

# Submission to the Select Committee on the National Broadband Network, Senate of Australia

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This submission will serve to supplement the testimony that I provided to the Committee on 4 March 2009 in Canberra. It consists primarily of pointers to reports, papers and other materials that are relevant to Australia's NBN initiative. I am also enclosing a number of these materials as enclosures.

All opinions expressed are my personal views. They do not necessarily reflect the views of my institute or of any client, and I am not representing any client in regard to the NBN.

I gave a presentation to the Australian Telecommunications Users' Group (ATUG) on 5 March 2009. The presentation covered largely the same themes as my testimony to your committee. Some of the slides serve to illustrate the "ladder of investment", whereby competitors initially achieve market entry using wholesale products available from the incumbent that require relatively low initial investment, but that offer limited profitability. Over time, as competitors achieve greater customer density, they work their way up the ladder, using incumbent wholesale offerings (especially Local Loop Unbundling (LLU)) that are more capital-intensive but that also enable greater service differentiation and thus greater profitability. The presentation is available at: <http://www.atug.com.au/ATUGThisWeek/ATW060309/JSMPres.pdf>.

My colleagues at the WIK (the *Wissenschaftliches Institut für Infrastruktur und Kommunikationsdienste*) recently completed a comprehensive study of Next Generation Access (NGA) on behalf of the European Competitive Telecommunications Association (ECTA). Many would consider this to be the definitive analysis of NGA for Europe. The report reaches a number of key findings that are relevant to nearly all developed countries:

- It is very unlikely that the complete national territory of a country will be covered by fibre-based NGA solely as a result of private investment unassisted by some form of subsidy or stimulus.
- For most of the national territory, once a first mover has deployed fibre-based NGA, it will not be profitable for another firm to replicate that infrastructure.
- Consequently, if regulators are intent (as they should be) on maintaining competition for electronic communications services, then even more focus will be needed going forward than was in the past to ensure that wholesale competitive access is fully effective.

The report is available on the ECTA web site at:

[http://www.ectaportal.com/en/upload/ECTA%20NGA\\_Executive\\_Summary\\_masterfile\\_2008\\_09\\_16.pdf](http://www.ectaportal.com/en/upload/ECTA%20NGA_Executive_Summary_masterfile_2008_09_16.pdf) and

[http://www.ectaportal.com/en/upload/ECTA\\_NGA\\_masterfile\\_2008\\_09\\_15\\_V1.zip](http://www.ectaportal.com/en/upload/ECTA_NGA_masterfile_2008_09_15_V1.zip)

In my testimony, I compared European regulation to U.S. regulation, and argued that the European approach should be preferred going forward. Two of my papers may be useful to the Committee. I wrote the first in 2002, when the European system had been legislatively enacted but before it had been put into practice. At the time, I argued that the European system would reach similar conclusions to those of the U.S., but might do so with greater ease and accuracy in a converged world. A few years later, I returned to the same comparisons, and found that the European system was working well – but that the United States had meanwhile abandoned its procompetitive approach, and would most likely pay a great price for doing so.

Federal Communications Commission (FCC) Office of Strategic Planning and Policy Analysis (OSP) Working Paper 36, “The Potential Relevance to the United States of the European Union’s Newly Adopted Regulatory Framework for Telecommunications,” July 2002, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-224213A2.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-224213A2.pdf). The article and derivative works also appear in: *Rethinking Rights and Regulations: Institutional Responses to New Communications Technologies*, Ed. Lorrie Faith Cranor and Steven S. Wildman, MIT Press, 2003; in the *Journal on Telecommunications and High Technology Law* 111 (2003); and in the *2004 Annual Review* of the European Competitive Telecommunications Association (ECTA).

“Is the U.S. Dancing to a Different Drummer?” *Communications & Strategies*, no. 60, 4th quarter 2005. Available at: [http://www.idate.fr/fic/revue\\_telech/132/CS60%20MARCUS.pdf](http://www.idate.fr/fic/revue_telech/132/CS60%20MARCUS.pdf). Also available in *intermedia* (the journal of the International Institute of Communications), vol. 34, no.3, July/August 2006.

In my testimony on March 4, I spoke of threats to Network Neutrality, and noted that the United States would most likely be forced to re-regulate to address these threats. This re-regulation is likely to be intrusive and messy, because it will be difficult to identify in advance which behaviours are likely to be harmful to consumer welfare. In Europe, by contrast, Network Neutrality is not a significant concern, because markets are sufficiently competitive to make harmful discrimination unprofitable and thus unlikely. I would call the committee’s attention to a short and (hopefully) fairly readable paper that I wrote on the subject a year ago, and also to a larger report including case studies that my group at the WIK completed more recently for the German national regulatory authority (BNetzA).

“Network Neutrality: The Roots of the Debate in the United States”, *Intereconomics*, Volume 43, Number 1, January 2008. See: <http://www.springerlink.com/content/53k108282v170324/fulltext.pdf>.

Kenneth R. Carter, J. Scott Marcus, and Christian Wernick, *Network Neutrality: Implications for Europe*, WIK, January 2009. Available at: [http://www.wik.org/content/diskus/Diskus\\_314.pdf](http://www.wik.org/content/diskus/Diskus_314.pdf).

The Committee might also find interesting a very short piece that I wrote about events in New Zealand. My co-author, Prof. Justus Haucap, had worked for the New Zealand Treasury (in effect, the regulator) during the years in question. The paper was intended as a cautionary tale to my American colleagues. The absence of

procompetitive regulation of network access and interconnection can lead to problems.

With Justus Haucap, “Why Regulate? Lessons from New Zealand”, *IEEE Communications Magazine*, November 2005, available at: <http://www.comsoc.org/ci1/Public/2005/nov/> (click on "Regulatory and Policy").