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SUBJECT TO LEGAL REVIEW FOR ACCURACY, CLARITY AND CONSISTENCY
MARCH 1, 2004
CHAPTER TWELVE
TELECOMMUNICATIONS

ARTICLE 12.1 : SCOPE AND COVERAGE

1. This Chapter applies to measures affecting trade in telecommunications services.
2. Except to ensure that enterprises operating broadcast stations and cable systems have continued access to and use of public telecommunications services, this Chapter does not apply to measures adopted or maintained by a Party relating to broadcast or cable distribution of radio or television programming.
3. Nothing in this Chapter shall be construed to:
 - (a) require a Party to compel any enterprise to establish, construct, acquire, lease, operate or provide telecommunications networks or services where such networks or services are not offered to the public generally; or
 - (b) require a Party to compel any enterprise exclusively engaged in the broadcast or cable distribution of radio or television programming to make available its broadcast or cable facilities as a public telecommunications network.

Section A: Access To And Use Of Public Telecommunications Services

ARTICLE 12.2 : ACCESS AND USE

1. Each Party shall ensure that enterprises of the other Party have access to and use of any public telecommunications service, including leased circuits, offered in its territory or across its borders, on terms and conditions that are reasonable and non-discriminatory (including with respect to timeliness), including as set out in paragraphs 2 through 5.
2. Each Party shall ensure that such enterprises are permitted to:
 - (a) purchase or lease, and attach terminal or other equipment that interfaces with a public telecommunications network;
 - (b) provide services to individual or multiple end-users over any leased or owned circuit(s);
 - (c) connect owned or leased circuits with public telecommunications networks and services in the territory, or across the borders, of that Party or with circuits leased or owned by another enterprise;
 - (d) perform switching, signalling, processing and conversion functions; and
 - (e) use operating protocols of their choice.

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3. Each Party shall ensure that enterprises of the other Party may use public telecommunications services for the movement of information in its territory or across its borders and for access to information contained in databases or otherwise stored in machine-readable form in the territory of either Party or any WTO member.
4. Notwithstanding paragraph 3, a Party may take such measures as are necessary to ensure the security and confidentiality of messages subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or disguised restriction on trade in services.
5. Each Party shall ensure that no condition is imposed on access to and use of public telecommunications networks or services other than as necessary to:
 - (a) safeguard the public service responsibilities of suppliers of public telecommunications networks or services, in particular their ability to make their networks or services available to the public generally; or
 - (b) protect the technical integrity of public telecommunications networks or services.

Section B: Suppliers Of Public Telecommunications Services¹²⁻¹

ARTICLE 12.3 : INTERCONNECTION

1. Each Party shall ensure suppliers of public telecommunications services in its territory provide, directly or indirectly, interconnection with the suppliers of public telecommunications services of the other Party.
2. In carrying out paragraph 1, each Party shall ensure that suppliers of public telecommunications services in its territory take reasonable steps to protect the confidentiality of commercially sensitive information of, or relating to, suppliers and end-users of public telecommunications services and only use such information for the purpose of providing those services.

ARTICLE 12.4 : NUMBER PORTABILITY

Each Party shall ensure that suppliers of public telecommunications services in its territory provide number portability for fixed telephony and any other service designated by that Party to the extent technically feasible, and on terms and conditions that are reasonable and non-discriminatory (including with respect to timeliness).

ARTICLE 12.5 : DIALING PARITY

¹²⁻¹ For the purposes of this Chapter, Articles 12.4 and 12.5 do not apply to suppliers of commercial mobile services. Moreover, a state regulatory authority may exempt a rural local exchange carrier, as defined in Section 251 (f) (2) of the United States Communications Act of 1934, as amended by the Telecommunications Act of 1996, from the obligations contained in Articles 12.4 and 12.5.

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Each Party shall ensure that suppliers of public telecommunications services in its territory provide dialing parity to suppliers of public telecommunications services of the other Party, and afford suppliers of public telecommunications services of the other Party non-discriminatory access to telephone numbers and related services.

ARTICLE 12.6 : SUBMARINE CABLE SYSTEMS

Each Party shall ensure reasonable and non-discriminatory treatment for access to submarine cable systems (including landing facilities) in its territory, where a supplier is authorized to operate such a submarine cable system as a public telecommunications service.

