SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202)424-7645

PATRICK J. WHITTLE
OF COUNSEL
DIRECT DIAL 202-424-7851
PJWHITTLE@SWIDLAW.COM

NEW YORK OFFICE
405 LEXINGTON AVENUE
NEW YORK, NY 1017

January 24, 2003

VIA HAND DELIVERY

Gloria Blue
Executive Secretary
Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508
ATTN: Section 1377 Comments

RE: Consultations Regarding WTO General Agreement on Trade in Services: Mexico

Dear Ms. Blue:

RCN Corporation ("RCN"), by its undersigned counsel, pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 3106 ("Section 1377"), hereby submits its comments in response to the request of the United States Trade Representative ("USTR") for comments pertaining to compliance with certain telecommunications trade agreements. RCN is a U.S. telecommunication carrier with an ownership interest in Megacable Comunicaciones de México, S.A. de C.V. ("MCM Telecom"), a facilities-based local exchange carrier authorized to provide service in Mexico. Approximately forty percent of MCM Telecom is ultimately owned by RCN; the remainder is ultimately owned by a group of Mexican investors.

RCN supports the comments filed by the Competitive Telecommunications Association ("CompTel") relating to Mexico's lack of compliance with its obligations under the World Trade Organization ("WTO") Fourth Protocol and Annex on Telecommunications (together, the "Telecommunications Agreements"). In particular, Mexico has seriously failed to comply with its commitments regarding competition in domestic and local services.

Since mid-2000, the USTR has been aware of RCN and MCM Telecom's struggles to gain effective competitive entry into the local exchange and access markets in Mexico. RCN has previously brought to the USTR's attention the anticompetitive actions of Mexico's dominant carrier, Teléfonos de México, S.A. de C.V. ("Telmex"), which together with the complicity of the Mexican authorities practically have forced MCM Telecom to abandon its business plan. The Mexican Government's utter lack of enforcement to preclude Telmex from engaging in such discriminatory practices has severely harmed MCM Telecom and RCN. RCN hereby

incorporates by reference in their entirety its previous filings with the USTR's Monitoring and Enforcement Unit for its *WTO Consultations Regarding Telecommunications Trade Barriers in Mexico*, which describe in detail the factual and legal history of these struggles.[1]

RCN's efforts to bring Telmex's anticompetitive conduct to light also have been documented in submissions to other relevant U.S. government agencies, such as the Federal Communications Commission ("FCC"). Attached as Exhibit I is RCN's petition to deny (the "Petition to Deny") the application filed by Telmex, through a wholly-owned subsidiary, requesting the FCC's approval to acquire an indirect forty percent ownership interest in XO Communications, Inc. and XO Long Distance Services, Inc.[2] In the Petition to Deny, RCN provides evidence that (i) Telmex continues to assert significant market power in the local access and interconnection markets in Mexico; (ii) Telmex fails to provide interconnection to competitors at cost-oriented and reasonable rates; and (iii) the government of Mexico -- through the *Secretaría de Comunicaciones y Transportes* ("SCT") and the *Comisión Federal de Telecomunicaciones* ("COFETEL") – has utterly failed to curb Telmex's abusive behavior, in violation of both Mexico's commitments under the Telecommunications Agreements and Mexico's own internal legislation.[3]

Of particular concern to RCN and the United States, is the Mexican government's inability to establish an effective legal framework that regulates Telmex's activities as a dominant carrier. In June 2002, a Mexican Federal Court struck down an order from the antitrust authority (*Comisión Federal de Competencia*) declaring Telmex as a dominant operator in five telecommunications markets in Mexico, including, access and local service.[4] Based on the Order, in September 2000, COFETEL issued dominant carrier regulations for Telmex.[5] The Dominant Carrier Regulations imposed on Telmex the obligation to negotiate non-discriminatory and cost-based interconnection rates. For procedural reasons, the Federal Court's ruling rendered the Dominant Carrier Regulations invalid, thus leaving competitors defenseless and COFETEL without any authority to issue new regulations. The absence of anticompetitive practices regulation violates Mexico's commitments under Section 1.1 of Mexico's WTO Reference Paper on Basic Telecommunications Service (the "Reference Paper").

---

1 Letters of October 5, 2000 and December 13, 2000, regarding the WTO Consultations on Telecommunications Trade Barriers in Mexico (the "Letters").

2 *In the Matter of XO Communications, Inc. and XO Long Distance Services, Inc., Applications for Consent to Transfer Control of Licenses*, IB Docket No. 02-50 (April 22, 2002).

3 Section 1.1 of Mexico's WTO Reference Paper on Basic Telecommunications Service and Article 63 of the Mexican Federal Telecommunications Law.

4 *Resolución del Pleno de la Comisión Federal de Competencia* AD-41-97 (December 4, 1997) (the "Order").

5 *Resolución Administrativa por la que la Secretaría de Comunicaciones y Transportes por Conducto de la Comisión Federal de Telecomunicaciones, establece a Teléfonos de México, S.A. de C.V., obligaciones específicas relacionadas con tarifas, calidad de servicio e información, en su carácter de concesionario de una red pública de telecomunicaciones con poder sustancial en cinco mercados relevantes, de acuerdo con el artículo 63 de la Ley Federal de Telecomunicaciones*, published in the Diario Oficial de la Federación on September 12, 2000 (the "Dominant Carrier Regulations").

