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March 16, 2001

## VIA HAND DELIVERY

Mr. David Krech  
Telecommunications Division, International Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

RE: Public Forum on Entry by U.S. Companies into Telecommunications  
Markets in Foreign Countries

Dear Mr. Krech:

RCN Corporation ("RCN"), a U.S. telecommunications company with operations in Mexico, hereby submits its comments in response to the request of the Federal Communications Commission ("Commission") for information on experiences regarding entry by U.S. companies into foreign telecommunications markets. RCN appreciates this opportunity to participate in the development of the International Bureau's 2000 International Markets Report and to share with the Commission RCN's experiences in entering and competing in the Mexican telecommunications market through RCN's part-ownership of a Mexican competitive local exchange carrier.

Megacable Comunicaciones de Mexico S.A. de C.V. ("MCM Telecom") is a facilities-based local exchange carrier authorized to provide service in Mexico. Approximately forty-nine percent of MCM Telecom is ultimately owned by RCN Corporation, a U.S. telecommunications company; the remainder is 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, as discussed below, substantial and ongoing anti-competitive behavior by incumbent Telefonos de Mexico, S.A. ("Telmex") 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 on Telecommunications (“Telecommunications Annex”) (collectively “WTO Agreements”) and Mexico’s own national legislation and regulations.

MCM Telecom’s struggles to gain effective competitive entry into the Mexican local exchange and access markets have been described in detail in previous submissions by MCM Telecom to the United States Trade Representative (“USTR”), the Organization for Economic Co-operation and Development (“OECD”) and the European Commission.<sup>1</sup> This letter provides the Commission with an overview of MCM Telecom’s experiences in Mexico, and the ongoing failure of the Mexican government to correct these problems, in utter disregard of both its international treaty obligations and its own national laws.

## **I. INTERCONNECTION IN THE LOCAL EXCHANGE AND ACCESS MARKETS**

On July 5, 1997, Mexico’s Secretaría de Comunicaciones y Transportes (“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 the following services: (i) basic local telephony; (ii) sale or lease of facilities to transmit or receive voice, images and data; (iii) resale of the facilities or capacity of other carriers; (iv) provision of value-added services; (v) operator services; (vi) data, video, audio and videoconference services; (vii) credit or prepaid calling cards; (viii) lease of dedicated circuits; and (ix) pay phone services. The Concessions obligate MCM Telecom to a minimum equity investment of 75 million pesos<sup>2</sup> (which MCM Telecom has already far surpassed), as well as an aggregate minimum build-out of 295 km of fiber optic network in the three metropolitan areas. The Concessions also obligate MCM Telecom to serve residential customers within reach of its fiber network.

Under its business plan, MCM Telecom has already developed and constructed a state-of-the-art facilities-based telecommunications network using over 200 km of 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. Investment to date exceeds \$60 million, and MCM Telecom intends to make significant additional investments. However, the serious difficulties MCM Telecom has encountered may force it to reconsider its plans if these problems should continue unabated. The failure to resolve these issues will likewise leave significant barriers in place that effectively prevent U.S. companies from entering the Mexican market.

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<sup>1</sup> RCN would be pleased to provide copies of these submissions to the Commission upon request.

<sup>2</sup> At the time the Concessions were issued, 75 million pesos was the equivalent of about US \$10 million.

**A. 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. First, Telmex refused even to meet with MCM Telecom for a substantial period of time. Next, Telmex stuck fast to the position that it would charge MCM Telecom the same interconnection rate applicable to long distance carriers -- a rate significantly in excess of rates charged for local interconnection in other countries. Finally, Telmex denied that it had any obligation to compensate MCM Telecom reciprocally for traffic terminated on MCM Telecom's network.

After many attempts by MCM Telecom to resolve the dispute and arrive at an agreement with Telmex that is fair to both companies, as well as multiple failed attempts to have COFETEL resolve the dispute, COFETEL finally issued a decision arbitrating the interconnection dispute between MCM Telecom and Telmex (the "Interconnection Decision") on November 27, 1998. This date was fourteen months after negotiations began, and -- even under the most charitable interpretations of statutory deadlines -- three-and-a-half months after COFETEL was legally obligated to act. In the Interconnection Decision, COFETEL set the rates for termination and routing of traffic between both parties' respective networks for the period 1999-2000. The rates, as explained in detail in MCM Telecom's submissions to the USTR and discussed in Section I.B. below, 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. Notwithstanding the illegality of these rates, MCM Telecom had no choice: beginning to provide services meant entering into an Interconnection Agreement with Telmex that sustained such rates.

