December 21, 2010

VIA E-MAIL
www.regulations.gov
USTR-2010-0034

Ms. 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, D.C. 20508

RE: GERMANY AND MEXICO

Dear Ms. Blue:

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 3106 ("Section 1377"), COMPTEL hereby responds to the request of the Office of the United States Trade Representative ("USTR") for comments regarding compliance with U.S. telecommunications trade agreements.

COMPTEL is the leading industry association representing communications service providers and their supplier partners. COMPTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services.

COMPTEL appreciates the opportunity to present its members’ experiences in a number of countries which have undertaken specific commitments with regard to telecommunications services as part of their WTO obligations. Germany and Mexico are two extremely important markets for U.S. carriers and consumers and this filing focuses on continuing problems in those markets.

GERMANY WTO Violations GATS, Reference Paper and GATS Telecom Annex

COMPTEL appreciates the efforts that USTR has made in the past to raise its concern with the German Ministry of Economics and the Federal Network Agency ("BNetzA"). We believe that USTR’s efforts have resulted in some improvements in the regulatory framework and BNetzA actions. However, Germany still has not fully implemented its GATS commitments. In light of the importance of the German market
and continued government ownership of 31.75 percent of Deutsche Telekom’s ("DTAG"), Germany merits USTR’s continued attention.

There are proceedings pending at BNetzA regarding most of the issues raised by COMPTEL. BNetzA is supposed to issue a ruling on mobile termination fees by the end of February and on unbundled local loop rates by the end of March.

**Discriminatory Treatment of Competitors**

Competitive carriers continue to be frustrated and handicapped by the lack of transparency and discriminatory treatment in regulatory proceedings regarding DTAG. Many of DTAG’s filings are heavily redacted before being made available to the public. A recent example of this is the pending regulatory proceeding on mobile termination fees, where DTAG’s submissions are heavily redacted so that it is impossible to verify DTAG’s calculations. This makes it impossible to address or challenge the information provided by DTAG. Similarly, large portions of BNetzA’s decisions relating to DTAG, which support and explain the regulator’s reasoning, continue to be redacted.

At the same time, information provided by competitive carriers is made available to the public without similar redactions. This discriminatory treatment of information is not justified by competitive concerns. There are ways to make information available without jeopardizing confidential business information. Germany has a national treatment obligation under Article XVII of the GATS, which requires non-discriminatory treatment of all carriers where commitments have been scheduled. Moreover, domestic regulation, according to Article VI of the GATS, should be impartial. BNetzA’s actions protecting DTAG in this respect fail to meet those standards and heavily favor DTAG.

**Failure to Implement Access Obligations**

Section 5(a) of the GATS Telecom Annex requires a Member State to ensure that the providers of scheduled services have “access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions.” Germany has failed to require DTAG to do so for many kinds of network elements that competitive carriers need to compete effectively with DTAG.

*Wholesale Broadband Access.* In last year’s report, USTR noted problems with access to IP-Bitstream and ATM-Bitstream. In September 2010, BNetzA finally ordered DTAG to provide a Reference Offer for IP-Bitstream. This order should have included, but did not, an explicit requirement that the Reference Offer cover a subset of IP-Bitstream, known as IP-Multicast. As noted by USTR in its last 1377 report, competitors in Germany require access to a wholesale service optimized for video distribution. IP-Multicast enables competitors to provide Internet Protocol distributions to compete with

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1 Demand for ATM Bitstream is diminishing as carriers switch to IP-based platforms. Therefore this filing concentrates on IP-Bitstream access.

2 BNetzA’s Ruling Chamber 3, Docket number BK 3b 09-069 - Obligations for “Broadband Access for Large Customers” - EU Market 5 (September 17, 2010).
DTAG’s IPTV service. Competitors need a high bit-rate above 25 MBs to provide a competitive service.

In connection with last year’s 1377 review, DTAG argued that it held only a small share of the market for IPTV and did not have a standard multicast platform that it could offer to competitors. This is no longer true; DTAG currently has more than 1 million IPTV customers and has had at least a year to create a multicast platform for access by competitors. Ignoring BNetzA’s order to issue a comprehensive Reference Offer for IP-Bitstream, in November 2010, DTAG issued a Reference Offer which does not include access to IP-Multicast as needed to provide competitive high-bit rate video programming.

BNetzA has scheduled a hearing on the DTAG Reference Offer for February 2011, with a decision on its adequacy in mid-March. But BNetzA can extend its review for an indefinite period, while DTAG continues to roll out its own service, occupying this lucrative market sector. If BNetzA does not take stern action to enforce its own order against DTAG, Germany will continue to deny competitive carriers “access to and use of” the telecommunications network on reasonable terms and conditions, in violation of the GATS Telecom Annex.

As COMPTEL explained in last year’s filing in detail, switching customers from DTAG to a competitive carrier (porting) is a complicated process full of obstacles. COMPTEL has complained about DTAG’s shortcomings and lack of action in this area for many years. The receiving carrier is only able to provide reliable information to the new client (e.g., the scheduled porting date and the availability of a DTAG technician to switch a line over) if it has non-discriminatory access to DTAG’s Operating Support System (OSS). However, DTAG continues to refuse to provide OSS access to the competitors, mainly hiding behind security concerns that could be resolved. A BNetzA proceeding has been pending for at least a year with respect to the WITA interface which is a prerequisite for OSS access with no deadline for conclusion. Amendments to the German Telecoms Act to make this process easier and more reliable are currently being debated in Germany. But no amendment can be expected before summer 2011 and, even then, will not provide immediate relief because BNetzA will need to determine the implementation rules. Prolonged failure to require DTAG to provide access to its OSS is a violation of the GATS Telecom Annex which guarantees “access to and use of” needed telecommunications services.