Section C: Conduct Of Major Suppliers Of Public Telecommunications Services^{12-2 12-3}

ARTICLE 12.7 : TREATMENT BY MAJOR SUPPLIERS

Each Party shall ensure that a major supplier in its territory accords suppliers of public telecommunications services of the other Party treatment no less favourable than such major supplier accords in like circumstances to its subsidiaries and affiliates, or any non-affiliated service supplier, regarding:

- (a) the availability, provisioning, rates or quality of like public telecommunications services; and
- (b) the availability of technical interfaces necessary for interconnection.

ARTICLE 12.8 : COMPETITIVE SAFEGUARDS

Each Party shall maintain appropriate measures for the purpose of preventing suppliers who, alone or together, are a major supplier in its territory from engaging in or continuing anti-competitive practices, including in particular:

- (a) engaging in anti-competitive cross-subsidization;
- (b) using information obtained from competitors with anti-competitive results; and

¹²⁻² For the avoidance of doubt, the obligations imposed under this Section only apply with respect to those public telecommunications services that result in a supplier of public telecommunications services being a major supplier.

¹²⁻³ For the purposes of this Chapter, Section C does not apply to rural telephone companies, as defined in section 3(37) of the U.S. Communications Act of 1934, as amended by the Telecommunications Act of 1996, unless a state regulatory authority orders otherwise. Moreover, a state regulatory authority may exempt a rural local exchange carrier, as defined in section 251(f)(2) of the U.S. Communications Act of 1934, as amended by the Telecommunications Act of 1996, from the obligations contained in Section C. In addition, Section C does not apply to suppliers of commercial mobile services.

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- (c) not making available, on a timely basis, to suppliers of public telecommunications services, technical information about essential facilities and commercially relevant information that is necessary for them to provide services.

ARTICLE 12.9 : RESALE

1. Each Party shall ensure that major suppliers in its territory:
 - (a) offer for resale, at reasonable rates,¹²⁻⁴ to suppliers of public telecommunications services of the other Party, public telecommunications services that such major supplier provides at retail to end users that are not suppliers of public telecommunications services; and
 - (b) do not impose unreasonable or discriminatory conditions or limitations on the resale of such services.¹²⁻⁵
2. Each Party may determine in accordance with its domestic law and regulation which public telecommunications services must be offered for resale by major suppliers in accordance with paragraph 1, based on the need to promote competition or such other factors as are considered relevant.

ARTICLE 12.10 : UNBUNDLING OF NETWORK ELEMENTS

Each Party shall provide its telecommunications regulatory body with the authority to require that major suppliers in its territory provide suppliers of public telecommunications services of the other Party access to network elements for the provision of public telecommunications services on an unbundled basis, and on terms, conditions, and cost-oriented rates that are reasonable, non-discriminatory and transparent.

ARTICLE 12.11 : INTERCONNECTION

General Terms and Conditions

1. Each Party shall ensure that a major supplier in its territory provides interconnection for the facilities and equipment of suppliers of public telecommunications services of the other Party:
 - (a) at any technically feasible point in the major supplier's network;
 - (b) under non-discriminatory terms, conditions (including technical standards and specifications) and rates;

¹²⁻⁴ Parties may determine reasonable rates in accordance with any methodology considered appropriate. Wholesale rates, set pursuant to domestic law and regulation, shall be considered to be reasonable for purposes of subparagraph (a).

¹²⁻⁵ Resellers that obtain, at wholesale rates, a public telecommunications service available at retail only to a category of subscribers may be prohibited from offering such service to a different category of subscribers, where provided for under national law or regulation.

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- (c) of a quality no less favourable than that provided by such major supplier for its own like services, for like services of non-affiliated service suppliers, or for its subsidiaries or other affiliates;
- (d) in a timely fashion, on terms, conditions (including technical standards and specifications), and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier seeking interconnection need not pay for network components or facilities that it does not require for the service to be provided; and
- (e) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

Options for Interconnecting with Major Suppliers

2. Each Party shall ensure that suppliers of public telecommunications services of the other Party may interconnect their facilities and equipment with those of major suppliers in its territory pursuant to at least one of the following options:

- (a) a reference interconnection offer or another standard interconnection offer containing the rates, terms, and conditions that the major supplier offers generally to suppliers of public telecommunications services;
- (b) the terms and conditions of an existing interconnection agreement or
- (c) through negotiations of a new interconnection agreement; or
- (d) arbitration.

Public Availability of Interconnection Offers

3. Each Party shall ensure that each major supplier in its territory makes publicly available a reference interconnection offer or other standard interconnection offer containing the rates, terms, and conditions that the major supplier offers generally to suppliers of public telecommunications services.

