

December 21, 2004

VIA E-MAIL: FR0502@USTR.EOP.GOV

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

RE: Comments Concerning Compliance with
Telecommunications Trade Agreement. Mexico
Noncompliance.

Dear Ms. Blue:

Megacable Comunicaciones de México S.A. de C.V. (“MCM Telecom”), which is a facilities-based local exchange carrier authorized to provide service in Mexico, hereby submits its comments in response to the *Request for Comments Concerning Compliance with Telecommunications Trade Agreement*, issued by the Office of the United States Trade Representative (“USTR”) pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. § 3106).

In the years of 2000 and 2002, MCM Telecom submitted letters in which set forth in detail facts that demonstrates that Mexico has failed to comply with its obligations under the General Agreement on Trade in Services (“GATS”), and to effectively open its telecommunications market to competition (the “Previous Communications”). As shown in the Previous Communications and this letter, the government of Mexico through the Secretaría de Comunicaciones y Transportes (“SCT”) and the Comisión Federal de Telecomunicaciones (“COFETEL”) have (i) repeatedly violated Mexico’s commitment under the WTO Fourth Protocol (“Basic Telecommunications Agreement”) and Annex on Telecommunications (“Telecommunication Annex”) (collectively “WTO Agreements”); (ii) failed to comply with Mexico’s own national legislation and regulations; and (iii) taken repeated actions to benefit the incumbent dominant operator, Teléfonos de México, S.A. de C.V. (“Telmex”), provoking 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.

I. INTERCONNECTION IN THE LOCAL EXCHANGE AND ACCESS MARKETS

On July 5, 1997, Mexico's SCT granted MCM Telecom three 30-year Concessions to install, operate and exploit a public telecommunications network (the "Concessions"). Under the Concessions, MCM Telecom has authority to build and operate its network in the Mexico City, Guadalajara and Monterrey metropolitan areas and is authorized to provide services basic local telephony, sale or lease of facilities to transmit or receive voice, images and data, resale of the facilities or capacity of other carriers and provision of value-added services, among others services.

Under its business plan, MCM Telecom has already developed and constructed a state-of-the-art facilities-based telecommunications network using fiber optic rings in Mexico City to provide services to customer requiring broadband facilities in the three cities where it will operate. Additional phases will include similar networks in Monterrey and Guadalajara, as well as residential services. However, the serious difficulties MCM Telecom has encountered may force it to reconsider its plans if these problems should continue unabated.

Negotiating for Interconnection with Telmex

Pursuant to the 1995 Mexican Federal Telecommunications Law (the "Mexican Law") and the Rules for Local Service (the "Rules"), Telmex is required to interconnect its local network with MCM Telecom's local network to deliver and terminate calls originated by the respective users of both carriers. Interconnection negotiations began as of September 1, 1997, when MCM Telecom sent Telmex a letter requesting the initiation of negotiations. Negotiations between the parties became a long and tortuous process due to Telmex's obdurate unwillingness to reach a fair interconnection agreement, leveraged by its historic monopoly position.

After many attempts by MCM Telecom to resolve the dispute and arrive at an agreement with Telmex, COFETEL finally issued a decision arbitrating the interconnection dispute between MCM Telecom and Telmex (the "Interconnection Resolution") on November 27, 1998. In the Interconnection Resolution, COFETEL set the rates for termination and routing of traffic between both parties' respective networks for the period 1999-2000. Such rates are severely unbalanced in Telmex's favor, are well in excess of U.S. interconnection rates, are counter to established international standards and have been set in blatant violation of Mexican law.

Apart from the substantive result, COFETEL's procedural delays also resulted in severe economic injury to MCM Telecom. MCM Telecom acceded to an interconnection agreement with Telmex on April 8, 1999, accepting under protest the unreasonable interconnection rate imposed upon it by COFETEL. MCM Telecom is currently challenging the legality of the interconnection rate through Mexican tribunals.

According to COFETEL's Interconnection Resolution, by no later than July 2000, MCM Telecom and Telmex were to begin negotiations for the new interconnection rates that would apply to services between the parties as of January 1, 2001. Telmex was obdurate and refused meaningful negotiations. It was not until October 3, 2000, that Telmex, to MCM Telecom's surprise, agreed with MCM Telecom to jointly notify COFETEL of the commencement of formal negotiations.

Finally in November 19, 2002, COFETEL issued the resolution No. P/191102/219 arbitrating the interconnection dispute between MCM Telecom and Telmex (the "Second Resolution"). This resolution was issued 1 month before of the expiration of term to be regulated and pretends applied retroactively the rates determined, in flagrant violation of the Mexican Supreme Law (Mexican Constitution). The Second Resolution has not resolved the interconnection issues submitted for MCM Telecom and Telmex although its statutory obligation has expired for more than one year and concentrated mainly on the establishment of interconnection rates ex post facto. Consequently, MCM Telecom is still without a new interconnection contract with Telmex. In the interim, MCM Telecom must continue paying the exorbitant and unbalanced interconnection rates established by COFETEL in 1998 while Telmex as discussed below, continues refusing to pay past-due interconnection fees to MCM Telecom – fees which Telmex acknowledges it owes and which in fact three different arbitration panels has ruled that it owes in three different arbitration procedures. Currently MCM Telecom is executing the Arbitration Award of the above mention procedures trough Mexican tribunals.