Moreover, due to the lack of enforcement authority, COFETEL has failed to resolve the ongoing interconnection dispute between Telmex and MCM Telecom. As noted in the Letters, after failure to reach an agreement with Telmex on the local interconnection rates for 2001 and 2002, in December 2000, MCM Telecom filed with COFETEL a petition to resolve the key issues of the dispute. It was not until November 2002 that COFETEL issued a resolution imposing interconnection rates for the period 2001-2002 (the "Resolution"). [6] An English translation of the Ordering Clauses of the Resolution is attached hereto as Exhibit II.

Under Section 2.5 of the Reference Paper, a provider of telecommunications services requesting interconnection with a dominant supplier must have a recourse to an independent body, to resolve disputes regarding appropriate terms, conditions and rates for interconnection "*within a reasonable period of time.*" Two years can hardly be deemed a *reasonable period of time* for a decision made by an authority. Furthermore, the Resolution clearly violates the due process principle embedded in the Mexican Constitution, the Mexican Federal Administrative Procedures Law and the Mexican Federal Telecommunications Law ("FTL"), which provide that any authority must resolve a petition within four months from filing.

The Resolution is deeply troublesome for MCM Telecom. In the Resolution, COFETEL set two different types of interconnection rates, one for voice traffic and a second, one for traffic to Internet Service Providers. This dichotomy was artificially created by COFETEL without any legal basis, and in clear violation of (i) Sections 2.2(a) and 2.2(b) of the Reference Paper; (ii) the FTL; and (iii) MCM Telecom and Telmex's concession agreements. The interconnection rates set by the Resolution are not cost-based as mandated by the Reference Paper, but rather assessed exclusively on numbers provided by Telmex. Moreover, the rates are not based on the "long run average incremental cost analysis", as mandated by Article 63 of the FTL, but upon a discriminatory cost model of COFETEL's devising.

Equally disturbing is the fact that the Resolution has an *ex post facto* application (*i.e.*, is to be retroactively applied to the rates billed and to be collected for 2001 and 2002). If allowed to stand, this will necessitate a complete reallocation of costs for MCM Telecom, and a reassessment of its business structure, rates and payments.[7] The Resolution constitutes a severe legal and economic blow to MCM Telecom, by denying it a transition period in which it can make these adjustments and by *de facto* depriving MCM Telecom of interconnection fees for 2002. And of course, the specter of future retroactive rulings makes planning for future periods impossible as well. This sort of retroactive regulation creates a level of risk that goes well beyond the economic risks that all businesses must face, and puts a cloud of uncertainty over not just MCM Telecom, but anyone contemplating investing in the telecommunications market in Mexico.

In addition, the Resolution provides no meaningful relief regarding certain anticompetitive provisioning and practices by Telmex. Telmex's failure to provide quality

---

[6] The interconnection rates for 2003 are currently under negotiation with Telmex.

[7] Indeed, as a result of such retroactivity and its accompanying uncertainty, MCM Telecom has not even been able to finalize its financial statements for the past years. The Resolution could negatively affect the financial statements of the past three years.

interconnection and deliver numerous interconnection ports, as previously documented to the USTR, continues with no improvement. MCM Telecom has provided clear evidence to COFETEL that Telmex blocks *over 60%* of the traffic from Telmex's network to MCM Telecom, but COFETEL has consistently failed to require Telmex to correct this egregious practice. This anti-competitive practice has cost MCM Telecom significant amounts and has significantly hampered MCM Telecom's business.[8]

Finally, despite repeated pleas from MCM Telecom that it do so, the Resolution does not address such key issues Telmex's enormous delinquency in its own payments to MCM Telecom; the unbundling of the local loop; and number portability -- all of which are fundamental to increasing the competitiveness of the market, not to mention being basic informational requirements for MCM Telecom's business plan. All of these should have been resolved since January 1, 2001, and this delay further aggravates the harm to MCM Telecom.

In conclusion, COFETEL's actions have not been those of an independent, reasonable and impartial regulatory body, as mandated by the Reference Paper. For these reasons and those set forth in prior filings, RCN urges the USTR to take any additional action it deems appropriate to bring about Mexico's compliance with its commitments under the Telecommunications Agreements, to correct the anticompetitive practices by the dominant service provider, Telmex, and to ensure fair and non-discriminatory market conditions for all service providers.

Very truly yours,

Patrick J. Whittle

Counsel for RCN Corporation

cc: Mark Hilton (MCM Telecom)

[8] The Resolution does purport to impose a penalty on Telmex, but this is a ruse; in fact, Mexican law does not permit COFETEL to impose, or MCM Telecom to collect, such a penalty.

EXHIBIT I

RCN's petition to deny Telmex's application to acquire control of FCC licenses held by XO Communications, Inc. and XO Long Distance Services, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
XO COMMUNICATIONS, INC. and	)	
XO LONG DISTANCE SERVICES, INC.	)	IB Docket No. 02-50
	)	
Applications for Consent to Transfer	)	
Control of Licenses	)	

PETITION TO DENY APPLICATIONS

Scott Burnside
Sr. Vice President, Regulatory and
Government Affairs
RCN Corporation
100 Lake Street
Dallas, PA 18612
Tel: (570) 674-1601
Fax: (570) 674-1620
E-mail: scott.burnside@rcn.net

Dated: April 22, 2002

TABLE OF CONTENTS

EXECUTIVE SUMMARY

I. INTRODUCTION 2

II. GRANT OF THE APPLICATIONS IS FLATLY INCONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY 2

A. Telmex's Anticompetitive Behavior Poses a "Very High Risk to Competition" and Therefore Rebuts the Presumption in Favor of Entry. 3

1. Telmex Has and Continues to Exercise Market Power in Mexico. 3

2. Telmex Has the Ability to Harm Competition on the U.S.-Mexico Route 6

3. Dominant Carrier Safeguards Would Be Ineffective To Protect U.S. Carriers. 7

B. Grant of the Applications Would Conflict with U.S. Trade Policy Concerns. 8

III. TELMEX'S BEHAVIOR IS WORSE THAN THE BEHAVIOR XO COMPLAINS OF IN INCUMBENT LECS IN THE UNITED STATES. 10

IV. CONCLUSION 12

EXHIBIT 1

EXECUTIVE SUMMARY

RCN Corporation ("RCN"), a U.S. telecommunications carrier with operations in Mexico, urges the Commission to deny the applications of XO Communications, Inc. ("XO Communications") and XO Long Distance Services, Inc. ("XO Long Distance") (together "XO"), or at the very least, expressly condition any approval on Teléfonos de México S.A. de C.V. ("Telmex") acquiring any interest in XO's Commission licenses.