Public Availability of the Procedures for Interconnection Negotiations

4. Each Party shall ensure that applicable procedures for interconnection negotiations with major suppliers in its territory are made publicly available.

Public Availability of Terms and Conditions for Interconnection with Major Suppliers

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5. Each Party shall ensure that the rates, terms, and conditions for interconnection with a major supplier:

- (a) contained in a reference interconnection offer or other standard interconnection offer approved by a telecommunications regulatory body; or
- (b) determined by a telecommunications regulatory body through arbitration

are made publicly available.

ARTICLE 12.12 : PROVISIONING AND PRICING OF LEASED CIRCUITS SERVICES

1. Each Party shall ensure that major suppliers in its territory provide suppliers of public telecommunications services of the other Party leased circuits services that are public telecommunications services on terms and conditions and at rates that are reasonable, non-discriminatory (including with respect to timeliness), and transparent.

2. In carrying out paragraph 1, each Party shall provide its telecommunications regulatory body the authority to require major suppliers in its territory to offer leased circuits services that are public telecommunications services to public telecommunications services suppliers of the other Party at capacity-based, cost-oriented prices.

ARTICLE 12.13 : CO-LOCATION

1. Subject to paragraphs 2 and 3, each Party shall ensure that major suppliers in its territory provide to suppliers of public telecommunications services of the other Party physical co-location of equipment necessary for interconnection or access to unbundled network elements on terms and conditions and at cost-oriented rates that are reasonable, non-discriminatory (including with respect to timeliness) and transparent.

2. Where physical co-location is not practical for technical reasons or because of space limitation, each Party shall ensure that major suppliers facilitate alternative solutions, which may include:

- (a) conditioning additional equipment space or providing virtual co-location, on terms and conditions and at cost-oriented rates that are reasonable, non-discriminatory (including with respect to timeliness) and transparent;
- (b) permitting facilities-based suppliers to locate equipment in a nearby building and to connect such equipment to the major supplier's network;
- (c) optimising the use of existing space; or
- (d) finding adjacent space.

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3. Each Party may determine, in accordance with domestic law and regulation, which premises in its territory are subject to paragraphs 1 and 2.

ARTICLE 12.14 : ACCESS TO POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY

1. Each Party shall ensure that major suppliers in its territory provide access to poles, ducts, conduits, and rights of way owned or controlled by such major suppliers to suppliers of public telecommunications services of the other Party under terms, conditions, and cost-oriented¹²⁻⁶ rates that are reasonable, non-discriminatory (including with respect to timeliness), and transparent.

2. Nothing in this Chapter shall prevent a Party from determining under its domestic law and regulation which particular structures owned or controlled by a major supplier in its territory are required to be made available in accordance with paragraph 1 provided that this is based on a determination that such structures cannot feasibly be economically or technically substituted in order to provide a competing service.

Section D : Other Measures

ARTICLE 12.15 : FLEXIBILITY IN THE CHOICE OF TECHNOLOGY

Neither Party may prevent suppliers of public telecommunications services or suppliers of value-added services from choosing the technologies they wish to use to supply their services, including packet-based services and commercial mobile wireless services, subject to requirements necessary to satisfy legitimate public policy interests.

ARTICLE 12.16 : CONDITIONS OF PROVISION OF VALUE-ADDED SERVICES

1. Neither Party may require an enterprise in its territory providing value-added services and which supplies such services over facilities that it does not own to:

- (a) supply such services to the public generally;
- (b) cost-justify rates for such services;
- (c) file a tariff for such services;
- (d) interconnect its networks with any particular customer for the supply of such services; or
- (e) conform with any particular standard or technical regulation for interconnection other than for interconnection to a public telecommunications network.

¹²⁻⁶ In the United States, this obligation may not apply to those states that regulate such rates as a matter of state law.

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except to remedy a practice that the Party has found in a particular case to be anti-competitive under its law or regulation or to otherwise promote competition or safeguard the interests of consumers.

2. For greater certainty, nothing in this Article shall exempt a Party from complying with the obligations in Articles 12.2 through 14.

ARTICLE 12.17 : INDEPENDENT REGULATORY BODIES AND DIVESTMENT

1. Each Party shall ensure that any telecommunications regulatory body that it establishes or maintains is independent and separate from, and not accountable to, any supplier of public telecommunications service.