Apart from the substantive result, COFETEL's procedural delays also resulted in severe economic injury to MCM Telecom. Had COFETEL fulfilled its legal obligations to issue a resolution by August 5, 1998, at the very latest, MCM Telecom would have been able to suspend its investment pending review, and to avoid much of its now-unrecoverable loss. Instead, under intense economic pressure to initiate its business operations, 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 Decision, 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 made no effort to commence negotiations by this date. On July 7, 2000, MCM Telecom approached Telmex to insist upon its right to renegotiate, and thereafter made several attempts to obtain from Telmex a commitment guaranteeing lower interconnection rates and better quality of services from Telmex. However, as in the previous rounds in 1998, Telmex was obdurate and refused

meaningful negotiations. On September 18, 2000, MCM Telecom notified COFETEL of the ongoing negotiations with Telmex, and of the expiration of the 2-month statutory term for the parties to arrive at an agreement. MCM Telecom requested COFETEL to intervene and resolve the outstanding dispute. Contrary to basic principles of law and to the express provisions of Mexican law, COFETEL ignored MCM Telecom's petition, just as it had done in 1998. 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.

However, the Interconnection Decision itself 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 March 2001, COFETEL has yet to issue any decision or even comments on the draft interconnection agreement submitted by MCM Telecom and 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 an arbitration panel has ruled that it owes – thus putting pressure on MCM Telecom to make more concessions to Telmex in the new interconnection contract.

#### **B. Interconnection Rates Established in Violation of WTO and Mexican Law**

COFETEL's Interconnection Decision set a 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. Even though Mexican regulation states that a local service provider ("LSP") must not apply to a call termination rate any additional charges for performing such service,<sup>3</sup> COFETEL has allowed Telmex to impose on MCM Telecom an unsupported and biased charge for recovery of the costs of the residential local access service that Telmex is obligated to provide. Payment of these charges by MCM Telecom to Telmex constitutes a government-protected cross-subsidy that has the sole effect of preserving Telmex as the dominant local service provider and weakening or eliminating competitors. It should also be noted here that such anti-competitive cross-subsidization is one of the practices expressly singled out for condemnation in the WTO Agreements.

COFETEL also imposed on MCM Telecom an unfounded definition of "reciprocal compensation" for the benefit of Telmex. In its decision, COFETEL stated that "reciprocal" compensation merely means that compensation in some amount is to flow between the interconnecting carriers and that "reciprocal" compensation is *not* the same as "symmetrical" compensation, which would mean the payment of the *same rate* in both directions. Accordingly, COFETEL allowed Telmex to charge MCM Telecom rates for termination of traffic that were

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<sup>3</sup> See Rule 22 (IV) of the *Reglas del Servicio Local* (Rules for Local Service), enacted October 22, 1997.

two-and-a-half times the rates that MCM Telecom was allowed to charge Telmex.<sup>4</sup> As MCM Telecom explained in its submissions to the USTR, this action by COFETEL was directly contrary to international standards acknowledged by the International Telecommunications Union -- of which Mexico is a member.

Further, although COFETEL allows Telmex to charge MCM Telecom for interconnection ports, and the Interconnection Decision establishes that each carrier will pay for the costs of the ports each needs for the transmission of the traffic to its network, Telmex refuses to pay MCM Telecom for such ports (as would be the case in a truly reciprocal arrangement).

Thus, to add insult to injury, despite its success in extracting unreasonable interconnection rates from MCM Telecom, Telmex nevertheless to this day owes MCM Telecom several million dollars for undisputed interconnection compensation, placing severe pressure on MCM Telecom's finances. Some of these amounts owed by Telmex are already more than one year past due. To delay paying interconnection compensation, Telmex constantly changes and manipulates the billing and collection procedures that it claims must be followed by MCM Telecom, thus denying payment of the amounts it owes, as further detailed in MCM Telecom's submissions to the USTR. MCM Telecom was forced to take this matter to arbitration, which resulted in a decision in favor of MCM Telecom. Nevertheless, Telmex still refuses to make payment to MCM Telecom and is now leveraging these outstanding amounts to extract concessions from MCM Telecom in their current negotiations for a new interconnection agreement. This is a classic example by Telmex of anti-competitive and monopolistic behavior, yet this has been acquiesced in by COFETEL.