The public interest analysis necessitates denial of these applications. Telmex possesses – and has used -- the ability to exercise its market power in Mexico and to harm competition in the U.S. market, and thus Telmex's entry into the U.S. market through XO poses a "very high risk to competition." In Mexico, Telmex's substantial and ongoing anticompetitive behavior runs rampant with minimal enforcement by Mexican government officials. In the U.S. market, as the Commission clearly recognized in its forfeiture case against Telmex's U.S. affiliate, Telmex has the ability to harm competition on the U.S.-Mexico route and does not hesitate to leverage its market power against U.S. carriers. Dominant carrier safeguards would be ineffective in detecting and deterring Telmex's anticompetitive behavior especially given Telmex's poor track record for regulatory compliance.

The public interest also requires denial because granting the XO applications may seriously undermine any leverage that the USTR could derive from them to achieve its trade policy goal of addressing anticompetitive activity in Mexico, especially as a WTO panel investigation of Mexico is pending. Finally, RCN urges the Commission not to penalize U.S. competitive carriers' efforts to compete on a level playing field, while rewarding Telmex's flagrant anticompetitive behavior, which is worse than that of the Regional Bell Operating Companies in the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
XO COMMUNICATIONS, INC. and	)	
XO LONG DISTANCE SERVICES, INC.	)	IB Docket No. 02-50
	)	
Applications for Consent to Transfer	)	
Control of Licenses	)	

PETITION TO DENY APPLICATIONS

RCN Corporation ("RCN"), a U.S. telecommunications company with operations in Mexico, by its undersigned counsel, hereby submits its Petition to Deny the applications of XO Communications, Inc. ("XO Communications") and XO Long Distance Services, Inc. ("XO Long Distance") (together "XO") referenced in the above-captioned docket (the "Applications"). The Applications request Commission approval of a transaction whereby Teninver, S.A. de C.V. ("Teninver"), an indirect wholly owned subsidiary of Teléfonos de México, S.A. de C.V. ("Telmex"), would acquire an indirect 40 percent ownership interest in the various Commission authorizations held by XO. As described in greater detail below, Telmex's acquisition of such interest would be directly contrary to the public interest. Accordingly, the Commission should deny the Applications or, at the very least, expressly condition any approval on Telmex not acquiring any interest in XO.[1]

---

[1] In its Applications, XO also seeks a declaratory ruling pursuant to section 310(b)(4) of the Act, that it will not serve the public interest to prohibit indirect foreign ownership of XO's wireless licenses in excess of the statutory 25 percent foreign ownership benchmark by Telmex and another partner. This request, too, should be denied.

I. INTRODUCTION

As the Commission is aware, RCN has invested in Megacable Comunicaciones de México, S.A. de C.V. ("MCM Telecom"), a facilities-based local exchange carrier authorized to provide a variety of telecommunications services in Mexico. RCN ultimately owns approximately forty percent of MCM Telecom, with the remainder ultimately owned by a group of Mexican investors. Since 1997, MCM Telecom has invested millions of dollars developing and constructing a state-of-the-art telecommunications network in Mexico and providing competitive local exchange services to Mexican consumers. However, Telmex's campaign of anticompetitive actions together with the Mexican regulators' utter lack of enforcement to preclude Telmex from engaging in such discriminatory practices, not only jeopardizes this substantial investment, but also runs counter to the U.S. public interest. The Commission should not reward Telmex's misbehavior by allowing it to obtain a major stake in a U.S. carrier.

II. GRANT OF THE APPLICATIONS IS FLATLY INCONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY.

In considering the proposed transaction, the Commission is under a statutory obligation, pursuant to Section 214(a) and Section 310(d) of the Communications Act of 1934, as amended,[2] to ensure that the proposed transfer of control will serve the public interest. The Commission considers several public interest factors relevant to the grant or denial of an application. In this case, the public interest analysis tips the scales in favor of denying the Applications or, at the very least, conditioning approval of the Applications on Telmex's *not* acquiring an interest in XO.

---

[2] 47 U.S.C. §§ 214(a), 310(d).

A. Telmex's Anticompetitive Behavior Poses a "Very High Risk to Competition" and Therefore Rebuts the Presumption in Favor of Entry.

As a factor in its public interest analysis, the Commission adopted, a rebuttable presumption that an application does not pose a risk to competition in the U.S. market that would justify denial, unless it is shown that granting the application would pose a very high risk to competition.[3] To pose a "very high risk to competition", an applicant must possess the ability to exercise its foreign market power as well as the ability to harm competition in the U.S. market.[4] RCN submits that just such exceptional circumstances exist here.