2. Each Party shall ensure that the decisions and procedures of its telecommunications regulatory body are impartial with respect to all interested persons. To this end, each Party shall ensure that its regulatory body does not hold a financial interest in any supplier of public telecommunications services; and that any financial interest that the Party holds in a supplier of a public telecommunications services does not influence the decisions and procedures of its regulatory body.

3. Where a Party has an ownership interest in a supplier of a public telecommunications service and it intends to reduce or eliminate that interest, it shall notify the other Party as soon as feasible.

ARTICLE 12.18 : UNIVERSAL SERVICE

Each Party shall administer any universal service obligation that it maintains in a transparent, non-discriminatory and competitively neutral manner and shall ensure that its universal service obligation is not more burdensome than necessary for the kind of universal service that it has defined.

ARTICLE 12.19 : REGULATORY PROCEDURES

1. Each Party shall ensure that rulemakings, including the basis for such rulemakings, of its telecommunications regulatory body are promptly published or otherwise made available to all interested persons.

2. Where a Party requires a supplier of public telecommunications services to have a license, the Party shall make publicly available:

- (a) all the licensing criteria and procedures it applies, including any standard terms and conditions of the license;
- (b) the period of time normally required to reach a decision concerning an application for a license; and

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- (c) the terms and conditions of all licenses it has issued.
3. Each Party shall ensure that, upon request, an applicant receives the reasons for the denial of a license.
4. Each Party shall ensure that tariffs filed with its telecommunications regulatory body are promptly published or otherwise made available to all interested parties.

ARTICLE 12.20 : ALLOCATION AND USE OF SCARCE TELECOMMUNICATIONS RESOURCES

1. Each Party shall administer procedures for the allocation and use of scarce telecommunications resources, including frequencies, numbers and rights of way, in an objective, timely, transparent and non-discriminatory manner.¹²⁻⁷
2. Each Party shall make publicly available the current state of allocated frequency bands but shall not be required to provide detailed identification of frequencies assigned for specific government uses.
3. Decisions on allocating and assigning spectrum and frequency management are not measures that are *per se* inconsistent with Article 10.4 (Market Access), which is applied to Chapter Eleven (Investment) through Article 10.1.3 (Scope and Coverage). Accordingly, each Party retains the right to exercise its spectrum and frequency management policies, which may affect the number of suppliers of public telecommunications services, provided that this is done in a manner that is consistent with the provisions of this Agreement. Each Party also retains the right to allocate frequency bands taking into account existing and future needs.
4. Each Party shall endeavour to rely on an open and transparent public comment process that considers the overall public interest, when making a spectrum allocation for non-government telecommunications services. Each Party shall endeavour to rely generally on market-based approaches in assigning spectrum for terrestrial non-government telecommunications services.

ARTICLE 12.21 : ENFORCEMENT

1. Each Party shall ensure that the relevant regulatory body is authorized to enforce compliance with domestic measures relating to the obligations set out in Articles 12.2 through 12.7 and Articles 12.9 through 12.14.¹²⁻⁸
2. Such authority shall include the ability to impose, or seek from administrative or judicial bodies, effective sanctions, which may include financial penalties, injunctive relief (on an interim or final basis), or modification, suspension and revocation of licenses.

¹²⁻⁷ For greater certainty, telecommunications resources do not include spectrum allocated and used for the broadcast of radio and television programming.

¹²⁻⁸ For the purpose of Australia's obligations under this Agreement, notwithstanding this paragraph, a supplier of public telecommunications services may be required to apply to a judicial body for the enforcement of a determination by a regulatory body in relation to the resolution of a dispute under a domestic measure relating to the obligations in Article 12.11.

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ARTICLE 12.22 : RESOLUTION OF DOMESTIC TELECOMMUNICATIONS DISPUTES AND APPEAL PROCESSES

Further to the obligations contained in Article 20.4 (Administrative Agency Processes) and Article 20.5 (Review and Appeal), each Party shall ensure that:

- (a) enterprises of the other Party may seek timely review by a telecommunications regulatory body or other relevant body to resolve disputes arising under domestic measures addressing a matter set out in Articles 12.2 through 12.7 and Articles 12.9 through 12.14.
- (b) suppliers of public telecommunications of the other Party that have requested interconnection with a major supplier in its territory will have recourse to a telecommunications regulatory body:
 - (i) at any time; or
 - (ii) after a reasonable period of time which has been made publicly known to review disputes regarding appropriate terms, conditions, and rates for interconnection.
- (c) any enterprise aggrieved by a determination or decision of its telecommunications regulatory body may obtain judicial review of such determination or decision by an impartial and independent judicial authority. An application for judicial review shall not constitute grounds for non-compliance with such a determination or decision unless stayed by the relevant judicial body.