### **C. Telmex's Ongoing Contractual Violations and Abusive Behavior**

In addition to its refusal to pay undisputed compensation for interconnection, Telmex continues to violate the terms of its interconnection agreement with MCM Telecom with regard to delivery of interconnection ports, establishment of links, service quality and delivery of traffic to MCM Telecom's network.

For the past two years and throughout the 2000 negotiations as well, Telmex has failed to establish any mechanisms that will adequately fulfill its obligations with regard to shared traffic. Contrary to the terms of the interconnection agreement, Telmex has refused to provide MCM Telecom with facilities requested -- and *already paid for* -- by MCM Telecom: specifically, 1,350 ports that would interconnect MCM Telecom's facilities and networks with those of Telmex. As of today, Telmex had delivered only 300 -- or less than one-fourth -- of these ports to MCM Telecom, nearly 9 months after their initial request and payment. Not surprisingly, this small fraction of the ports paid for has proven woefully inadequate to meet MCM Telecom's needs.

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<sup>4</sup> The rates set by COFETEL are adjusted for inflation on a monthly basis. As of November 2000, the rates were 0.1234 pesos (approximately US\$0.0129) for every minute originating on Telmex's network and terminating through MCM Telecom's network, and 0.3175 pesos (approximately US\$0.03342) for every minute originating on MCM Telecom's network and terminating through Telmex's network.

In addition, Telmex has not provided MCM Telecom with the same level of service quality that it provides to itself, its affiliates and other carriers. Telmex refuses to set up links to MCM Telecom's switches that would deliver the traffic originating in Telmex's network and bound for MCM Telecom's, as mandated by the Interconnection Decision. MCM Telecom is thus forced to pay for the full cost of the links and the collocation of the necessary equipment exclusively at Telmex's premises. Evidence of Telmex's non-compliance was provided to COFETEL in a claim filed by MCM Telecom before COFETEL on June 26, 2000 (the "Congestion Complaint"). This evidence was accepted as true in the study and report conducted by COFETEL on August 28, 2000 ("August 28, 2000, Report"). Both the Congestion Complaint and COFETEL's own study show that approximately *60% of all traffic* originating on Telmex's network and destined for termination through MCM Telecom's network was being blocked by severe network congestion caused by a disproportionate allocation of interconnection ports and lack of appropriate procedures by Telmex to handle traffic overflow. While matters have improved somewhat since then, blockage remains over 30%, far in excess of acceptable levels.

Telmex's flagrantly abusive behavior has never been questioned by COFETEL. For example, although it agreed in the August 28, 2000, Report that Telmex was blocking over 60% of the traffic that should have been delivered to MCM Telecom's network for termination, it has taken no enforcement action against Telmex for this failure, and, indeed, has given no hint of any such action, though MCM Telecom has continued to beseech it for such relief.

For obvious reasons, Telmex's refusal to provide reasonable interconnection and the resulting blockage of traffic destined for MCM Telecom's network has harmed MCM Telecom's reputation with its customers, who are largely unaware of (and, arguably, indifferent to) the fact that the blame for poor service and call completion lies not with MCM Telecom, but with Telmex.

## **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 of COFETEL and the Mexican government as a whole. COFETEL consistently refuses to intervene to prevent or restrain this behavior in any way. On those occasions when COFETEL does get involved, it utilizes procedural delays that violate Mexican administrative law and it disregards both Mexican law and international treaty obligations to arrive at substantive results favorable to Telmex. As a result, Telmex is able to continue engaging in anti-competitive conduct with impunity and to abuse its dominant market position in order to crush its competitors, with no fear of regulatory or legal repercussions.

We have already discussed COFETEL's repeated violations of Mexican administrative law to delay taking any sort of definitive action to resolve the interconnection dispute between MCM Telecom and Telmex – a dispute COFETEL is required to resolve promptly under both Mexican law and Mexico's WTO obligations – and its eventual unsupportable ruling on interconnection rates. Unfortunately, these are anything but isolated incidents.

