularly given the conservative target price, and the prolonged period of high charges is too onerous on calling parties. Rather than allowing the MNOs to continue extracting super-normal monopoly profits from call termination services, ACCC should eliminate this market distortion in one step. No transition period is necessary, particularly given that the MNOs have understood for several years that this is a Declared Service, for which the ACCC expected that charges should come down towards cost-based levels. A lengthy transition period rewards the MNOs for their prior misbehavior in maintaining unreasonably high rates.

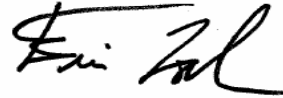
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For the above reasons, AT&T applauds the ACCC's conclusion to continue treating MTA service as a Declared Service, and to implement a more aggressive pricing principle that will align rates with underlying costs. However, AT&T urges ACCC to implement the proposed rate reductions immediately rather than over a lengthy and unnecessary glide-path, and also urges ACCC to further reduce the target price to a LRIC-based rate.

Richard York
April 30, 2004
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If you have any questions concerning these comments, please do not hesitate to contact me in that regard.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eric Loeb". The signature is written in a cursive style with a large, sweeping initial "E".

Eric H. Loeb