ARTICLE 12.23 : FORBEARANCE¹²⁻⁹

1. The Parties recognize the importance of relying on market forces to achieve wide choices in the supply of telecommunications services. To this end, each Party may forebear from applying regulation, to the extent provided for in domestic law, to a service that the Party classifies as a public telecommunications service upon a determination by its telecommunications regulatory body that:

- (a) enforcement of such regulation is not necessary to prevent unreasonable or discriminatory practices;
- (b) enforcement of such regulation is not necessary for the protection of consumers, and

¹²⁻⁹ For purposes of this Agreement, the extent to which the United States telecommunications regulatory body may forebear is governed by section 10 of the U.S. Communications Act of 1934, as amended by the Telecommunications Act of 1996.

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- (c) forbearance is consistent with the public interest, including promoting and enhancing competition among suppliers of public telecommunications services.
- 2. Interested persons of the other Party shall be provided with adequate public notice and opportunity to comment prior to any decision regarding forbearance by a Party's telecommunication regulatory body.
- 3. Any enterprise aggrieved by a regulatory body's decision regarding forbearance may obtain judicial review of such decision by an independent and impartial judicial authority.

ARTICLE 12.24 : RELATIONSHIP TO OTHER CHAPTERS

In the event of any inconsistency between this Chapter and another Chapter, this Chapter shall prevail to the extent of such inconsistency.

ARTICLE 12.25 : DEFINITIONS

For the purposes of this Chapter:

- 1. **commercial mobile services** means public telecommunications services supplied through mobile wireless means;
- 2. **cost-oriented** means based on cost, and may include a reasonable profit, and may involve different cost methodologies for different facilities or services;
- 3. **dialing parity** means the ability of an end-user to use an equal number of digits to access a like public telecommunications service, regardless of the public telecommunications service supplier chosen by such end-user and in such a way that involves no unreasonable dialing delays;
- 4. **end-user** means a final consumer of or subscriber to a public telecommunications service, including a service supplier other than a supplier of public telecommunications services;
- 5. **essential facilities** means facilities of a public telecommunications network or service that (a) are exclusively or predominantly provided by a single or limited number of suppliers, and (b) cannot feasibly be economically or technically substituted in order to provide a service;
- 6. **interconnection** means linking with suppliers providing public telecommunications services in order to allow the users of one supplier to communicate with the users of another supplier and to access services provided by another supplier;
- 7. **leased circuit** means telecommunications facilities between two or more designated points that are set aside for the dedicated use of, or availability to, a particular customer or other users;
- 8. **major supplier** means a supplier of a public telecommunications service that has the ability to materially affect the terms of participation (having regard to price and supply) in the

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relevant market for public telecommunications services as a result of control over essential facilities or use of its position in the market;

9. **network element** means a facility or equipment used in supplying a public telecommunications service, including features, functions and capabilities provided by means of such a facility or equipment;
10. **non-discriminatory** means treatment no less favourable than that accorded to any other user of like public telecommunications services in like circumstances;
11. **number portability** means the ability of end-users of public telecommunications services to retain, at the same location, existing telephone numbers when switching between suppliers of like public telecommunications services;
12. **physical co-location** means physical access to space in order to install, maintain or repair equipment, at premises owned or controlled and used by a supplier to supply public telecommunications services;
13. **public telecommunications service** means any telecommunications service that a Party requires, explicitly or in effect, to be offered to the public generally. Such services may include, *inter alia*, telephone and data transmission typically involving customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information;¹⁰
14. **telecommunications** means the transmission and reception of signals by any electromagnetic means;
15. **telecommunications regulatory body** means a national body responsible for the regulation of telecommunications;
16. **user** means an end-user or a supplier of public telecommunications services; and
17. **value-added services** means services which add value to telecommunications services through enhanced functionality. For the United States, for the purpose of this Agreement, these are services as defined in 47 USC § 153(20). For Australia, value-added services are telecommunications services for which suppliers "add value" to customer information by enhancing its form or content or by providing for its storage and retrieval.

¹²⁻¹⁰ Because the United States does not classify services described in 47 USC § 153(20) as public telecommunications services, these services are not considered public telecommunications services for the purposes of this Agreement. This does not prejudice either Party's positions in the WTO on the scope and definition of these services.