Competitive Telecommunications Association

Advancing Global Communications Through Competition

1900 M Street, NW, Suite 800
Washington, DC 20036-3508
PH: 202.296.6650
FX: 202.296.7585
www.comptel.org

CompTel

February 1, 2000

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

RE: **GERMANY, MEXICO**: *WTO Basic Telecommunications Agreement and Reference Paper*

JAPAN: *May 1998 U.S.-Japan Deregulation Joint Statement*

TAIWAN: *1998 Agreement on WTO Accession Commitments in Telecommunications Services (US-Taiwan Accession Protocol)*

Dear Ms. Blue:

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. 3106 ("Section 1377"), the Competitive Telecommunications Association ("CompTel") hereby responds to the request of the Office of the United States Trade Representative ("USTR") for comments regarding compliance with certain telecommunications trade agreements. CompTel is the principal U.S. industry association representing competitive telecommunications carriers and their suppliers. CompTel has approximately 20 years of experience working actively to advance telecommunications competition in the United States and other countries. With the development of liberalized regulatory regimes and competitive market conditions in a growing number of countries, many of CompTel's members have made significant investments in telecommunications facilities and services outside the United States, including, in particular, Germany, Mexico, Japan, and Taiwan.

GERMANY – 1999 OUT-OF-CYCLE REVIEW

CompTel is concerned about a recent development in the German market that restores a serious barrier to entry bearing directly on USTR's 1377 review of Germany's trade commitments under the *WTO Basic Telecommunications Agreement Reference Paper.*

On October 28th, the Superior Administrative Court in Muenster reinstated Germany's national telecommunications license scheme, overturning a preliminary injunction issued by the Administrative Court in Cologne. We understand that RegTP is likely to begin collecting national license fees from competitors in the German market shortly.

In March 1999, CompTel filed the first of three comments we submitted last year in this review process regarding Germany's market opening commitments. The comments discussed Germany's extraordinary policy of extracting a 3 million DM (approximately $1.7 million) fee for a Class 4 national license to deploy and operate transmission lines from new entrants who wish to provide service nationwide at regulated interconnection rates. Germany's fee for a Class 3 national infrastructure license to deploy and operate transmission lines is even higher – a remarkable 10.6 million DM fee (nearly $6 million). Last month, CompTel submitted an informal complaint to the European Commission ("EC") stating that these fees constitute a serious barrier to entry and an undeniable impediment to competition. *See* Letter to Robert Verrue, Director-General, Information Society (DG XIII) and Alexandre Schaub, Director-General, Competition (DG IV), EC, from Carol Ann Bischoff, CompTel, (Jan. 10, 2000).

These exorbitant fees are premised upon an up-front payment of administrative costs *projected over a 30 year period*, without possibility of a refund if a carrier ceases doing business in Germany or RegTP's administrative costs decrease over time. They work to the obvious advantage of well-entrenched German carriers, most notably Deutsche Telekomm ("DTAG"), who already derive substantial revenue from the German market. No other country in Europe or North America charges license fees this onerous. The fees not only far exceed licensing costs in the United States, but also dwarf similar costs in the rest of the EC, as the EC's 5th Report on implementation of the Telecommunications Regulatory Package (the "5th Report") demonstrates. As a result, the total administrative fees for a carrier in its first year of operation are nearly six times higher in Germany than in the next most expensive EC Member State. *See* 5th Report, at 170.

Nor should this barrier to entry be viewed in isolation. As CompTel explained in our March comments, its anti-competitive effect is compounded by DTAG's up to one year delays provisioning interconnection, major uncertainty regarding rates and interconnection conditions, and effective termination of DTAG billing and collection services for call-by-call service in Germany.

The license fee barrier is a problem that calls out for intervention with the European Commission and the German government, and failing satisfactory results, for a WTO Dispute Settlement Action concerning these and other barriers to competition in the German market. CompTel understands that the Commission's position thus far has been to leave the issue to the German courts. However, there is little prospect that German courts will delay enforcement of the license fee system. It is highly unlikely that the German Constitutional Court – the only other avenue of appeal at this stage of the proceedings – will agree to review the Muenster court's decision.

It will take a minimum of two to three years for the case to be resolved after remand to the Cologne court. Because of very significant backlog in the lower court in Cologne, which hears all appeals from RegTP decisions, a final decision in that court on the merits of the challenge to the licensing scheme is unlikely in less than two years. It would then likely take the Muenster appeals court more than a year to review that decision. Similarly, referral of the issue to the European Court of Justice by either the Cologne court, the Muenster appeals court, or (at a later stage of the proceedings) by the German Federal Administrative Court or Constitutional Court would likely take two more years.