As discussed above, on June 27, 2000, MCM Telecom filed its Congestion Complaint with COFETEL concerning Telmex's blockage of approximately 60% of all calls bound for termination on MCM Telecom's network. The Congestion Complaint was filed in response to COFETEL's express request at a previous meeting that MCM Telecom describe its problems with Telmex in writing. Under Mexican procedural law, COFETEL is required to issue a decree accepting the Congestion Complaint for filing within three days after the claim is filed. Yet nearly eight-and-a-half months later, the decree has yet to be issued and no written notice to Telmex of the complaint has been provided. COFETEL eventually provided Telmex oral notification of the Congestion Complaint on November 16, 2000, and gave Telmex ten days to respond. However, to this day, MCM Telecom has yet to receive a copy of Telmex's response or any other correspondence between COFETEL and Telmex concerning this issue. Any information MCM Telecom has been able to receive has come informally, through meetings with officers of COFETEL. COFETEL has also declined to acknowledge or act on any further evidence or submissions from MCM Telecom. Every one of these delays, actions, and refusals by COFETEL is in direct violation of Mexico's law on administrative procedure.

Under Mexican law, COFETEL is required to issue a final resolution on private party petitions, such as the Congestion Complaint, within three months from the date of filing. On August 28, 2000, COFETEL issued a report stating that, based on its own testing, MCM Telecom's claims of approximately 60% call blockage were true. Since that date, however, COFETEL has taken no action to address MCM Telecom's complaint or to alleviate the *verified* congestion and blockage problem, such as ordering Telmex to deliver the remaining 1,050 interconnection ports paid for by MCM Telecom eleven months ago. Similarly, COFETEL has taken no action to assist MCM Telecom in collecting the millions of dollars owed by Telmex for interconnection beginning in 1999, thus forcing MCM Telecom to initiate arbitration proceedings.

Despite the foregoing, it should be noted that COFETEL cannot bear the sole blame for its lack of action concerning Telmex. Although nominally the regulatory authority responsible for Mexico's telecommunications market, COFETEL does not have any power to enforce its decisions or to ensure compliance, and therefore lacks the ability to take direct action against Telmex. Instead, COFETEL's decisions operate merely as opinions to be considered by the SCT, who ultimately has the last word in Mexico on telecommunications policy and market developments.

COFETEL's ineffectiveness is further demonstrated by its resolution of September 12, 2000 (the "Dominant Carrier Resolution"), which was adopted with the intention of imposing specific regulation on Telmex as a dominant carrier regarding rates, quality of service and information. On its face, the Dominant Carrier Resolution places significant restraints on Telmex's ability to engage in anti-competitive behavior and largely comports with international standards and practices for dominant carrier regulation. If the provisions of the Dominant Carrier Resolution were to be enforced as written, many of the harms suffered by MCM Telecom and other competitive telecommunications service providers in Mexico would at last begin to be ameliorated. In practice, however, the Dominant Carrier Resolution is wholly ineffectual.

First, implementation of the Dominant Carrier Resolution's obligations is left to Telmex itself and there is no independent mechanism to ensure compliance. Rather, Telmex is to provide COFETEL periodic reports with information demonstrating its compliance with the Dominant Carrier Resolution. Obviously, Telmex has no incentive whatsoever to provide COFETEL with accurate or timely information concerning potentially anti-competitive behavior. COFETEL also lacks adequate staffing or resources to be able to effectively analyze and review any reports it receives in a timely manner. Secondly, COFETEL cannot sanction Telmex directly for noncompliance with the Dominant Carrier Resolution, but can only propose sanctions to the SCT. Further, the only sanctions available through the SCT are relatively modest fines, which in the case of Telmex are unlikely to serve as an effective deterrent to its anti-competitive behavior.

Finally, Telmex has challenged the validity of the Dominant Carrier Resolution before a Mexican Federal Court. This enables Telmex to request an injunction against implementation of the Dominant Carrier Resolution at any time. Even if the court should uphold the Dominant Carrier Resolution, the delays resulting from the hearing process – as well as from any appeals Telmex may file – would effectively put off implementation of the Dominant Carrier Resolution for many months or even years. As discussed in more detail in MCM Telecom's letter of December 13, 2000, to the USTR, formal administrative and judicial proceedings in Mexico are particularly complex and time-consuming with numerous procedural layers, any of which can serve as a window of delay. As an example, on January 7, 1999, MCM Telecom filed for review of the Interconnection Decision by the SCT, COFETEL's administrative superior. The SCT did not issue a decision until June 2000 – a full year-and-a-half after the petition was filed. It was only at this stage that MCM Telecom was able under Mexican law to bring the matter before a federal court, which it did on August 23, 2000. Resolution of the case by this court is still pending. Any appeal of the court's decision by either side would then take another year or longer.