1. Telmex Has and Continues to Exercise Market Power in Mexico.

As RCN and MCM Telecom have documented over the years through filings with the Commission and other relevant government entities, MCM Telecom has been striving for five years to arrive at a level playing field in Mexico's telecommunications market. Despite these efforts, substantial and ongoing anticompetitive behavior by Telmex, the incumbent monopoly carrier in Mexico, has thrown up enormous barriers to effective competitive entry into the Mexican telecommunications market and continues to affect the sustainability of MCM Telecom as a competitive carrier operating in Mexico. This untenable situation is further exacerbated by the failure of the government of Mexico -- through the Secretaría de Comunicaciones y Transportes ("SCT") and the Comisión Federal de Telecomunicaciones ("COFETEL") -- to curb Telmex's abusive behavior, in violation of both Mexico's commitments under the World Trade Organization ("WTO") Fourth Protocol ("Basic Telecommunications Agreement") and Annex

---

[3] *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 29831 ¶ 51 (1997) (*Foreign Participation Order*), *on further reconsideration*, 15 FCC Rcd 18158 (2000).

[4] *Id.* ¶ 52.

on Telecommunications ("Telecommunications Annex") as well as Mexico's own national legislation and regulations.

MCM Telecom's struggles to gain effective competitive entry into the Mexican local exchange and access markets against the determination of Telmex and the failure of the Mexican authorities have been described in extensive detail in previous submissions by RCN and MCM Telecom to the United States Trade Representative ("USTR"), the Organization for Economic Co-operation and Development ("OECD"), the European Commission, and the Commission. For the Commission's convenience, we attach to this Petition as Exhibit 1 MCM Telecom's most recent filing, which was made to the USTR.[5] In summary, MCM's Telecom's primary concerns are as follows:

(a) **Inability to negotiate fair and effective interconnection.** Repeated attempts to negotiate an interconnection agreement with Telmex since September 1, 1997, became a long and tortuous process due to Telmex's obdurate unwillingness to reach a fair interconnection agreement.

(b) **Inaction by Mexican Authorities.** TelMex's anti-competitive, abusive and illegal behavior has been carried out – and continues – with full knowledge and even approval of COFETEL and the Mexican government as a whole.

(c) **Unjust rates established in violation of the WTO and Mexican law.** COFETEL's Interconnection Decision, among other things, sets a non-reciprocal, non-cost-justified and discriminatory interconnection rate for termination of MCM Telecom's traffic, which MCM Telecom was forced to accept due to intense economic pressure to initiate its business operations. The Interconnection Decision is in direct violation of both Mexico's WTO commitments and its own telecommunications legislation.

(d) **Poor service quality.** Telmex has not provided MCM Telecom with the same level of service quality that it provides to itself and to its affiliates. Both MCM Telecom's complaint and COFETEL's own study show that approximately 60 percent of all traffic originating on Telmex's network and destined for termination through MCM Telecom's network was blocked by severe network congestion.

---

[5] *See* Exhibit 1, Comments of MCM Telecom to the Office of the United States Trade Representative, dated December 13, 2000.

(e) **Financial pressure.** To this day, Telmex owes MCM Telecom several million dollars for undisputed interconnection compensation, placing severe pressure on MCM Telecom's finances.

A thorough factual and legal history of these matters can be found in MCM Telecom's last USTR filing, attached as Exhibit 1. The filing demonstrates an unbroken, years-long chain of anticompetitive acts perpetrated by Telmex and winked at by COFETEL. After that filing, the COFETEL Interconnection Decision expired on December 31, 2000. If the parties could not reach a new interconnection agreement by that date, the one-sided terms of the Interconnection Decision were to be extended for another year. After the failure of negotiations with Telmex, MCM Telecom filed a draft interconnection agreement with COFETEL on December 8, 2000, highlighting the key issues of dispute between MCM Telecom and Telmex.

As of today, COFETEL still has not resolved the disputed interconnection issues for MCM Telecom and Telmex, although COFETEL's statutory deadline for doing so passed *more than one year ago*. Consequently, MCM Telecom is *still* without a new interconnection agreement with Telmex. In the interim, MCM Telecom must continue paying the exorbitant and unbalanced interconnection rates established by COFETEL in 1998. Meanwhile, Telmex continues to refuse to pay millions of dollars in interconnection fees to MCM Telecom – fees past due by more than two years in some cases. This is not a mere commercial dispute: Telmex acknowledges it owes these fees and in fact two different arbitration panels in two separate arbitration procedures have ruled that Telmex owes them. By holding up payment, Telmex is engaging in a conscious maneuver to apply economic coercion to MCM Telecom to force it to acquiesce in additional unreasonable concessions under a new interconnection agreement.

2. Telmex Has the Ability to Harm Competition on the U.S.-Mexico Route.

Telmex not only has leveraged its market power to seriously injure competition within Mexico, but has the ability to seriously harm competition on the U.S.-Mexico route. A primary concern of the Commission is "the ability of U.S. carriers to terminate traffic on the foreign end of an international route."[6] Telmex maintains and leverages its bottleneck control of services and facilities on the Mexico end of the U.S.-Mexico route to the detriment of U.S. carriers. As a case in point, the Commission's Notice of Apparent Liability for Forfeiture against Telemex International Ventures USA, Inc. ("Telmex USA") was based on Telmex's repeated refusals to provide U.S. carriers MCI WorldCom and AT&T private circuits and lines *at all*, let alone on a timely basis.[7] The private circuit and lines were to be used by U.S. carriers to provide end-to-end U.S.-Mexico service to their customers. Moreover, based on MCM Telecom's firsthand experience, Telmex's anticompetitive practices squeeze out local competition, thereby reducing options for and raising the costs of local termination of international traffic in Mexico. This has the effect of artificially raising the costs of U.S. carriers – and ultimately the rates for consumers making long distance calls to Mexico – to supracompetitive rates. The USTR recently expressed similar concerns with Telmex's discriminatory practices that affect the U.S.-Mexico route as described in greater detail in Section II.B. below. Telmex's ability to leverage its dominant

---

6 *Foreign Participation Order* ¶ 144.