Furthermore, it is doubtful that the German proceedings will produce a pro-competitive ruling on the license issue. The Muenster appeals court's decision has already set forth a negative view of the merits of the challenge to the license fee system, stating that "there is no substantial probability that the complaint will be successful on the merits." This suggests that the court would reverse any pro-competitive decision that might emerge from the Cologne court. In light of this statement, it is possible that the plaintiff, a small German carrier, will choose simply to drop its case.

The very serious nature of this development warrants continuation of the 1377 review by USTR. U.S. engagement with both the German government and the European Commission is imperative in order to eliminate these anti-competitive fees and secure refunds to carriers who have already paid these inflated fees, and if necessary a WTO dispute settlement action addressing this and other barriers to entry into the German market.

Moreover, additional barriers to competition in the German market may develop in the course of this year through other court and agency decisions. CompTel requests that the U.S. Government continue to follow developments in this market carefully and respond as appropriate.

MEXICO – 1999 OUT-OF CYCLE REVIEW

CompTel's members also have concerns regarding the failure of the Mexican government to allow resale in Mexico and to prevent behavior by Telefonos de Mexico S.A. de C.V. ("Telmex") that continues to undermine the ability of U.S.-affiliated new entrants to enter the telecommunications market and compete effectively in Mexico. The Mexican regulator, Cofetel, has repeatedly refused to act to safeguard competition, as required under the *WTO Agreement*.

In March 1999, CompTel submitted comments in this review process regarding Mexico's continuing refusal to authorize resale, constituting a serious violation of Mexico's WTO obligations. CompTel also expressed its concern to the Federal Communications Commission ("FCC") regarding the critical need for switched resale market entry in Mexico. *See* Letter to M. Salas, FCC, from Carol Ann Bischoff, CompTel (Feb. 8, 1999) (ITC-97-127). As CompTel noted in its letter (at 3), "many carriers are effectively excluded from the Mexican market because they are not able to enter on a resale basis" and, therefore, it is "difficult if not impossible to compete against the U.S. arm of Telmex's bilaterally integrated business operations in the United States and Mexico." At that time, CompTel urged USTR to take all necessary actions to ensure that Mexico comply with its WTO obligations; and, it urged the FCC's International Bureau to consider suspending the ability of Telmex/Sprint Communications ("TSC") to sign-up new customers until meaningful switched resale opportunities are available in Mexico.

Adequate switched resale opportunities still are not available to U.S.-affiliated carriers in Mexico, in violation of Mexico's commitments under the *WTO Agreement*. Moreover, Cofetel has not taken any regulatory action in response to Telmex's repeated anti-competitive abuses. For example, Telmex has refused to provision private lines and circuits to its U.S.-affiliated competitors for over six months without any reaction from Cofetel. Nor has Cofetel acted to prevent Telmex's price squeeze in the Mexican long distance market. Finally, Cofetel has failed to implement regulations to address the Mexican Competition Commission's finding that Telmex is dominant in five markets. In sum, the Mexican Government's inaction in the face of Telmex's anti-competitive abuse represents a failure to live up to its international commitments.

CompTel respectfully requests that USTR take decisive action using all means at its disposal to bring Mexico into compliance with its obligations as quickly as possible.

BILATERAL TRADE AGREEMENTS

JAPAN

CompTel previously has written to the Ministry of Posts and Telecommunications ("MPT"), urging the MPT to adopt a pro-competitive interconnection regime that will foster competition in the Japanese telecommunications market. *See* Letter to Sadanori Amano, Director General, Telecommunications Bureau, MPT, from Carol Ann Bischoff, CompTel (Jan. 13, 2000).

Japan has made commitments under the *World Trade Organization's Basic Telecom Agreement*, including the *Reference Paper*, and in the *May 1998 U.S.-Japan*

Deregulation Joint Statement. Among other things, the *Reference Pape*r and the *Joint Statement* require that interconnection be available at "cost-oriented" rates. *The WTO Basic Telecom Agreement* and *Reference Paper* also require that measures be taken to prevent suppliers from engaging in anti-competitive practices, such as cross-subsidization. Long-run incremental cost ("LRIC") modeling is a key method used by regulators throughout the world to ensure that interconnection rates charged by the incumbent operator are "cost-oriented". Cost-oriented rates ensure that customers benefit from lower rates, more service options, and innovations in services and technologies.