COFETEL itself recognizes its lack of enforcement power and the ability of Telmex to use the Mexican court system to delay or derail any measures COFETEL may take to rein in Telmex. In an interview with *Communications International*, Jorge Nicolin, the President of COFETEL, said, "I may impose a fine on Telmex for anti-competitive behavior, but Telmex can bring an injunction suit that could drag on for a year or two years in the Mexican courts."<sup>5</sup>

### **III. USTR ACTIONS AND ALESTRA/AVANTEL AGREEMENT WITH TELMEX HAVE NOT YET RESULTED IN SIGNIFICANT CHANGES**

As the Commission is aware, the problems encountered by U.S. companies attempting to enter the Mexican telecommunications market are hardly news to the U.S. government. After months of discussions and negotiations failed to achieve any results, the USTR announced on November 8, 2000, the initiation of formal WTO proceedings against Mexico in connection with Mexico's failure to meet its WTO obligations on the opening of its telecommunications market to competition. Specifically, the USTR's request for the formation of a WTO dispute resolution

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<sup>5</sup> Vineeta Shetty, *Telmex Set to Fight Cofetel Ruling in Court*, *Communications International*, Oct. 27, 2000 (available online through <http://www.totaltele.com> (a free site, but registration is required)).

panel pointed to Mexico's failure to ensure: (i) timely, non-discriminatory interconnection for local competitors; (ii) cost-oriented interconnection for all calls into and within Mexico; and (iii) competitive alternatives for terminating international calls in Mexico. The USTR also requested consultations concerning the Dominant Carrier Regulations and COFETEL's recently revised long-distance interconnection rates, which were being challenged by Telmex before a Mexican federal court.

In January 2001, Alestra and Avantel -- part-owned by AT&T and WorldCom, respectively, and two of the major industry participants in the USTR's investigation and complaint -- reached an agreement with Telmex that resolved the interconnection dispute between these companies. Telmex agreed to drop its court case and instead to accept the long-distance interconnection rates set by COFETEL in October 2000, and in return, Alestra and Avantel agreed to pay Telmex the past interconnection fees they withheld during the dispute. Subsequently, the USTR announced in February 2001 that it had decided against requesting the formation of a dispute resolution panel at his time. However, as a USTR spokesperson stated, "We have not dropped our complaint. We are in a watch-and-see mode."<sup>6</sup>

The USTR has recognized that there are still outstanding issues, including the "apparent unwillingness" of COFETEL to enforce dominant carrier regulations against Telmex. Further USTR action is still possible and, in the view of RCN, warranted. RCN is concerned that with the USTR's decision to pause, however temporarily, in pressing these issues, both Telmex and the Mexican government no longer feel the same degree of pressure to make the reforms necessary to correct the problems in their system. RCN is also concerned that the agreement between Alestra, Avantel and Telmex may in itself have anti-competitive consequences, such as discriminatory treatment, since it is unclear to what degree other competitive carriers will benefit. What is clear is that many serious problems remain unresolved, and pressure must be maintained on Mexico to swiftly and effectively correct these problems.

Overall, RCN applauds the efforts of the USTR to bring Mexico into compliance with its WTO obligations and urges continued action from all sectors to remove the existing barriers to entry by U.S. companies into the Mexican telecommunications market.

#### **IV. CONCLUSION**

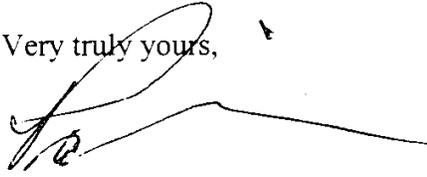
As MCM Telecom's experiences as a new entrant in the Mexican telecommunications market demonstrate, the barriers to entry in Mexico remain unacceptably high. Telmex's ability to abuse its dominant position with impunity and the inability or unwillingness of Mexican authorities to adhere to Mexican law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

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<sup>6</sup> *Communications Daily*, Feb. 2, 2001, at 4.

Mr. David Krech  
March 16, 2001  
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Very truly yours,

A handwritten signature in black ink, appearing to read 'P. Whittle', with a long horizontal flourish extending to the right.

Patrick J. Whittle  
David D. Rines

Counsel for RCN Corporation

cc: Susan Ness, Commissioner  
Scott Burnside  
Juan Antonio Gonzalez  
Andrew D. Lipman