7 *Telmex International Ventures USA, Inc. Notice of Apparent Liability for Forfeiture*, 15 FCC Rcd 714 (rel. Jan. 13, 2000) (*Telmex USA Case*). The Commission found Telmex USA, a common carrier authorized to provide international switched resale telephony service, liable for a forfeiture in the amount of $100,000. In that case, Telmex USA had apparently willfully and repeatedly violated the conditions of its Section 214 authorization because of Telmex's refusal to provision private lines and circuits to all carriers on a timely and nondiscriminatory basis.

position in Mexico to thwart competition in this manner is reason enough to deny the Application.

3. Dominant Carrier Safeguards Would Be Ineffective To Protect U.S. Carriers.

XO's acceptance of dominant carrier safeguards on the U.S.-Mexico route would fail to protect against potential harm to the U.S. international telecommunications market and ultimately U.S. consumers. The dominant carrier safeguard approach was designed to enable the Commission to detect and deter a foreign carrier from using its market power on the foreign end in a way that discriminates against unaffiliated U.S. carriers.[8] If the goal of dominant carrier regulation is to detect and deter anticompetitive behavior, as the *Telmex USA Case* demonstrates, that goal would not be achieved with respect to Telmex. As in the *Telmex USA Case*, the Commission has already detected Telmex's anticompetitive behavior, but has not been successful in deterring Telmex from leveraging its market power in Mexico against unaffiliated U.S. carriers.

Moreover, the Commission's dominant carrier safeguards rely heavily on compliance with reporting requirements.[9] Telmex's track record for regulatory compliance is deplorable both in Mexico (as described in Exhibit 1) and in the United States. The Commission is all too familiar with Telmex's willful and repeated violations of Commission regulations, and Telmex's blatant disregard for Commission authority. In the *Telmex USA Case*, despite repeated promises to the Commission that it would abide by the condition in Telmex USA's Section 214 authorization to provide private circuits and lines on a timely and non-discriminatory basis,

---

8 *Foreign Participation Order* ¶ 221.

9 *Id.* ¶ 225.

Telmex ceased providing such circuits and lines altogether, warranting a significant forfeiture action. The Commission has determined that the failure to comply with the Commission's competitive safeguards in the past, in particular adjudicated violations of Commission Rules, may indicate conduct that poses a "very high risk to competition," thus warranting denial.[10] If the past is any indication of Telmex's regulatory compliance record, the Commission cannot expect that its dominant carrier safeguards will provide adequate protection against Telmex's anticompetitive conduct. Accordingly, Telmex's repeated disregard of the Commission's regulatory requirements and willingness to abuse its power in Mexico require something more than merely imposing dominant carrier regulation on XO on the U.S.-Mexico route.

B. Grant of the Applications Would Conflict with U.S. Trade Policy Concerns.

As a critical part of its public interest analysis, the Commission also considers whether the proposed transaction raises issues of national security, law enforcement, foreign policy and ***trade policy.*** Competitive concerns in Mexico continue to be a main trade enforcement priority of the USTR. Recently, the USTR's 2002 "Section 1377" review of its telecommunications trade enforcement priorities for the coming year, issued April 3, 2002, identifies as a main enforcement priority the difficulty U.S. operators continue to experience in obtaining interconnection from Telmex.[11] In fact, the case is so serious that the United States government requested that a WTO panel examine its claims that Mexico has failed to ensure that: (1) Telmex provides U.S. telecommunications companies interconnection for international calls at "cost-oriented" and "reasonable" rates; and (2) U.S. telecommunications companies can send their

---

10 *Id.* ¶ 53.

11 *Results of the 2002 "Section 1377 Review of Telecommunications Trade Agreements,* Office of the United States Trade Representative, April 3, 2002 (*1377 Review*) at 2.

calls into and out of Mexico over leased lines.[12] The WTO agreed to set up the panel to conduct a full investigation. The USTR also recognizes the passivity of Mexican government officials in its statement that "absent action on the part of the Government of Mexico, the United States will continue to pursue its WTO rights."[13] More specifically, the Report stated:

> In Mexico, U.S. operators continue to have difficulty obtaining interconnection from Mexico's major supplier of telecommunications (Telmex), as specified under Mexico's WTO obligations . . . . In addition, Mexico's regulator has not resolved a local interconnection dispute between Telmex and a U.S.-affiliated operator, which has invested heavily in building local networks. The delay in resolving this dispute - which has now dragged on for 15 months -- prevents the U.S.-affiliated operator from expanding its service. WTO rules require Mexico's regulator to resolve interconnection disputes in a timely and impartial manner. Likewise, Mexican law requires the regulator to resolve interconnection disputes within 60 days. USTR urges Mexico to resolve this dispute and to ensure that the U.S.-affiliated operator obtains interconnection from Telmex at cost-oriented rates. Finally, USTR remains disappointed that Mexico has not enforced domestic rules designed to prevent Telmex from engaging in anti-competitive practices, despite numerous instances of alleged violations.[14]

Grant of the Applications may seriously undermine the trade policy of USTR. If the Commission grants the Applications, it may forfeit any leverage that the USTR could derive from them to achieve its trade policy goal of addressing anticompetitive activity in Mexico. We remind the Commission that it adopted the rebuttable presumption in favor of foreign carrier entry on the basis that the commitments entered into by the WTO Member countries were likely to open competition to foreign markets and increase competition in the global marketplace. Commitments made by WTO countries justify relaxed entry regulation for entities from those countries *only if* those commitments are in fact reasonably adhered to. In Mexico, as the USTR

---

12 *Id.*

13 *Id.*

14 *Id.*

has expressly noted, critical provisions of the WTO commitments have simply been ignored, and must be addressed if effectively open competition is to arise in Mexico.