Although CompTel endorses MPT's decision to base Nippon Telegraph and Telephone's ("NTT") interconnection rates on LRIC, CompTel is concerned that MPT's LRIC model does not reflect a true LRIC computation and therefore does not comply with Japan's obligation to ensure cost-oriented rates. In CompTel's view, MPT's LRIC model includes non-traffic sensitive costs that are more properly attributed to the provision of access lines rather that the transport and termination of traffic. Further, that model inflates certain traffic sensitive costs that NTT is permitted to recover through interconnection rates. Due to the inappropriate inclusion of non-traffic sensitive costs and the accelerated depreciation schedules of equipment and infrastructure, MPT's LRIC model will cause NTT's interconnection rates to be approximately eight times higher than comparable rates in the United States. Without a meaningful reduction in interconnection charges, competitive carriers will be hesitant to enter the market and challenge the dominant market position of NTT, thus stifling competitive entry to the Japanese market and preventing Japanese consumers from reaping the benefits of a fully competitive telecommunications marketplace.

In CompTel's view, in order for Japan to move towards compliance with its WTO obligations, MPT should adopt the Case B interconnection model option within this calendar year. While Case B's reductions will result in charges that remain above those in the United States and the European Union, they represent a major step in the right direction. For these reductions to have the intended pro-competitive impact, they must be implemented at once. Any plan that implements these reductions incrementally over a long transition period should be rejected because it will block competitive entry and deprive Japanese consumers of the benefits of competition. Furthermore, the delay will give NTT still more time to use subsidies from excessive interconnection rates to entrench itself as the dominant carrier in Japan, thereby slowing investment and innovation.

CompTel believes that Japan's comparatively low e-commerce levels already reflect the impact of NTT's exorbitant interconnection rates. NTT's current interconnection rates are 2-3 times higher than rates in other developed markets. For example, the rates in the United States, the United Kingdom, Sweden, and France are 50-80 percent less than those charged by NTT in Japan. Given these high rates, it is not surprising that investment in Japan's telecommunications sector has fallen for three straight years.

TAIWAN

Finally, as expressed in our November 1999 letter to Ambassador Richard W. Fisher, CompTel is concerned that Taiwan has adopted regulations that are inconsistent with its market opening commitments that it has agreed to in order to garner United States' support for Taiwan's entry into the WTO.

In 1998, Taiwan entered into a written agreement with the United States governing the market access terms under which the United States would support Taiwan's accession to the WTO. A key aspect of the WTO entry agreement was Taiwan's promise to open its telecommunications market and significant time and effort was spent in bilateral negotiations on specifying clearly the market opening measures Taiwan would take.

In the *U.S.-Taiwan 1998 Accession Protocol*, Taiwan committed to end Chungwha Telecommunications' existing monopoly in July 2001, and to permit additional competitors, including U.S. telecommunications companies, to enter the Taiwanese market. Other than certain limits on foreign ownership of telecom licensees and the continuation of Chunghwa's monopoly until July 2001, Taiwan scheduled no market access restrictions in its fixed wireline market. Specifically, it promised it would not limit the number of licensees in its fixed wireline market, as it had earlier been contemplating.

Unfortunately, Taiwan now appears to be directly violating this unambiguous written commitment. Rather than allow for open access to its fixed line market from July of 2001 on, Taiwan is currently planning to license only consortia that can meet the extraordinary pre-conditions of agreeing to invest US $1.2 billion in capital in the Taiwan market and build out at least 1 million exchange lines, 150,000 of which must be installed prior to any service offering. Such conditions are a significant restriction on market access, *de facto* limiting entry to only one or two additional providers.

Because Taiwan did not schedule these restrictions, they are inconsistent with Taiwan's 1998 agreement with the United States. Moreover, such entry barriers are anti-competitive and are not commercially viable. They effectively, for example, exclude the whole new generation of U.S. carriers that plan to offer services in additional market segments, such as the data or Internet service markets, instead of serving as conventional voice telephone carriers, building out a business based on voice lines. While Taiwan committed to opening its market in July 2001, unscheduled regulations in place today that create significant barriers to entry nullify the market opening commitment, given that communications providers must plan well in advance for investing the significant sums demanded to build state-of-the-art networks.

Such a policy contravenes the worldwide trend to open telecommunications markets to competition and promote electronic commerce over the Internet. It will certainly harm Taiwan consumers and businesses, by limiting their access to competitively priced broadband capacity, just as it will harm U.S. firms.

In July 1999, Ambassador Fisher wrote to the Taiwan Government specifically stating that the U.S. Government views Taiwan's proposed licensing regime to be inconsistent with its WTO entry commitments. CompTel respectfully requests that USTR follow up on this letter and ensure that Taiwan fulfills its commitments to the United States in this critical matter, for the sake of the future competitiveness of the Taiwan market.

CONCLUSION

CompTel is prepared to provide additional information concerning these matters at USTR's request.

Sincerely,

Carol Ann Bischoff

Carol Ann Bischoff
Executive Vice President &
General Counsel