Failure to Require Interconnection at Cost-Based Rates

DTAG’s monthly charges for unbundled local loops remain very expensive. According to a recent study, the average cost of an unbundled local loop in the 27 members of the European Union is €8.38, with Ireland at the high end of €12 and Austria at the low end at €5.87.³ Germany is among the most expensive with a rate of €10.63 per loop that is 32% higher than the EU average and almost twice as high as the rates in the neighboring countries, Austria (€ 5.87) and the Netherlands (€ 6.53). The costs in

³ Cullen International Report (December 7, 2010), available only by subscription.
Germany cannot be that much higher than its neighbors. Cost-based rates for unbundled local loops are crucial because unbundled local loops remain by far the most popular method for most competitive carriers to reach their end customers. BNetzA has failed to order further reductions by DTAG and the current rates clearly are not cost-based as required by the Reference Paper.

MEXICO WTO Violations Reference Paper

Despite years of complaints and petitions to curb the monopolistic actions of Telmex, the Mexican government has not taken serious actions against Telmex, to the detriment of U.S. consumers and U.S. companies. The power of Telmex is evident in its market share – at least ten years after the opening of the Mexican market. Telmex continues to provide 80% of the fixed-line services and 70% of wireless services in Mexico.4

Although the Federal Telecommunications Commission ("COFETEL") has issued a number of decisions sanctioning actions by Telmex, these decisions have not been implemented by the Secretariat of Communications and Transportation ("SCT"). The list of anti-competitive activities of Telmex includes: 1) blocking the majority of competitive traffic into the rural half of Mexico; 2) illegally inserting lengthy recorded messages into calls carried into Mexico by certain competitive carriers, telling U.S. and Mexican customers that future calls may not be completed if they use that carrier; 3) refusing to allow competitors to install local or long haul facilities that would provide competitive termination for U.S. carriers; 4) maintaining differential and discriminatory pricing structures for interconnection and termination services; 5) refusing to provide carriers with interconnection in Non-Equal Access ("NEA") calling areas that would represent more competition and better rates for the public; 6) providing interconnection at a degraded quality level; and 7) failing to consolidate local areas codes as ordered by COFETEL so that the calls between two areas would be considered as a local call and not a long distance call, which would result in huge savings for the public and the carriers.

In each case, competitive carriers have filed complaints with COFETEL. For example, with respect to the degradation of interconnection quality, a competitive carrier filed a complaint with COFETEL in November 2008, stating that seven of ten calls to the NEA areas were not completed and the tracing of calls showed that the problem was at the switching level in the Telmex switching station. In March 2009, COFETEL sent inspectors to verify the complaints but did not issue its verification report until October 2009. It then took COFETEL until July 2010 to decide that the quality degradation was a violation and that sanctions should be imposed against Telmex. Although COFETEL recommended sanctions to SCT, SCT has failed to approve those sanctions.

Similarly, competitive carriers filed complaints with COFETEL that as of May 27, 2010, Telmex had inserted an illegal recorded message into calls coming from the

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5 NEA areas were formerly closed to competition but are now open.
United States into Mexico and domestic Mexico calls, stating that the long distance carrier is not paying the contracted rate to the local operator (Telmex) and if that continues the local operator will no longer complete calls. A second recording is specific to one carrier, stating that the long distance carrier had lost a court decision and was ordered to pay the local carrier. If the long distance carrier fails to do so, the local operator will no longer complete calls. This recording affects calls into the three main cities in Mexico and heavily impacts international traffic, particularly calling card traffic from the United States.

In the case of the recorded messages, COFETEL immediately sent inspectors to verify the complaints and on July 16, 2010 recommended sanctions to SCT – which still has not acted and the illegal recordings continue at least with respect to one carrier.

In the case of Telmex’s failure to provide termination in the NEA areas, allow carriers to collocate equipment in the NEA areas and provide non-discriminatory interconnection and termination pricing, competitive carriers filed complaints with COFETEL in October 2009. COFETEL ruled against Telmex in April 2010 but did not send recommended sanctions to SCT until November 4, 2010. For violations of the interconnection rules, the sanction is revocation of the license and that is what COFETEL recommended.

It is highly unlikely that SCT will agree to revoke Telmex’s license. SCT’s track record has been to ignore COFETEL recommendations, such as the ones regarding interconnection quality and the recorded messages. SCT’s failure to act calls into question the independence of COFETEL.

Mexico agreed as part of its WTO commitments to require its major supplier to provide interconnection to its network on non-discriminatory terms and conditions, in a timely fashion and, upon request, at points in addition to the network termination points offered to the majority of users. It also agreed to institute a dispute settlement procedure to resolve interconnection disputes between a major supplier and competitive carriers. SCT’s failure to implement COFETEL’s recommendations with respect to interconnection and to resolve Telmex’s disputes with competitive carriers is a violation of Article 2 of the Reference Paper.

More worrisome is the lack of independence of COFETEL from government interference. Although COFETEL is technically independent, it does not have authority to act and must depend on SCT to do so. Yet SCT seems unable to act. Although SCT has no direct financial interest in Telmex, it is tied politically to the company. Article 6 of the Reference Paper states that the regulator has to be independent of the operator. The continued brazen behavior of Telmex demonstrates that SCT is not an independent regulator with the ability to control the behavior of a major supplier to the detriment of U.S. consumers and companies.

CONCLUSION
For the reasons described above, COMPTEL urges the Office of the U.S. Trade Representative to work aggressively to address with Germany and Mexico the issues set out herein. USTR should take appropriate actions to ensure that these countries ensure fair and non-discriminatory market conditions in accordance with their respective trade commitments.

Respectfully submitted,

Jerry James
Chief Executive Officer