III. TELMEX'S BEHAVIOR IS WORSE THAN THE BEHAVIOR XO COMPLAINS OF IN INCUMBENT LECS IN THE UNITED STATES.

XO has filed several complaints against almost all of the Regional Bell Operating Companies ("RBOCs") for their anti-competitive practices in the United States. In particular, XO has argued vehemently that the RBOCs should not be allowed into the long distance market in numerous states because the RBOCs have not sufficiently opened local markets in these states to competition. But Telmex's behavior in Mexico makes the RBOCs and other U.S. incumbent local exchange carriers ("ILEC") look like champions of competition. XO cannot argue on the one hand that the RBOCs' behavior disqualifies them from entering the interexchange market and on the other that allowing Telmex's entry in the light of its own far worse behavior is perfectly acceptable.

As recently as March 4, 2002, XO filed comments with the Commission arguing that BellSouth should not be allowed into the long distance market in Georgia and Louisiana.[15] In this filing, XO complains, among other things, that BellSouth fails to provide non-discriminatory access to unbundled network elements, fails to provide special access facilities at parity, fails to provide number portability, and fails to comply with Checklist Item 13. For these reasons, XO

---

15 Comments of US LEC Corp. and XO Georgia, Inc., *Application of BellSouth Corporation, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Georgia and Louisiana* (WC Docket No. 02-35). XO filed comments making similar points even after XO entered into a Stock Purchase Agreement with Telmex. *See* Comments of XO Communications, Inc., *Application by Verizon New Jersey Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to provide to Provide In-Region, InterLATA Service in New Jersey* (WC Docket No. 02-67); and Comments of Time Warner Telecom and XO Communications, Inc., *Performance Measurements and Standards for Interstate Special Access Services et al.,* Notice of Proposed Rulemaking, CC Docket No. 01-321, FCC 01-339 (rel. Nov. 19, 2001).

argues that BellSouth's application to provide long distance service in Georgia and Louisiana should be denied. We could not agree more. Yet, XO apparently believes that Telmex, whose anticompetitive behavior in Mexico makes BellSouth look like an amateur in exercising market power, should be allowed into the U.S. market! In fact, it would represent considerable progress in Mexico if MCM Telecom's problems with Telmex were on the order of those XO complains about with BellSouth, but unfortunately they are much more grave. Issues such as unbundled network elements and number portability are not even radar screen in Mexico, so that it would be completely pointless to complain about the lack of these features, even if there were a regulator that were willing to listen to these complaints.

There is little or no effective competition in local services in Mexico because of the unbridled anti-competitive practices of Telmex. Unlike the Commission, COFETEL has done effectively nothing to promote a fair competitive landscape. If the Commission allows Telmex to enter the U.S. market under such circumstances, what message does this send the RBOCs in the United States? Is the message that Telmex, which conducts itself with anticompetitive and monopolistic fervor in Mexico to the detriment of U.S.-affiliated carriers, can freely enter the U.S. interstate telecommunications services market, while the RBOCs in the United States must satisfy a number of exacting conditions to do so? Or worse still, that if U.S. RBOCs play their cards right, they can cynically have it both ways like Telmex – unbridled monopolies in their incumbent markets, while enjoying access to other parts of the telecommunications market that are competitive, such as that for long distance services? RCN urges the Commission to ensure that it does not penalize U.S. competitive carriers' efforts to compete on a level playing field while rewarding Telmex's flagrant anticompetitive behavior.

IV. CONCLUSION

For the foregoing reasons, the Commission should either deny the Applications or, at the very least, expressly condition any approval on Telmex not acquiring any direct or indirect ownership interest in XO.

Respectfully submitted,

RCN CORPORATION

By:_____

Scott Burnside
Sr. Vice President, Regulatory and
Government Affairs
RCN Corporation
100 Lake Street
Dallas, PA 18612
Tel: (570) 674-1601
Fax: (570) 674-1620
E-mail: scott.burnside@rcn.net

Dated: April 22, 2002

VERIFICATION

I declare under penalty of perjury that the factual assertions contained in "Petition to Deny Applications" are true and correct to the best of my knowledge, information and belief.

Executed this ____ day of April 2002.

By:_____

Scott Burnside
Sr. Vice President, Regulatory and Government Affairs
RCN Corporation

EXHIBIT II

Translation of COFETEL's November 2002 Interconnection Decision – Ordering Clauses

RESOLUTIONS

FIRST. During the period comprised of January 1 2001 through December 31 2002, the interconnection between the public telecommunications networks of Megacable and Telmex authorized to provide basic local telephone services should be subject to the interconnection rates, conditions and terms provided in the following resolutions.

SECOND. The interconnection rates which must be paid reciprocally and symmetrically by Telmex to Megacable and vice versa, for voice calls within the same local service area or group of local service centers, are the following:

a) From January 1 through December 31 2001, the equivalent of US$0.125 per interconnection minute in domestic currency.

b) From January 1 through December 31 2002, the equivalent of US$0.0975 per interconnection minute in domestic currency.

The above rates already include the expenses corresponding to the necessary interconnection ports.