In the Second Resolution, MCM Telecom is again being discriminated. COFETEL refrains from noting discrepancy on coverage issues, but now sets a distinction between the "type" of communications (voice vs data), and this distinction has no support within Mexican law and violates the terms of the concession of both Telmex and MCM Telecom, in addition to Mexican Law.

The outcome of the Second Resolution is that MCM Telecom loses all income for interconnection services rendered in the benefit of Telmex during 2002. Furthermore it announces that for 2003 both parties should consider B&K, which establishes the precedent for a COFETEL's 2003 resolution.

On the other hand, the Second Resolution states that rates are based on Telmex costs, an argument which is contrary to Mexican Law, which requires rates based on the Long-run incremental costs of an efficient and modern network. Notwithstanding the law, the Resolution reiterates that even in the case of other carriers, COFETEL has developed a cost model which considers Telmex costs and sets rates based only on Telmex costs. It also grants Telmex various clear ilegal advantages

Another significant illegality of the Resolution is its retroactive, or Ex Post Facto, application. Even though under Mexican law an administrative Resolution (which is like a law) may not be applied retroactively, the COFETEL Resolution was issued in November 2002 and states that its terms are applicable for the interconnection contract between Telmex and MCM Telecom starting on January 1, 2001 and ending on December 31, 2002. This dispossession of an MCM 's acquired right is based on the fact that Telmex's rates structure requires from MCM to change its business plan. The consequence is that MCM has to reallocate its costs, its business structure, and rates to accomplish and enable Telmex to realize its business plan during past periods.

Likewise, the foregoing Resolution is retroactive in order to recalculate the rates to the benefit of Telmex, but there is no retroactive means that make it possible to MCM Telecom to obtain interconnection ports, links, or to modify the quality of the interconnection for 2001, 2002, 2003 and 2004.

Perhaps the most insidious aspect of this Ex Post Facto regulatory tactic is that it furthers Telmex's goal of maximizing uncertainty – uncertainty for MCM as well as the entire industry. Uncertainty equals risk, and this is something that Telmex is obviously aware of and wishes to use as a competitive tactic, limiting the ability of its competitors to access capital and make basic business decisions regarding the future direction of their companies. The Mexican Government through their corresponding authorities have failed to give certainty to the players in the Telecom field.

In addition to the foregoing, MCM has stated and rendered clear evidence that Telmex blocks 60% of the traffic from Telmex's network to MCM. No remedy was granted to MCM in connection with this practice.

Key issues not covered by the Second Resolution that should have been include:

- The Resolution is silent in connection with Telmex's participation as a dominant carrier.
- Silent in connection with Telmex honoring the 1999 interconnection agreement. COFETEL still permits Telmex not to cover any amounts due to MCM Telecom, instead leaving MCM Telecom to try its luck with Mexican courts.
- Silent in connection with key quality issues such as: enforcement, remedies, penalties, quantification, quality measurement, etc.
- Silent in connection with unbounding the local loop.
- Silent in connection with number portability.

Finally, the Second Resolution was impugned by both parties in the Mexican Courts and until today remains subjudice.

On the other hand, almost in the same time that the Second Resolution were notified to the parties, both parties independently made files to COFETEL asking their intervention and resolve the outstanding dispute, now for the term from January 1, 2003 to December 31, 2004. As of today, December 16, 2004, COFETEL has not issued any resolution in despite of their mandatory obligation to resolve the discrepancies in a term of 60 days.

Both COFETEL's resolutions set, in one way or other, non-reciprocal, non-cost-justified and discriminatory interconnection rate for termination of MCM Telecom's traffic, in direct violation of both Mexico's commitment under the WTO Agreements regarding pro-competitive regulatory principles and its own telecommunications legislation.

II. LACK OF ACTION BY MEXICAN AUTHORITIES

As discussed above, Telmex's anti-competitive, abusive, and illegal behavior has been carried out – and continues – with the full knowledge and even approval of COFETEL and the Mexican government as a whole, including the SCT.

On the other hand, the Mexican authorities have failed to issue regulation in connection with new technologies i.e. wi-fi, wi-max, voip, which results in barrier to provide services in Mexico.

III. CONCLUSION

As MCM Telecom's experiences as a new entrant in the Mexican telecommunications market demonstrate, the barriers to entry in Mexico remain unacceptably high. Telmex's ability to abuse its dominant position with impunity and the inability or unwillingness of Mexican authorities to adhere to Mexican law and Mexico's commitments to the WTO will prevent any real or effective competition from developing as long as these conditions persist.

Very truly yours,

Juan A. González.
Counsel for Megacable Comunicaciones
de México, S.A. de C.V..

Enclosure

cc. Benito T. Ohara, Chief Executive Officer, MCM Telecom
Mark Hilton, Chief Operating Officer, MCM Telecom
Jonathan R. Mchale, USTR