THIRD. The interconnection rates which must be paid reciprocally and symmetrically by Telmex to Megacable and vice versa, for the calls directed to internet service providers with the same local service are or group of local service centers, are the following;

a) From January 1 through December 31 2001, the equivalent of US$0.125 per interconnection minute in domestic currency.

b) From January 1 through December 31 2002, the equivalent of US$0.020 per interconnection minute in domestic currency.

The above rates already include the expenses corresponding to the necessary interconnection ports.

Telmex and Megacable should exchange the numbers contracted by the internet service providers, which should be registered in their invoice systems no later than 10 (ten) business days following the day on which these Resolutions take effect.

The contracting of a new number by an internet service provider should be notified to the opposite party no later than ten (10) days after the date of the contracting of the same. Furthermore, these numbers should be registered in the invoice systems within the following five (5) business days.

FOURTH. The local traffic rates which must be paid reciprocally and symmetrically by Telmex to Megacable and vice versa, within the same local service area or group of local service centers, are the following:

a) From January 1 through December 31 2001, the equivalent of US$0.030 per minute of interconnection in domestic currency.

b) From January 1 through December 31 2002, the equivalent of US$0.020 per minute of interconnection in domestic currency.

The above rates should be paid without prejudice to the interconnection payments made for third network call termination services.

FIFTH. In each invoice period, which shall be for less than one month, Telmex and Megacable shall calculate the charges for rendering the interconnection services, adding the total use time of the corresponding infrastructure and multiplying said sum, rounded to the closest minute, by the established interconnection rates.

For conversion of the service rates referred to in the items above to domestic currency, the exchange rate determined to transact business in the Mexican Republic should be used, as published by the Banco de México in the Official Gazette of the Federation [Diario Oficial de la Federación] valid on the last business day of the month prior to the month in which such rates are to be applied.

SIXTH. Services corresponding to the installation and lease of dedicated circuits and local links corresponding to interconnection links shall be requested, operated, invoiced and rendered by one party to the other separately and under non-discriminatory conditions, and in accordance with the rates that for such purpose have been registered before the Commission.

SEVENTH. Telmex and Megacable shall install the interconnection links necessary to terminate traffic to the target network. The links may be their own or leased and the corresponding costs shall be covered by the concessionaire requiring them to terminate its traffic.

In the event that any one of the parties requests from the other the installation of bi-directional links, the party that was asked to do so shall be obligated to provide them, as long as it is technically feasible, provided that Megacable and Telmex should share, in equal parts, the costs of such links.

EIGHTH. Megacable and Telmex are responsible for and obligated to provide the ports, systems, programs and other equipment required to be installed in their own facilities in order to interconnect their public telecommunications networks.

The recovery of expenses incurred by each concessionaire to carry out the above, should be made by means of the charging of rates for such services to the other concessionaire, which shall have the obligation to cover such expenses.

The interconnection rates referred to in items SECOND and THIRD above include the costs corresponding to the ports necessary for interconnection.

NINTH. Megacable and Telmex should abide by the following maximum periods of time for the delivery of ports, links and interconnection services requested by the other party:

- Twenty five business days for services contracted within the same local service area or groups of local service centers.
- Thirty five business days for services contracted that involve at least two local service areas or groups of local service centers.

The format for the application for interconnection service that Telmex and Megacable should use in order to provide interconnection services, shall be the format that both parties use to date.

Both concessionaires shall receive and shall deal with the interconnection service applications presented by the other party, in the same time period and in the form in which they deal with their own applications, the applications of subsidiaries or affiliates, as well as those of other concessionaires with which they have executed interconnection agreements.

TENTH. The party that is in default with the time periods established in the resolution immediately above should pay the damaged party the amount equivalent to the charge of the installation of the interconnection service requested, plus the total of the interconnection rate that may result from the occupation of 70% of the interconnection service for the duration of the delay, estimated as traffic exiting the network of the concessionaire in default and ending up at the affected concessionaire's network.

In this case, the affected party may discount from the respective invoice to the defaulting concessionaire, the corresponding amount, on a monthly basis and until the service requested is provided.

ELEVENTH. The physical interconnection points between the Megacable and Telmex networks, for the directing of routed public traffic, are as follows:

a) in the metropolitan area of Mexico City, the interconnection centers of Telmex in which Megacable currently has interconnection capacity are: Roma I, Roma II, Nextengo I and Nextengo II.

b) In Monterrey and Guadalajara, the centers in which Telmex currently has the capacity to provide interconnection links and ports, taking into consideration the architecture of the Megacable network.

The physical points where the Telmex network is connected to the Megacable network are those Megacable interconnection centers with the capacity to provide interconnection ports and links to Telmex. In Mexico City, that would be the Megacable center located on Sierra Candela. Telmex should interconnect to the Megacable center located on Sierra Candela within a term of 30 calendar days, starting as of the date these Resolutions take effect.

The above is without prejudice to the fact that both Megacable and Telmex should interconnect their public telecommunications networks at any other routing point, or any other that is technically feasible, at the request of any of the parties.

TWELFTH. Interconnection between the Megacable network and the Telmex network shall be made in accordance with the provisions of NOM-152-SCT1-1999 and for signals, under the provisions of NOM-112-SCT1-1999.

THIRTEENTH. Telmex should balance the interconnection ports requests by Megacable, in order so such ports are not located only at one Telmex center, but rather are evenly distributed in accordance with item ELEVENTH, above.

The idea of balancing out the interconnection ports provided in the above paragraph should be applied, as applicable, by Megacable in its relationship with Telmex.

In the event the concessionaire obligated to provide the interconnection points at a center in particular cannot provide them at that center, then the interconnection ports requested

shall be provided from any other center, as long as it is technically feasible and the requesting party is in agreement.

FOURTEENTH. Megacable and Telmex should provide one another with the same establishment time and call completion rate, with respect to origination and termination, that they provide to themselves, their subsidiaries and affiliates, as well as to the concessionaires with which they have executed local interconnection agreements.

The above is without prejudice to other parameters of quality and capacity that in this respect shall be agreed to between the parties.

Telmex and Megacable should review, every two months, the installed interconnection capacity of all parties, taking as a basis to calculation the same, that the occupation level should not surpass an average of 70%, measured during four business days at prime time for one month.

For effects of the provisions of the first paragraph of these Resolutions, both parties must present before the Commission, the documentation that evidences their compliance, when so requested by the Commission.

FIFTEENTH. The increase in the capacity of interconnection links between Megacable and Telmex should be carried out by means of the increase in signaling points located at the interconnection points referred to in item ELEVENTH, without prejudice to the fact that in the future, the use of alternative frameworks to increase the capacity between both public telecommunications networks may become feasible.

SIXTEENTH. The forecast of demand for Local Interconnection Services should be presented and updated by Telmex and by Megacable under the same terms and conditions under which the practice is carried out between Telmex and the other concessionaires with which an interconnection agreement has been executed.

Apart from the content of the forecasts for the demand of Local Interconnection Services that, as applicable, are presented or updated by Megacable to Telmex, and vice versa, both concessionaires should comply with the terms provided under resolution NINTH.

SEVENTEENTH. The format that shall govern the relationship between Megacable and Telmex to invoice the interconnection services rendered by both parties, as well as for the other services necessary to provide such services, shall be the "Sole Invoice Format" or "Sole Invoice Format of 100 Positions", and the same shall be attached hereto as **Exhibit 13**, as an integral part of these Resolutions.

EIGHTEENTH. The parameters of quality that Megacable and Telmex should observe in the interconnection of their respective networks are as follows:

1. The transmission should comply with NOM-152-SCT1-1999 with respect to the delivery of the dedicated or routed links and circuits.

   Furthermore, they should comply with the corresponding recommendations of the International Telecommunications Union [Unión Internacional de Telecomunicaciones] ("UIT"), which are provided under the Local Service Rules [Reglas del Servicio Local], in the Fundamental Technical Plans [Planes Técnicos Fundamentales] as well as any other applicable administrative provisions.

2. Signaling issues should comply with the provisions of NOM-111-SCT1-1999 and NOM-112-SCT1-1999. Furthermore, they should comply with recommendation Q-706 of the UIT.

3. For each one of the dedicated or routed interconnection ports, circuits and links, each party should provide the other with a measure of availability equal to the measure Telmex provides to itself, its subsidiaries or affiliates, as well as any other concessionaires with which it has executed interconnection agreements.

4. With respect to the capacity of automatic redundancy and diversity in signaling routes, routing and overflow of traffic, both parties should offer each other the same functional qualities on the network that in practice they offer to themselves, their subsidiaries and affiliates as well as any other concessionaires with which they has executed local interconnection agreements.

   With respect to the rendering of the automatic redundancy service, both Megacable and Telmex shall only have the right to recuperate the direct costs in addition to those incurred.

5. With respect to reports regarding failures presented by one concessionaire to another, they should be dealt in the same time frame and in the manner in which, in practice, the reports presented or generated by such parties, their affiliates or subsidiaries or with any concessionaires with which they have executed interconnection agreements, are resolved.

NINETEENTH. The party that defaults on the obligations regarding the quality of interconnection services referred to in item EIGHTEENTH, above, shall pay the affected party an indemnification that shall be calculated in accordance with the damages suffered by such party, mainly taking into consideration the penalties that, as applicable, may be collected by the affected party in accordance with the agreements executed in writing by the users.

TWENTIETH. Megacable and Telmex shall create the following bonds that shall last for the duration of the interconnection:

a) A bond that will guaranty the payment of consideration to be paid by one party to the other;

The amount of the bond should be equal to an amount that will cover, by at least 120%, the total of the last three invoices issued by each one of the parties to the other, before the date on which these Resolutions come into effect.

The parties, by mutual agreement, may modify the amount of the bonds, for an amount equal to at least 120% of the first three invoices issued by each one of the parties to the other, with respect to this Resolution.

b) A bond guarantying the damages that, as applicable, each one of the parties shall cause to the public telecommunications network of the other party.

The amount of this bond should be equal to the amount of the bonds created by Telmex and other authorized concessionaires to provide local service, derived from the interconnection agreements that have been executed by them.

Megacable and Telmex should create the above bonds in favor of the other party, within a term of 30 calendar days commending as of the date on which notification of these Resolutions takes effect.

The above bonds should be created in accordance with the provisions of the Federal Law of Bond Institutions [Ley Federal de Instituciones de Fianzas] and should be granted by a Bond Institution that does not belong to the same corporate or interest group as the concessionaire under guaranty.

TWENTY FIRST. In the negotiations that, as applicable, Megacable and Telmex shall carry out in order to agree upon the terms and conditions that shall govern the interconnection of their respective public networks starting on January 1, 2000, both parties should take into consideration the feasibility of establishing compensatory agreements.

United Mexican States
Federal Telecommunications
Commission

TRANSITORY ARTICLE

These Resolutions shall take effect as of the day following its notification.

This agreement was made my means of a unanimous vote of the Commissioners, who sign below as evidence on November 19, 2002.

Illegible signature

JORGE ARREDONDO MARTÍNEZ
President

Illegible signature

ABEL MAURO HIBERT SÁNCHEZ
Commissioner

Illegible signature

JOSÉ LUIS MUÑOZ BALVANERA
Commissioner